

**DISTRICT COURT OF QUEENSLAND**

**CITATION:** *Radcliffe & Cotter*

**PARTIES:** **CATHRYN ALICE MORRIS (Nee RADCLIFFE)**  
**(Plaintiff)**

**And**

**MICHAEL JOSEPH COTTER**  
**(Defendant)**

**FILE NO/S:** D73/2005

**DIVISION:** Civil

**PROCEEDING:**

**ORIGINATING  
COURT:** District

**DELIVERED ON:** 19<sup>th</sup> June 2008

**DELIVERED AT:** Townsville

**HEARING  
DATES:** 20 June 2006, 11 December 2007, 10 & 11 March 2008.

**JUDGE:** R D Pack DCJ

- ORDER:**
1. Give leave to the plaintiff to amend the title of the claim from Radcliffe to Morris.
  2. Order the Department of Natural Resources by its appropriate officer substitute the name of Cathryn Alice Morris for Michael Joseph Cotter on the lease of Middle Percy Island.
  3. Order the Defendant vacate the island by not later than 31<sup>st</sup> July 2008.
  4. Order the Defendant remove all personal effects from the island including any vehicle or vehicles, vessel or vessels, chattels or effects owned by the Defendant from the island not later than 31<sup>st</sup> July 2008.
  5. Order the Defendant pay the plaintiff's costs of and incidental to the action to be agreed or assessed.
  6. I give liberty to apply within 28 days

**CATCHWORDS:** Unconscionable conduct – undue influence

**COUNSEL:**

**SOLICITORS:** J W Lee, instructed by Jeremy Hamilton and Associates as  
town agents for Johnathon C Whiting for the plaintiff

Defendant in person

- [1] Middle Percy Island of 1657.6 ha off the Central Queensland coast is located 122 kilometres to the south and east of Mackay. It was leased at relevant times from the Crown between from 1964 by Andrew Charles Martin, until the lease was transferred to the Defendant, Mr Cotter. He remained on the island thereafter, almost without going elsewhere except for stores until 1996.
- [2] Andrew Charles Martin died on 3<sup>rd</sup> May 2003.
- [3] The deceased appointed Mrs Morris as his attorney on 5<sup>th</sup> September 2001.
- [4] Probate of the deceased Martin's will was granted by the Supreme Court on 30<sup>th</sup> September 2003. The plaintiff was thereafter entitled to bring these proceedings.
- [5] The plaintiff, (now Morris following marriage) is a distant relative of the deceased and had visited Middle Percy Island many years ago before Mr Martin left to return to England.
- [6] By his will dated 17<sup>th</sup> April 2003 he devised and bequeathed the lease of Middle Percy Island to the plaintiff "on success of civil proceedings against M. Cotter including all monies owed to me by the Defendant."
- [7] I accept the evidence of Mrs Morris who said that in about August of 1996 Mr Martin returned to England. He had immigrated to Australia many years before. He did so in her belief because he was not well enough to remain living on the island. He left the island in the care of the Hicklings who had been there for some seven years at the time. She said it was always the intention of Mr Martin to put the Hicklings on the lease, as I understand it, to share the lease with the plaintiff. After returning to England in 1996 the plaintiff said that Mr Martin came back to Australia in 1999 for a few months in the company of a Rebecca Comyn. The Hicklings remained as caretakers following the 1999 visit.
- [8] The Defendant, Mr Cotter, was not legally represented at the trial.
- [9] At issue in this matter is whether a transfer of the lease of the island from Mr Martin to Mr Cotter should be set aside...
- [10] The Hicklings as long term residents of the island knew what the deceased required of them as caretakers.
- [11] Mr Cotter was born on 28<sup>th</sup> October 1967. He is not related to Mr Martin.
- [12] Mr Martin was described by Mrs Morris being "somewhat eccentric, very generous, very hard working, very truthful, very kind and trusting."
- [13] Mr Cotter gave evidence that he first went to the island with his parents on a yacht and they met the deceased, Martin, on that occasion. The Defendant says that he wanted to go back to the island upon leaving and he wrote to Andrew Martin who told him he would be welcome to come back to stay on the basis that he would work for his board and keep. He says that he was on board a smaller yacht that sailed back from Cairns to the island and stayed on the island for about three months before leaving it. He says after a three year delay he returned to the island and again spent about three months on the island. He says on that occasion he returned with a friend and each of them worked on the island for their board and keep for

three months. He said the first three months would have been in 1983 and the second three months would have been in 1986 and/or 1987.

- [14] Mr Cotter's further contact with Middle Percy Island came about after he became aware the vessel "Islander" was in Cairns. He recognised that vessel as one he believed to have been built on the island in 1934 by the leaseholders of the island at that time. The Defendant was living in Cairns at that time. In November or December 2000, he introduced himself to the Hicklings. The Hicklings were with the vessel which was in need of repair. Mr Cotter said he assisted by working on the boat providing food, accommodation and timber for the boat. He then sailed with the Hicklings back to Middle Percy Island in early January 2001. He said that the "Islander" was towed back to the island. The Defendant says that almost as soon as the party (he, a friend and the Hicklings) arrived at the island, the relationship soured, and the previously friendly Hicklings wanted him and his friend off the island. Before doing so, he obtained an address for Mr Martin in England from the Hicklings. It was described as incorrect or false in paragraph 9 of the defence. He said in evidence that he wasn't given the correct address.
- [15] Without much difficulty the Defendant located Mr Martin in England. The defence pleading and his evidence-in-chief lead to an inference he was endeavouring to create the impression the Hicklings had given him misleading information and he had difficulty locating Mr Martin as a result. In fact he had been given the correct address but for the street number. Mr Cotter may have had some cause to believe the Hicklings may not have been sympathetic to him in this action. The exaggeration of the minor inaccuracy in the address gives an indication there was an endeavour to paint himself as comparatively more worthy to take over the lease of the island.
- [16] The contract (Exhibit 18) was signed transferring the deceased Martin's interest in the lease to the Defendant on the 26<sup>th</sup> day of February 2001. The consideration was \$10.
- [17] The contract was signed four days after the deceased Martin and the Defendant returned to Australia from England.
- [18] The deceased Martin did not visit Middle Percy Island before signing the contract. Mr Cotter says he was shown a video.
- [19] As at 26<sup>th</sup> February 2001 Middle Percy Island was valued at \$320,000. A deed of pre-emption (Exhibit 19) was signed on 8<sup>th</sup> March 2001. The Defendant gave instructions to his solicitors to prepare this deed. He did this without any request to do so from Mr Martin. It gives an indication the Defendant had neither the intention or capacity to pay \$150,000 to Mr Martin.
- [20] Exhibit 17 shows two cheques each of \$9,950 were deposited to separate bank accounts at the Commonwealth Bank on 27.3.01. These accounts were in Mr Martin's name. The money for those payments did not come from the Defendant. They were paid into the account by him. He said it was provided by a person who received the loan against some timber owned by Mr Cotter.
- [21] By reference to the pleadings whether or not the Defendant told Mr Martin in England that he was at risk of losing Middle Percy Island because it was not being looked after, whether the Defendant knew or ought to have known that Mr Martin

did not have the mental capacity to enter into a contract, whether the Defendant arranged to take Mr Martin back to Australia, whether the Defendant proposed to Mr Martin that he should transfer his interest in Middle Percy Island to him and whether the Defendant offered \$160,000 for Middle Percy Island to Mr Martin are in issue. On the pleadings, the Defendant denies telling Mr Martin that he was at risk of losing Middle Percy Island and similarly denies that he had any reason to believe that Mr Martin lacked mental capacity. The Defendant says that he returned to Australia with Mr Martin at Mr Martin's request and that the proposal for Mr Martin to transfer Middle Percy Island to him was by a mutual agreement and that \$150,000 rather than \$160,000 was offered. The plaintiff's witness says the figure mentioned was 70,000 English pounds. This explains the minor difference in these figures.

- [22] Further on the pleadings the allegation the Defendant proposed for an agreement to transfer the lease for the sum of \$10 is denied. The Defendant's position is that was by a mutual agreement. A letter was signed by Mr Martin to the Department of Natural Resources dated 13<sup>th</sup> March 2001. By reference to the pleadings on the Defendant's case it was said to have been produced on the instructions of both Mr Martin and the Defendant. It was later accepted in cross-examination that all instructions to the solicitors were given by Mr Cotter. Thus letters were prepared on the Defendant's instructions. Those letters are Exhibits 6 and 10.
- [23] Exhibit 5 is a letter from the solicitors for the Defendant to Mr Martin. As noted it was written on the same day as the first letter was prepared for signature by Mr Martin to the department. The letter includes the paragraph:
- "We cannot act for you in this transaction. We recommend that you obtain your own independent legal advice in this matter. If required we can provide names and telephone numbers of nearby solicitors for you to consult.*
- If you intend to sign the contract and transfer you must sign both documents in the presence of a Justice of the Peace (not in this office).*
- After you have had the opportunity to peruse the contract, please advise if you require any amendments."*
- [24] The plaintiff then referred to seeing Mr Martin surprisingly again in 2001 in the February-March period in Proserpine.. She said she was told by Mr Martin that he was selling the island to a business man for hundreds of thousands of dollars. The contract to sell the lease for \$10 had been signed by that time. At or about that time she spoke to the Defendant. She was not informed by the Defendant that he had purchased the island for the sum of \$10. She became aware of that much later. The plaintiff said that if she had known there was any proposal to sell the island for \$10 she would have ensured that Mr Martin obtained professional advice.
- [25] Mrs Miller made a number of telephone calls between October 2001 and February 2002. The plaintiff said that the purpose of the phone calls was to chase up money which she believed was owing by the Defendant to Mr Martin.
- [26] Soon after the contract was signed Mr Martin arrived in Proserpine by bus. The plaintiff had received information that he would do so provided by Mr Martin

himself or by the Defendant. It was then that she was informed that the island had been sold.

- [27] After the first night Mr Martin stayed with the plaintiff she became very concerned about his health and sought medical advice and he was thereafter in hospital for a week. Thereafter he went to a nursing home in Mackay for some weeks before returning to motel accommodation in Proserpine.
- [28] Mr Martin asked Mrs Miller to contact the Defendant on a number of occasions.
- [29] Exhibit 22 confirms there were a number of contacts and attempts to contact the Defendant by telephone during late 2001 and early 2002. On some occasions the plaintiff says she was able to speak to the Defendant. She said that a number of the conversations were with Mr Martin after she had made the contact (by handing over the telephone). At no time however was she informed by the Defendant that he did not owe any money to Mr Martin and to the extent she did not follow the conversation, what she heard was to the contrary. I accept the evidence
- [30] In cross-examination the Plaintiff said she had no recollection of discussing either the sale of the island or the Hicklings leaving the island with the Defendant. She indicated that she had been on the island on two occasions before 1996 and a couple of times thereafter for extended periods. At the later times Mr Martin had returned to England. Again, I accept the Plaintiff's evidence.
- [31] As to delusional beliefs, Mrs Miller said in cross-examination that she was aware that Mr Martin believed that Princess Diana would be resurrected from her grave in October of 2001 at the time of the Feast of the Tabernacles. When this did not occur she said that she was aware Mr Martin was devastated.
- [32] Ms Rebecca Comyn gave evidence via a telephone link. She resides in Gloucestershire in England.
- [33] Ms Comyn had known Mr Martin for quite some years having met him in August of 1996. He lived at a residence she conducted for about three years, being intermittent over the first couple of years then full time for about a year.
- [34] Ms Comyn remained friends with Mr Martin until his death.
- [35] She met the Defendant early in February of 2001 when he arrived after apparently having sent a telegram to Mr Martin. She said that when Mr Cotter met Mr Martin gave no indication of having recognised Mr Cotter. She said that she was aware that the Defendant stayed in the area for a period of days and he had booked himself into a bed-and-breakfast in a village about two miles from where she and Mr Martin were living. She said that the Defendant came to the house on two or three occasions and after the first occasion, on subsequent days Mr Martin went out with the Defendant. They were some outings involving Mr Cotter, his son, Mr Martin and herself. She was aware that the predominant discussion concerned Middle Percy Island. In the initial stages she said that the discussion was about the maintenance of the island and Mr Martin had expressed concerns about the future maintenance of the island. She says she can recall that Mr Cotter asked her if Mr Martin had a mortgage on the island. She said she responded in the negative because she believed that was the case. She said there was a great deal of talk about John and Liz Hickling. She can recall that the Defendant indicated to Mr Martin that the

island was "in a very bad state, it was very run down, it wasn't being looked after." Ms Comyn also said that "the Defendant seemed to be full of big ideas and plans for the island" which included a statement that the Defendant wished "to maintain the homestead which was rather rundown." She said that the Defendant was adamant that he "should take Andrew back to the island and then store him there and accommodate his disabilities if he lived on the island." She said that at this time Mr Martin was very frail and it would have been difficult for him to get around the island. She says that she can recall that Mr Cotter indicated that he was going to offer all the money that he had. She says she converted \$160,000 in Australian currency to 70,000 English pounds. She said Mr Martin's response at least at this time was that he did not know what to do. She says that she can recall that Mr Martin was very agitated and concerned because on the one hand he was concerned about the future of the island but on the other because he was concerned about his own situation. She said that she did recall that Mr Martin said that he did not want to sell the island and that she heard him say something to that effect. She said that she formed the impression that the Defendant was putting pressure on Mr Martin to sell the island and as a result of that she had an argument with Mr Cotter and told him to leave the house. My firm impression is she was correct in that assessment. Mr Cotter did leave the house but he left the house with Mr Martin. Ms Comyn said that she had a letter from the Defendant's mother at the end of March or early April 2001 informing her that Mr Martin would be returning by aeroplane to England and requesting her to pick him up. She said that she drove down to London and found Mr Martin in what she described as a "dreadful state" and took him home. She was later asked to dictate letters which are Exhibits 1 and 2. There were each seeking payment of money to Mr Martin and she received in response, Exhibit 20 which is a letter from the Defendant's mother. A reasonable interpretation of the last mentioned letter is that the Defendant, through his mother, was claiming that Mr Martin had insisted that money the Defendant had, be used to improve the island and that money owing could be paid to Mr Martin at a later date. She gave no evidence to the effect that Mr Cotter had stated Mr Martin was in danger of losing the lease as pleaded. Her evidence Mr Cotter had said the island had been neglected and was in need of proper care was not challenged. Her evidence Mr Martin stated he did not wish to sell the island was likewise not challenged.

- [36] It appears Mr Martin was at material times in an extremely impoverished state in terms of cash reserves. Ms Comyn denied in cross-examination that she had telephoned the Defendant's mother to apologise for writing in Exhibit 2 about stating that the letter was a harsh reminder to pay Andrew Martin outstanding money.
- [37] There was evidence given from Professor Yellowlees, consultant psychiatrist whose report forms Exhibit 21. His evidence was also given by telephone. Andrew Martin was examined on 3<sup>rd</sup> December 2002 and found by Professor Yellowlees to have "obvious and relatively severe cognitive impairment." The report dated 13<sup>th</sup> December 2002 gives an account of what the deceased told Professor Yellowlees. He said that he was told about the potential loss of the lease among other things. Professor Yellowlees found that Mr Martin was suffering from a "form of schizophrenia, which is characterised by paranoid delusions." Professor Yellowlees gave evidence, said in his report that "there was clear evidence to suggest that Mr Martin also has multi-infarct dementia." He went on to say that Mr Martin had "little insight" into his cognitive impairment. He said that in his opinion, Mr Martin was "mentally unfit to enter into such a contract" and that at the time of the contract "he seems to have been unable to understand correctly the extent of his possessions,

the relationship of these possessions to potential beneficiaries, and the effect of making the contract." Because of the evidence of delusional thought he was clear in his opinion under cross-examination. I thought Professor Yellowlees' evidence was both honest and reliable.

- [38] It can be observed that if as the Defendant claims, Mr Martin had said to him after some payments had been made that he was to spend the money owed on rehabilitating the island rather than upon payment to him, there is nothing in writing to indicate he had made such a concession and the written and oral contact by telephone make it clear Mr Martin understood there was money owing. There was no security for any such liability.
- [39] The evidence shows that the Defendant had paid debts on behalf of Mr Martin and met his air fare expenses in coming to Australia, and later his airfare to return to England.
- [40] Mr Cotter said in evidence that he spoke to Mr Martin on the telephone before leaving for England, having done so he then made arrangements quite soon afterwards to obtain passports, hire a car in England and to visit Mr Martin. He said he wanted to see Mr Martin to see if he could buy the island and if he wished to sell it to bring Mr Martin back to Australia to "try and look after him as best I could." It was not suggested there had been any contact between Mr Martin and the Defendant for approximately 14 years before this. Whilst there may well have been willingness to look after Mr Martin, I strongly suspect that had much more to do with acquiring the island than concern for Mr Martin's welfare.
- [41] Upon arriving in England he said that he first discussed the subject of the island with Rebecca Comyn so that he could ascertain what Mr Martin's plans were for the island. He said that Ms Comyn said that he was looking for someone to take over and to do something with it. Having heard Mrs Comyn and observed the Defendant, I do not accept such a statement was made by Ms Comyn. He said that having been encouraged by this he said to Mr Martin that he would not beat about the bush and asked Mr Martin if he would sell the island to him. He said that Mr Martin's response to that was that he would not sell it to him but he would give him the island if he would Mr Cotter he said that he then said, "well, I'll give you \$150,000" which was just a figure pulled out of my head as to what the lease might be worth..." he said Mr Martin then said, "Yes, okay." He said that on the next morning when he went back to the house Andrew was ready to go with his bags packed. He said that Mr Martin said he had had an argument with Rebecca the night before. He said that as a result of this they drove to the bed-and-breakfast where he had been staying and Mr Martin stayed with him. He said that after making enquiries of a solicitor in England he formed the impression that the transaction could not be carried out in England. The Defendant said that Mr Martin said that he wanted to come back to Australia to go back to the island. He said that when Mr Martin found out the condition of the island he no longer wished to live there. Even if partly correct, I conclude Mr Martin's disability was a paramount consideration. He could not be cared for adequately on the island.
- [42] Before Mr Martin returned to Australia with Mr Cotter. Mr Cotter paid the air fares and accommodation expenses and he also paid an amount of what he described as being over 400 pounds which was overdue to Ms Comyn for bed-and-breakfast fees. He was aware that Mr Martin had no funds available to himself at that point in time. He said he took Mr Martin to a chiropodist to see if anything could be done

with his feet. He said that he believed there might have been some problems with Mr Martin's circulation. The air fare was purchased within two days of him and Mr Martin leaving Ms Comyn's residence with the Defendant. Before returning to Australia the Defendant, who also had with him his son, visited Stonehenge and some other tourist destinations before they all returned to Australia after approximately 10 days. He said Mr Martin wanted him to have the island for nothing as a gift. He said the solicitors said it would be ridiculous to have no dollar amount so he said, "Okay, \$10." He said in evidence he gave Mr Martin \$1500 in cash before putting him on a bus to Proserpine.

- [43] The Defendant explained that when they returned to Australia he went to the office of his solicitors and spoke to them about the preparation of transfer documents with respect to the island. It would appear on the date that the transfer documents were signed, Mr Martin went to the offices of the Defendant's solicitors. The Defendant spoke to his solicitor alone whilst Mr Martin was in the waiting room. The transfer documents apparently were prepared and given to the parties and signed in a coffee shop. They were witnessed by a JP according to the Defendant who came to the coffee shop for that purpose.
- [44] A barge was purchased for \$45,000. He said that Mr Martin told him to buy the boat. He said that between three or four people he would have been able to obtain \$150,000 to pay Mr Martin. The only reason that that amount was not paid to him was because of the need of additional expenditure of the kind which were made and set out in the defence.
- [45] The Defendant said in evidence that the deed of pre-emption was created in case Mr Martin had misgivings about the transaction. Whilst he had said at times that the island was a gift by Mr Martin to him he also said in cross-examination that money that he did pay to Mr Martin was a gift to Mr Martin. When questioned about the deed of pre-emption the Defendant says that he knew that Mr Martin was 76 years of age, adding that "that doesn't constitute as old necessarily." It was put to the Defendant that he knew Mr Martin was "...frail, old and relatively feeble mentally..." and the Defendant denied that proposition. It was put to him that he knew Mr Martin was "...physically frail..." the Defendant said that whilst he was "unable to walk on - on steady feet but apart from that he was still fairly strong."
- [46] It emerged in the evidence that at this time Mr Martin could move with a walking stick but used a wheelchair as well. He was not able to walk over uneven ground. The Defendant said the pain in Mr Martin's feet was the main problem. It was put to him that in effect the deed of pre-emption would never come into effect because of his death but he denied that he knew that Mr Martin would die relatively sooner. When asked why he did not give his solicitors instructions to pay Mr Martin \$150,000 he said "That was 'because that was - the island was given to me by Andy. He said 'you can have the island' and I said, 'I'll gift him the money. It was not a transaction for \$150,000.'" Effectively it seems that the Defendant was saying that he did not have an obligation to pay \$150,000 because it was a gift.
- [47] The Defendant agreed in cross-examination that he had stated to a Bob Norson in an email that he had "deposited a large amount of my life savings into Andy's accounts." He agreed that that statement was not truthful. He was responding to an article earlier written by Mr Norson which had given coverage to the plaintiff's side of the case. The Defendant said that the lie was not "purposeful" and the email was written in haste.



- [48] With reference to the second page of exhibit 20 and in particular that part of the exhibit which reads "He told me that you insisted he use the money he owes you to spend on improving the island and to repay you as soon as able. That is his intention." The Defendant said that he may have told his mother that he intended to pay.
- [49] Mr Cotter said he had no recollection of telling his solicitors that he proposed to pay Mr Martin \$150,000. It is to be noted that Exhibit 4, being a letter from the solicitors dated 24<sup>th</sup> February 2001 makes no reference to any such proposal.
- [50] When cross-examined about the apparent conflict between the reported intention to repay money in Exhibit 20 and what was said in the email to Mr Norson on 23<sup>rd</sup> November 2004 (Exhibit 23) and the statement that "at this point Andy told me that the monies and generosity so far received were more than sufficient and that I should spend any more money I made on the island and her maintenance...." In the antecedent sentences of the email before the words "at this point" were used Mr Cotter spoke of the relatively short time that elapsed between the signing of the contract and Mr Martin's return to England. He returned to England late in March of 2001 or very early in April. Whatever the date it was well before Exhibit 20 was written. When questioned about the apparent inconsistency between Exhibit 23 and Exhibit 20 Mr Cotter said after it had been noted that the communication with Mr Norson was in 2004 he said "...I had spoken to Andy on numerous occasions after the letter from my mother about what was to be done and then when I saw him at the nursing home in Mackay and when I took him from the Mackay Marina back to the Anchor Motel to drop him off over the period of that time, he discussed that he didn't need any more of the money. He didn't want any more of the money. Just try and get myself out of trouble." In that regard it seems to me that the time frame was well before Mr Cotter's mother wrote in July of 2001. As to the deed of pre-emption, Exhibit 19, the Defendant said that he brought that into being for Andy's peace of mind.
- [51] On the evidence it is clear that Mr Martin would have been interested in the condition of the island, because of his love of it. There is no doubt on Mr Cotter's own admission that he visited Mr Martin with a view to obtaining the island. A prudent person might not be quick to accept statements from someone who was endeavouring to purchase the island, as to whether the island was substantially run down. Knowing that the Hicklings had been regarded as competent caretakers, and they had been on the island for some seven years before Mr Martin left in 1996, that they remained as caretakers in 1999 after Mr Martin returned to the island for a short period, suggests that at least for a considerable period of time, caretaking was satisfactory.
- [52] I am satisfied that the Defendant did promote himself as a satisfactory candidate as a caretaker. In that regard his stated intention to renovate the homestead was perhaps of significance to Mr Martin. On the face of things however, there was nothing objective in the evidence to suggest that Mr Cotter's caretaking would have been equal to or superior to that of the Hicklings.
- [53] On the evidence, whilst the solicitors for the Defendant did in writing (Exhibit 5) inform Mr Martin they could not act for him and there was a recommendation to obtain independent legal advice, they prepared a document for his signature on the same date (Exhibit 6). Mr Cotter did not suggest that he made any recommendation to Mr Martin that he seek legal advice or that he should contact

any relative or anyone else before the contract was signed. I consider he should at least have taken one if not both of those steps in the circumstances.

[54] I accept Ms Comyn's evidence that she asked the Defendant to leave her house in Gloucestershire after she considered that Mr Martin was being placed under too much pressure to sell the island.

[55] It is not established just what the solicitors for the Defendant may have been told with regard to Mr Martin's age, general nature, frailty, non relationship to the Defendant, the real value of the island, or the like. There is nothing to suggest Mr Martin had any idea what the value of the island might be. If the solicitors were given information which included these facts, one would have thought that the Defendant would have received specific advice that the transaction was vulnerable to being set aside without precautions being taken in order to demonstrate that Mr Martin was not being overborne. However, it is not possible to draw any inferences along those lines because exactly what was said is not known. The Defendant was cross-examined about the content of an article in the Weekend Australian in or about the early part of April of 2002. The article (which is in evidence) included the following paragraph in reference to the Defendant:-

*"But he is inspired by Andy Martin, the Englishman who held the island lease for 38 years. Mr Cotter stayed with him on the island as a teenager before coaxing him back from England and convincing him to hand over the lease."*

[56] The article also referred to Mr Martin returning to the island to live. Mr Cotter denied making any statement to the effect that he had coaxed Mr Martin back from England or convinced him to hand over the lease although he said in cross-examined that the balance of Exhibit 25 does accurately reflect what he said to the reporter.

[57] A Mr Ericson gave evidence on behalf of the Defendant. He indicated that he had met Mr Martin at or about the time of the transfer and/or the deed of pre-emption was signed by Mr Martin. Whilst the date at which statements were made he said that he heard Mr Martin say that he wanted Mr Cotter to take over the island because he didn't want it "busted up. He wanted it kept as an island not as a five star resort." As to additional payment he said he heard Mr Martin say on a number of occasions that he was happy with what he already had and he was adamant that he wanted it "to go back into the island." Asked if had any general understanding as to what money had been received by Mr Martin, he said he understood it was "a fair bit...there was a fairly substantial amount, I could not put an exact dollar figure on it for you...but he was aware - like all his bills had been paid and what not so like the island was his first and - first well only love I guess." At the time of the conversation, whilst the date is imprecise no cash money apart from meeting some expenses and liabilities of Mr Martin had been met. As noted earlier, payments of almost \$20,000 to Mr Martin's accounts were made much later that the period about which Mr Ericson was speaking.

[58] Some of the statements attributed to Mr Martin by Mr Ericson may lead to an inference that Mr Martin was not fully appraised of the fact that he had transferred the island. Whatever the situation might be in that regard and even accepting that Mr Martin may well have made statements of the kind attributed to him by Mr

Ericson my overall conclusions in relation to the matter do not change after taking Mr Ericson's evidence into account.

- [59] In *Lowth v Diprose* (1992) 175 CLR 261 the High Court considered an appeal from the Full Court of South Australia. In the separate judgement of Brennan J he referred to the equitable principles involved in an action to set aside gifts procured by unconscionable conduct or undue influence stating "the jurisdiction of equity to set aside gifts procured by unconscionable conduct ordinarily arises from the concatenation of three factors: a relationship between the parties which, to the knowledge of the donee, places the donor at a special disadvantage vis a vis the donee: the donee's unconscionable exploitation of the donor's advantage: and the consequent overbearing of the will of the donor whereby the donor is unable to make a worthwhile judgment as to what it is in his or her best interest. A similar jurisdiction exists to set aside gifts procured by undue influence.
- [60] The Defendant invited me to consider the whole of the evidence suggesting firstly that there was no evidence that Mr Martin was "lacking mental capacity on or around the date of the transaction in question." He pointed out that the medical evidence was obtained well after the date of the transaction.
- [61] The Defendant invited me to find that at the date of the transaction it was more probable than not that Mr Martin had the mental capacity to enter into such an agreement of his own free will and suggested that if Mr Martin did lack such a capacity it would be more than likely that this would have come to the attention of mental health bodies or police. It was suggested further that the fact that Mr Martin had, on the evidence, been able to take care of himself, residing in bed-and-breakfasts and motels is inconsistent with him suffering from an advanced form of dementia.
- [62] He pointed further to the fact that the enduring power of attorney was dated 5<sup>th</sup> September 2001, that being more than some six months after the transaction in question. Effectively the Defendant asked rhetorically if Mr Martin had the capacity to sign an enduring power of attorney why would it then not be that the case that he had the capacity earlier to enter into the contract?
- [63] Mr Cotter also complained of being at some disadvantage because he could not call Dr Salway and Professor Yellowlees' recording that Mr Martin had very little interest in the money itself and no real plans." He noted that the report also refers to Mr Martin never having trusted solicitors.
- [64] Mr Cotter also referred in submissions to the claim for \$112,000 which was mentioned in Exhibit 2 as being the amount owing. Mr Cotter pointed to the fact that that figure could not have come out of the air. How the figure was arrived at is not clear. It is known that air fares to and from England, an amount of almost more than \$2,000 said to have been paid to cover a debt and a cash loan as well as the \$20,000. It is not readily apparent even from the Defendant's pleaded case how such a figure of \$112,000 could be arrived at. The fact this specific sum was claimed is at best equivocal. It might equally show Mr Martin did not have any clear view about what might remain owing at that time.
- [65] Mr Cotter concludes by stating he did not coerce Mr Martin to enter into the contract and he did not engage in any unconscionable conduct or "undue harassment".

- [66] Exhibit 21 being the report of Professor Yellowlees goes specifically address the question of the mental state of Mr Martin at the time of the signing of the contract.
- [67] If the most charitable view were taken of the evidence, that being that Mr Martin had at some stage invited the Defendant to utilise it to acquire equipment and/or to otherwise spend it on the maintenance of the island it nonetheless in my view remains unconscionable for the Defendant to claim that he has no liability to Mr Martin's estate because statements of that kind were made. It is quite clear that the money had not been received. Mr Martin was seeking further payment. It seems clear enough that if Mr Martin did approve something over which he had no control in any event he was clearly not acting in his own interests and the Defendant's conduct in accepting such charity was unconscionable particularly having regard to Mr Martin's impecunious circumstances. I have significant doubts about whether any such statement would in any event have been made but even if they were I think they would have been the result of undue influence. It is not suggested that at any such time Mr Martin's own situation financially was part and parcel of the discussions. The facts in this case are more than sufficient to raise a presumption that the transaction arose from undue influence and further that it would be unconscionable for the transaction to remain undisturbed.
- [68] This being the case the Defendant has the burden or proof of establishing that the transaction should be seen to be "fair and reasonable".
- [69] I am not so satisfied. I find the Defendant ought to have been aware Mr Martin was at a disadvantage. I find there was an unconscionable exploitation of Mr Martin. Mr Martin was not on the evidence, able to make any worthwhile judgement as to what was or was not in his best interests.
- [70] A very substantial benefit was conferred upon the Defendant by the transfer of the island. It appears that the transfer may have been induced by the promise of the payment of \$150,000. In this case Mr Martin had a strong emotional attachment to the island. Whether the Defendant made the statement to the reporter for the Weekend Australian or not, it seems to me and I find that the reality is that the Defendant did coax Mr Martin back from England and convinced him to hand over the lease to him. Mr Martin at the time did not have the capacity to give an informed consent. His love of the island, his physical and mental frailty and age made him vulnerable and placed Mr Martin under a special disability in all the circumstances at relevant times. Whilst he may have chosen not to seek legal advice the plain fact of the matter is that he received the advice of no person before entering into the transaction, and was under the influence of the Defendant at material times.
- [71] I accept Professor Yellowlees' evidence that Mr Martin suffered from delusions and I think a combined with a lot of physical factors, financial factors, together with affection for the island, he was especially vulnerable to exploitation. That I think ought to have been well understood by Mr Cotter. At the time the contract was signed Mr Martin was very much in the Defendant's care. I find he was subjected to undue influence.
- [72] The deed of pre-emption was created on the Defendant's instructions only as a form of salve or assurance for Mr Martin. It was never intended to have any legal effect because Mr Cotter never had any intention of selling the island antecedent to Mr Martin's death. It gives an indication that the Defendant himself recognised his

actions may be seen to be unconscionable, particularly since there was no apparent capacity to outlay expenditure in relation to the island and pay Mr Martin.

- [73] These proceedings were commenced on the 19<sup>th</sup> September 2005.
- [74] I am satisfied in all the circumstances that the Defendant's conduct does constitute a breach of s.40A(2) of the *Fair Trading Act* of 1989.
- [75] The Defendant pleads alternatively the allegations contained in paragraphs 26, 27, and 28 of the statement of claim are denied because the plaintiff's claim pursuant to s.40A of the *Fair Trading Act* of 1989 is statute barred pursuant to ss.99(3) and 100(5) of the same Act. Paragraph 26 of the statement of claim asserts the purchase by the Defendant of Martin's interest in Middle Percy Island falls within the definition of a sale of an interest in land within the meaning of s.40A of the *Fair Trading Act*. Paragraph 27 refers to the factual matters canvassed in paras 9-24 of the statement of claim. Those factual allegations have been dealt with in the course of this judgment and para 27 asserts that it was undue harassment or coercion in connection with the purchase of Mr Martin's interest in the island, contrary to s.40A(2) of the *Fair Trading Act* of para 28 of the statement of claim asserts the loss or damage particularised as loss of enjoyment of the use of the Island from the 26<sup>th</sup> February 2001 to the present date, loss of enjoyment and use of the Island until the expiration of the lease and the loss of opportunity to obtain a renewal of the lease from the Department of Natural Resources.
- [76] Subsection 3 of s.99 and subsection 5 of s.100 of the *Act* provide that actions may be commenced at any time within three years after the date upon which the cause of action accrued.
- [77] I do not think that the limitation periods in the *Fair Trading Act* have any application in this matter. The plaintiff's entitlement to bring this action did not accrue until probate of Mr Martin's will was granted. As noted earlier that was on the 30<sup>th</sup> September 2003.
- [78] I have concluded that the plaintiff must succeed in this action and I make the following orders:-
- [79] I give judgment for the plaintiff.
- 1) I give leave to the plaintiff to amend the title of the claim from Radcliffe to Morris.
  - 2) I order that the Department of Natural Resources by its appropriate officer substitute the name of Cathryn Alice Morris for Michael Joseph Cotter on the lease of Middle Percy Island.
  - 3) I order that the Defendant vacate the island by not later than 31<sup>st</sup> July 2008.
  - 4) I order that the Defendant remove all personal effects from the island including any vehicle or vehicles, vessel or vessels, chattels or effects owned by the Defendant from the island not later than 31<sup>st</sup> July 2008,
  - 5) I order that the Defendant pay the plaintiff's costs of and incidental to the action to be agreed or assessed.

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6) I give liberty to apply within 28 days.

*R. S. J. J.*  
19/6/08.