Neutral Citation Number: [2016] EWHC 3069 (Ch)

IN THE HIGH COURT OF JUSTICE

Case no. CH/2015/0086

CHANCERY DIVISION

ON APPEAL FROM THE IPSWICH COUNTY COURT

Date: 1 December 2016

Before :

STEPHEN JOURDAN QC SITTING AS A DEPUTY HIGH COURT JUDGE

- -

Between :

(1) MR BARRY JAMES FEHILY
(2) MRS ELVIN LYDIA FEHILY

Appellants

and

(1) MR PAUL ATKINSON
(2) MR GLYN MUMMERY

Respondents

Laurent Sykes QC (acting through the Public Access Scheme) for the Second Applicant

Niall McCulluch (instructed by Clarke Willmott LLP) for the Respondents

Hearing date: 11 October 2016

JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

Stephen Jourdan QC sitting as a Deputy High Court judge

Introduction

1. On 6 November 2011, HMRC issued petitions seeking bankruptcy orders against four individuals, Mr and Mrs Fehily and Mr and Mrs Williamson. HMRC claimed that those four individuals were jointly and severally liable for unpaid tax dating back to the mid-1990s due from the members of a partnership ("the Partnership") which had traded under the name "London and Essex Cleaning Services (Southern)". The amount said to be due, including interest and penalties, was about £224,000.

2. In January 2012, shortly before the petitions were due to be heard, each of those four individuals proposed to their creditors, including HMRC, that they enter into individual voluntary arrangements ("IVAs") under Part VIII of the Insolvency Act 1986. The proposals in each case were in similar terms, and were made on the basis that the four individuals were jointly and severally liable for the debt to HMRC, and as between the four of them, each was liable for 25%. The individuals each proposed that they would sell sufficient assets to pay the debt, and if no monies had been paid within 6 months, the supervisors would sell their properties.

3. The creditors voted in favour of modified versions of the proposals on 17 February 2012, and on 27 February 2012 the bankruptcy petitions were dismissed.

4. Mr and Mrs Williamson complied with the terms of their IVAs and paid HMRC the amount due. Mr and Mrs Fehily did not comply with the terms of their IVAs, and on 5 June 2013, the joint supervisors of their IVAs, Mr Glyn Mummery and Mr Paul Atkinson ("the Supervisors"), issued petitions for bankruptcy orders against them under s.264(1)(c) of the 1986 Act on the ground set out in s.276(1)(a) - that Mr and Mrs Fehily had failed to comply with their obligations under the IVAs.

5. On 2 August 2013, District Judge Russell made bankruptcy orders against both of them. One of the joint Supervisors, Mr Paul Atkinson, was appointed as trustees in bankruptcy.

6. On 6 August 2013, Mr and Mrs Fehily applied for orders annulling the bankruptcy orders, under s.282(1)(a) of the 1986 Act: "The court may annul a bankruptcy order if it at any time appears to the court that, on the grounds existing at the time the order was made, the order ought not to have been made". The application was made, essentially, on the basis that they had been treated unfairly.

7. In early 2014, Mr Fehily and his daughter, Rebecca Fehily, obtained advice from Jessica Powers, a barrister acting through the Bar Pro Bono Unit. She settled a skeleton argument which raised, for the first time, the contention that the IVAs were of no effect because Mrs Fehily lacked the mental capacity to enter into an IVA. Ms Powers advanced other points as well, but they are not relevant to this appeal.

8. On 26 August 2014, District Judge Parnell ("DJ Parnell") appointed Rebecca Fehily to act on Mrs Fehily's behalf under rule 7.44 of the Insolvency Rules 1986.

9. The annulment application was heard by DJ Parnell on 20 November 2014. Mr Fehily and Rebecca Fehily appeared in person, as they were unable to secure legal representation. The Supervisors were represented by Mr McCulloch of counsel, who also appeared before me. DJ Parnell then delivered a reserved judgment on 19 December 2014. He dismissed the application, rejecting the contention that Mrs Fehily did not have capacity to enter into her IVA. He also said that there would be no point in annulling the bankruptcy given that, if the IVA was ineffective, there was still a substantial debt due, and Mr and Mrs Fehily would inevitably be made bankrupt in any event.

10. Mr and Mrs Fehily then applied to this court for permission to appeal. Mr Fehily abandoned his application, but Mrs Fehily pursued hers. An order was made on 24 February 2016, at a hearing where Mr Sykes appeared for Mrs Fehily, directing a rolled up hearing, with the application for permission to be heard with the appeal to follow if permission was granted, the hearing to consider two issues: (1) whether Mrs Fehily lacked capacity to be bound by the IVA, and (2) whether she was liable, as partner, for the relevant debt. The order directed that Mrs Fehily be permitted to file and serve, on or before 9 March 2016, any further medical evidence relevant to her capacity and that the Supervisors be permitted to file and serve evidence in reply. It also appointed Rebecca Fehily to represent Mrs Fehily on the appeal, under r.7.44 of the 1986 Rules.

11. The application came before me on 11 October 2016, and I heard submissions from Mr Sykes QC for Mrs Fehily, and Mr McCulloch for the Supervisors. Mr Sykes argued that: (1) DJ Parnell was wrong to hold that Mrs Fehily had the mental capacity to enter into the IVA. DJ Parnell had applied the wrong test to decide if Mrs Fehily had capacity, and had failed to deal correctly with the evidence; (2) if Mrs Fehily lacked such capacity, the IVA was void; and (3) it would not be pointless to annul the bankruptcy order, because Mrs Fehily had a defence to the claim in respect of the tax, because she was not a partner in the Partnership.

12. In the light of the oral argument, at the hearing I invited, and after the hearing received, additional written submissions from counsel on the issue of what the right test is, in law, for determining if a person has the mental capacity for entering into an IVA. I am grateful to both counsel for their clear and helpful submissions.

13. Before the hearing, Mrs Fehily served additional evidence, in the form of witness statements by Mr Fehily and Rebecca Fehily, and some of her medical records. She did not serve any medical evidence. At the hearing, Mr Sykes applied for permission to rely on this evidence in support of the appeal.

14. After the hearing, at the end of his written submissions on the test to be applied to determine capacity, Mr Sykes also applied for permission to call further medical evidence and asked for an adjournment to obtain such evidence. I rejected that application. Mrs Fehily (represented by Rebecca Fehily) has had ample opportunity to adduce medical evidence, both in the course of the proceedings in the County Court and in the course of this appeal. It would be unfair to the Supervisors, and the creditors whose interests they represent, to allow yet further time for the admission of medical evidence.

15. I consider that the arguments put on behalf of Mrs Fehily were serious arguments, which had a realistic prospect of succeeding. I therefore give permission to Mrs Fehily to appeal. However, for the reasons given below, I have concluded that the appeal should be dismissed, for two reasons: (1) DJ Parnell was entitled to conclude that Mrs Fehily (represented by Rebecca Fehily) had failed to prove that she lacked capacity to enter into the IVA; and (2), even if she lacked such capacity, the IVA was binding on her.

16. I will begin by summarising the course of the proceedings below, the evidence on the capacity issue which DJ Parnell had to consider, and his assessment of it. I will then summarise the new evidence, and then the criticisms made of DJ Parnell's assessment by Mr Sykes. I will then give my judgment on those criticisms and my conclusions on the capacity issue. I will then explain my decision that, even if Mrs Fehily lacked capacity to enter the IVA, it was still binding on her.

The course of the proceedings below, and the evidence before the District Judge

17. DJ Parnell had before him two statements by Rebecca Fehily, three statements by Mr Fehily, two statements by Mr Mummery and one by Mr Atkinson. There was no witness statement or expert's report from a doctor. However, there were letters from two doctors exhibited to some of the statements by Rebecca and Mr Fehily. None of the witnesses were required to give oral evidence, and Mr McCulloch, who was present at the hearing, told me that the hearing proceeded on the basis that the evidence in the statements was not challenged, but submissions were made on the weight to be given to the evidence and the conclusions to be drawn from it. I will summarise those parts of the evidence which appear material to the capacity issue.

18. Mr Fehily's first statement, dated 11 March 2014, said that, on 8 January 2014, he had written to Mrs Fehily's GP, Dr Debbie Fairweather, asking that she give a provisional opinion on Mrs Fehily's mental capacity at the time she entered into the IVA. She was away from the surgery for several weeks, and so another doctor, Dr Thein Soe, wrote a letter providing such an opinion. He exhibited the letter from Dr Soe, dated 23 January 2014, addressed "to whom it may concern". Mr Fehily then said that he had tried to obtain a witness statement from Dr Soe, but the doctor had declined, because: "… He was not Mrs Fehily's usual doctor and did not have the full understanding of Mrs Fehily's medical history that Dr Fairweather does. Dr Fairweather will not be returning to the surgery until April". He asked for an adjournment of the annulment application to have time to obtain medical evidence.

19. Following that, on 14 March 2014 DJ Parnell directed the service of further evidence, including evidence by a suitably qualified medical professional on the capacity issue, by 25 April 2014.

20. Mr Fehily's third statement, dated 22 March 2014, said that Mrs Fehily had suffered a subarachnoid haemorrhage (a type of stroke caused by bleeding on the surface of the brain) in 1982. This affected her mental functioning and her day-to-day life. She no longer appeared to understand people's reactions to things that were said to her. Her ability to make decisions and retain information was severely affected and she no longer comprehended decisions of any magnitude. He took over management of all

financial matters. In March 2010 she suffered a further small stroke. After that, she struggled with holding a conversation. She did not seem to understand some conversations, appeared confused, and tended to repeat herself regularly. In March 2011 she suffered a bad fall, leaving her bedridden. After that, she became withdrawn. She also began to suffer from depression and anxiety. Her mental ability deteriorated.

21. He then said that, on 7 December 2011, Mr Guy, of HMRC, had come to the Fehily's home to serve bankruptcy petitions. Mr Fehily gave him a letter detailing Mrs Fehily's medical conditions, which he exhibited. Mr Fehily then explained that he was contacted in late 2011 by Mr Mummery, who was a friend of Mr Williamson. Mr Fehily explained Mrs Fehily's medical condition to Mr Mummery, and said they would struggle to attend Mr Mummery's offices because of her health. Mr Mummery advised that the only option for the Fehilys was to enter into an IVA.

22. Mr Fehily said that, in January 2012, his wife was not able to understand complex documents. She struggled to hold conversations, process information given to her, and retain information because of poor memory. He then said that he and Mrs Fehily had gone to Mr Mummery's offices, the offices of FRP Advisory, on 13 January 2012 to sign the proposal for the IVAs. This was the only time anyone from FRP Advisory had met or spoken to Mrs Fehily. He exhibited the signed proposal. This outlined the adverse effect on Mrs Fehily's physical condition of her two strokes and her fall, at the end of a section headed "reasons for financial difficulty", but said nothing about the effect of the strokes on her mental condition. Mr Fehily said: "My wife struggled to understand what it was she was signing. She signed the IVA because she believed that it would save her from further distress. My wife has never fully understood the implications of signing the IVA. Glyn Mummery was fully aware of my wife's severe medical condition as I have provided him with all medical reports relating to my wife." He referred to a conversation with Mr Mummery in August 2012, when he told Mr Mummery that Mrs Fehily was not mentally or physically capable of dealing with any legal proceedings. He then referred to three further letters from Dr Fairweather which he exhibited.

23. Rebecca Fehily's first statement, dated 23 March 2014, said that, after her mother's fall: "my mother would struggle greatly to fully comprehend what we were discussing, even if it was a mundane topic of conversation. I noticed an obvious deterioration in my mother's ability to hold conversations and retain information. An obvious example is that my mother would ask me to do something, and then repeat the same request a few minutes later." She also said that, in about August 2012, Mr Fehily had a telephone conversation with Mr Mummery, during which she was present. She said that Mr Fehily had:

> "… discussed my mother's ill health and her lack of comprehension of the IVA and bankruptcy process. I stated that I did not feel that Glyn Mummery or HMRC fully appreciated the severity of my mother's condition, however, Glyn Mummery assured us that he and HMRC fully appreciated her condition as all of my mother's medical reports have been forwarded on to HMRC".

24. Following those statements, orders were made extending the time for complying with paragraph 3 of the order dated 14 March 2014, including time for serving evidence given by a suitably qualified medical professional, with the last of those orders extending time to 15 August 2014.

25. On 25 August 2014, Rebecca Fehily made her second witness statement. This dealt with a number of matters, but did not say anything about any attempts made to obtain further medical evidence. It did not add to the evidence previously filed in respect of Mrs Fehily's mental condition.

26. On 26 August 2014, the matter came before DJ Parnell. Rebecca Fehily told him that she and her father had been unable to obtain any further medical evidence and they would have to rely on the evidence filed to date. DJ Parnell took the view that, on a balance of probabilities on the basis of the medical evidence filed to date and the family's own evidence to him, Mrs Fehily was unable to conduct the annulment application herself due to mental incapacity and/or physical affliction or disability; accordingly, he appointed Rebecca Fehily to act on her mother's behalf under rule 7.44 of the Insolvency Rules 1986 and listed the matter for final hearing.

27. On 3 November 2014, Mr Mummery made a witness statement. In that, he set out the history of the matter in some detail. He said that when he had first been approached by Mr Williamson, he was told by Mr Williamson that London and Essex Cleaning (Southern) was an equal partnership between Mr and Mrs Williamson and Mr and Mrs Fehily, that about £224,000 was due to HMRC from the four partners, and that HMRC had served statutory demands and petitions had been served on them. Mr Williamson told Mr Mummery that he and Mr Fehily had instructed a solicitor to pursue an application to set aside the statutory demands, but this application was not successful.

28. He said that when he first met Mr Fehily, on 6 December 2011, he was told that Mrs Fehily had an ongoing medical condition which meant Mr Fehily was a full-time carer, and she could not assist in asset realisations. He said he was told by Mr Fehily that Mr and Mrs Fehily had sought to set aside the statutory demands unsuccessfully. He had not been told by Mr Fehily that Mrs Fehily's ill health meant that she could not comprehend issues. He said that he assumed that Mrs Fehily's medical condition had been considered by the court at the stage of seeking to set aside the statutory demands, and it was not a reason for preventing a petition for bankruptcy. Mr Fehily told him that Mrs Fehily was very anxious, and that any stress would be detrimental to her health and that she was fragile, needing constant care. Mr Fehily said that he would inform Mrs Fehily of matters subject to his assessment of the anxiety likely to be caused to her by bad news, especially as he felt she was unable to assist in the practical steps needed to resolve the issue, and that any stress was extremely detrimental to their health.

29. As to what happened on 13 January 2012, when Mr and Mrs Fehily attended his office in order to sign the documents, he said this:

> "To my untrained observation, though Mrs Fehily was slow on her feet, she was able to walk and there was nothing to my untrained observation suggest that she was suffering from any mental impairment. She was not well-informed on the affairs of

the Partnership as she professed Mr Fehily in the main took responsibility for this, however she was aware of the key issues and that bankruptcy petitions were presented against her and Mr Fehily and she had therefore attended my office with Mr Fehily in order to progress the solution. Mrs Fehily seemed to me to be coherent and rational, though not as informed as Mr Fehily on the day-to-day details of their financial affairs. There was nothing to my recollection to suggest that she was not aware of the purpose of her and Mr Fehily's visit and I had already explained the terms of the IVAs by my letters and as far as I was aware, the situation had not changed with regards to either HMRC or Mr and Mrs Fehily's assets and liabilities. We therefore had a brief meeting in order to confirm the headline facts of the IVAs and for Mr and Mrs Fehily to sign the paperwork. Nothing at that meeting suggested to me that Mr Fehily's representations were incorrect or that Mrs Fehily did not have mental capacity to contract or that she did not understand the terms of her IVA proposal or application for an interim order".

30. He exhibited an exchange of letters between him and Mr Fehily in September 2012. Mr Fehily said that his wife's medical condition had deteriorated. She was in no fit state medically to travel, and was "… medically unfit to discuss any matter with regards to the above reference at this moment in time due to her declining health. As soon as my wife's condition improves, we can of course discuss the matter of a meeting, but given her current condition, it is completely unfeasible at present".

31. He also exhibited a letter dated 26 September 2012 from Mr Fehily complaining about a voicemail message left by someone from Mr Mummery's office. The voicemail had outlined that Mr Fehily should contact Mr Mummery immediately, as otherwise the Supervisors would be obliged to seek Mr and Mrs Fehily's bankruptcy. Mr Fehily said that he and Mrs Fehily had listened to the voicemail several times "… and to say that it caused her unease is a gross understatement. As I am sure you can appreciate, my wife's deteriorating health has not been helped by this incident."

DJ Parnell's judgment

32. In his judgment, DJ Parnell had to deal not only with the issue of whether Mrs Fehily had the mental capacity to enter into the IVA but also with an argument that the bankruptcy order should not have been made by District Judge Russell, because Mrs Fehily lacked capacity to deal with the litigation against her at the time of the hearing of the petition, and the court should not have dealt with the petition without appointing a litigation friend.

33. DJ Parnell dealt with that issue first, in paragraphs 10-20 of his judgment, after setting out the background, and summarising the terms of the IVAs. He said that litigation capacity was governed by the rule set out in the case of *Masterman-Lister v Brutton & Co* [2003] EWCA Civ 70 [2003] 1 W.L.R. 1511, which he summarised as being "… whether the party legal proceedings is capable of understanding with the assistance of such proper explanation from legal advisers and experts in other disciplines as the case may require the issues on which his consent or decision was likely to be necessary in the course of those proceedings". He also referred to the decision of HHJ Pelling QC in *Haworth v Cartmel* [2011] EWHC 36 (Ch) that: "The question of capacity is issue

and situation specific … the capacity issues that arise in this case are whether the applicant has proved that she did not have capacity to respond to the Statutory Demand … to respond to the Petition … and to decide whether to defend the bankruptcy proceedings either herself or by asking or instructing someone else to do so on her behalf".

34. He concluded, at paragraph 20 that:

> "… in the absence of any expert evidence from a consultant or even a more detailed letter from Mrs Fehily's GP I am unable to make a finding of fact that she lacked capacity to litigate as it to August 2013. Accordingly, there was no procedural irregularity arising out of District Judge Russell's failure to appoint a litigation friend or representative under rule 7.43 Insolvency Rules".

There is no appeal from that part of his judgment.

35. He then dealt with the issue of Mrs Fehily's capacity to enter into the IVA in paragraphs 21-27 of his judgement.

36. In paragraph 21, he set out the test which he considered he should apply as follows:

> "The law as to capacity to enter into a contract is governed by the common law rules. At common-law - and I quote from *Chitty* para 8-070 - the understanding and competence required to uphold the validity of a transaction depends on the nature of the transaction. There is no fixed standard of mental capacity which is requisite for all transactions. What is required in relation to each particular matter or piece of business transacted is that the party in question should have an understanding of the general nature of what he is doing. I might also add that that understanding will be based on whatever advice can be obtained by the person in question either from professional advisers or by family and friends as to the nature of the transaction. It follows from what I have said previously that the medical evidence is insufficient for me to make a finding that as at 13 January 2012 (the date the IVA proposal was made) on 17 February 2012 (the date the creditors approved the IVA proposal) Mrs Fehily lacked capacity to enter into a contract."

37. Accordingly, it is necessary to consider both the assessment of the evidence set out in paragraphs 10-20 and 22-26 of his judgment. I will summarise the evidence that the District Judge identified as material, and his assessment of it, but rather than do so in the order he set out in his judgment, I will do so in chronological order.

38. First, Dr Fairweather's letter of 6 December 2011, shortly before the IVA was proposed. The letter described the physical effects of the subarachnoid haemorrhage in 1982, the minor stroke in 2010, and Mrs Fehily's fall in March 2011 which resulted in a fractured ankle. The letter said nothing about Mrs Fehily's mental condition. DJ Parnell considered that it was noteworthy that this letter contained no reference to Mrs Fehily's mental state and solely related to problems with her mobility. He said he attached particular significance to the absence of any reference to cognitive impairment in this letter, written only a few weeks before the IVA was entered into. He said that it appeared this was written to assist the Fehilys in their dealings with the

Revenue, and "if, as is now contended, she actually lacked mental capacity to enter into a contract or manage her affairs it is surprising her GP did not mention this".

39. Second, Mr Mummery's evidence about his first meeting with Mr Fehily on 6 December 2011 (see paragraph 28 above), which DJ Parnell accepted, that Mr Fehily told Mr Mummery about Mrs Fehily's physical incapacity, depression, and anxiety, but did not suggest that she lacked mental capacity to enter into a contract or the IVA.

40. Third, Mr Mummery's evidence about his meeting with Mrs Fehily on 13 January 2012 (see paragraph 29 above), which he considered highly plausible. He thought it was unlikely that an experienced insolvency practitioner would have knowingly entered into an IVA with someone whose mental capacity was in doubt.

41. Fourth, the correspondence in early September 2012 (see paragraph 30 above), in which Mr Fehily had made no reference to Mrs Fehily having completely insufficient understanding to be able to enter into the IVA originally, and this being a permanent situation. The implication of the letter was Mr Fehily thought it quite possible that Mrs Fehily's health might improve, and he might be able to bring Mrs Fehily to a meeting with Mr Mummery.

42. Fifth, Mr Fehily's letter of 26 September 2012 (see paragraph 31 above). He attached significant weight to this, saying:

> "The implication of that letter is that Mrs Fehily found the voicemail extremely upsetting, but the implication also is that she was well aware of the significance of what was being said; in fact it is obvious from the letter that Mr Fehily is complaining that the warning about impending bankruptcy was well understood by Mrs Fehily and it was simply serving to upset her at a very difficult time in her life. The inferences that Mrs Fehily, who is now said to have lacked mental capacity to enter into the IVA in January 2012, was listening to voicemail messages from the Supervisors' office in September 2012, and understanding the messages sufficiently to become agitated".

43. Sixth, a letter from Dr Fairweather dated 15 November 2012. This explained the mobility issues that Mrs Fehily suffered from. As to her mental condition, it said:

> "….after a further in-depth conversation with Mrs Fehily I have confirmed severe stress related anxiety and depression. I have restarted her previous prescription of sertraline (an anti-depressant) and will review the response to treatment. If anything Mrs Fehily's health has declined since our last appointment and clearly how well-being in recovery is of paramount importance… Any amount of stress is going to be detrimental to her recovery could indeed impede both her short term and long term recovery. Mrs Fehily is unable to function on her own; she requires constant support and help".

44. DJ Parnell thought it was significant that this letter contained no reference to Mrs Fehily's mental capacity, and indeed referred to the doctor having an in-depth conversation with Mrs Fehily.

45. Seventh, a further letter from Dr Fairweather dated 9 January 2013. This was the first letter that referred to any problems with cognitive ability, saying: "… Mrs Fehily suffered a subarachnoid haemorrhage, which causes her extreme neurological and cognitive impairment this coupled with the severe break and fracture of her ankle and shin in several places makes Mrs Fehily's mobility a consistent strain and struggle… Her ill health and personal circumstances are placed an enormous amount of stress on Mrs Fehily and husband and I as Mrs Fehily's Dr would ask your consideration of their very delicate situation in these very difficult circumstances".

46. DJ Parnell thought that it was not clear from the phrase in the letter "extreme neurological and cognitive impairment" whether Dr Fairweather was saying that it was the neurological impairment which was extreme, or whether it was both the neurological and cognitive impairment which were extreme.

47. Eighth, a further letter from Dr Fairweather dated 23 July 2013. This said:

> "Having made a good initial response to antidepressants, Mrs Fehily has had a recent deterioration of her condition, with a worsening of both depressive and anxiety symptoms which I believe to be as a result of the increased stress relating to her on going tax affairs and the threat of possible court appearance. As you are aware, Mrs Fehily has a past history of subarachnoid haemorrhage and ankle fracture, the combination of which have left her with ongoing impairment of mobility, neurological deficit and cognitive state. Mrs Fehily's medical condition remains an ongoing cause for concern and I can confirm she requires ongoing care and support of home. Her ill-health and personal circumstances placed an enormous stress on both her and her husband".

48. DJ Parnell considered that this gave the impression that Mrs Fehily was aware of her financial situation and was troubled by it. The issue of Mrs Fehily's capacity to litigate was not raised by Dr Fairweather in that letter. It was significant that, in this letter, Dr Fairweather only referred to "ongoing impairment of mobility, neurological deficit and cognitive state" and did not use the word "extreme".

49. Ninth, at the hearing before District Judge Russell on 2 August 2013, Mrs Fehily's medical condition was discussed, but neither Mr Fehily, nor Rebecca Fehily made any suggestion that Mrs Fehily did not have the capacity to enter into the IVA or to comprehend the nature of the proceedings.

50. Tenth, the letter from Dr Soe of 23 January 2014. This gave Dr Soe's "provisional opinion" of Mrs Fehily's medical history and mental state at the times in question (January 2012-August 2013), during Dr Fairweather's absence from the surgery. This said:

> "Having reviewed Mrs Fehily's medical history and current condition it is clear that she has little to no ability when attempting to understand information that is pertinent to Mrs Fehily being able to make decisions. It is also almost impossible for Mrs Fehily to retain information, for example Mrs Fehily struggles greatly with absorbing information that is given to her, for this reason her daughter accompanies Mrs Fehily to all of her Doctor & Hospital appointments. This obviously results in

> Mrs Fehily being unable to process or evaluate information when making specific decisions.
>
> Given the above information in our medical opinion it is very likely that Mrs Fehily lacked capacity at the time she proposed the IVA, and at the time the bankruptcy order was made….".

51. DJ Parnell regarded this letter as entirely unreliable for several reasons. It was explicitly stated to be a provisional opinion only. The extent of Dr Soe's knowledge was largely dependent on the medical records. The examination on 23 January 2014 was entirely unreliable as an opinion as to Mrs Fehily's mental state at an earlier date in view of the fact that knowledge of her mental state prior to 23 January 2014 was apparently based solely on the records. Dr Soe was not on the practice letterhead. Dr Soe did not explain why Dr Fairweather, in her letter of 15 February 2012, did not refer to any cognitive impairment and said she was able to have an in-depth discussion with Mrs Fehily. Dr Soe had declined to provide a witness statement as Dr Soe was not Mrs Fehily's usual doctor, and did not have the full understanding of Mrs Fehily's medical history that Dr Fairweather did have. It had not been possible to obtain a full report from Dr Fairweather (who did have that full understanding) confirming what Dr Soe had said, or any further medical evidence.

52. DJ Parnell concluded, at paragraph 26:

> "I am satisfied that there is wholly insufficient medical evidence for me to come to a conclusion that she lacked capacity to enter into the IVA. I am also satisfied on the facts having looked at the witness statements and the surrounding correspondence but it was not suggested for a moment at that time that Mrs Fehily lacked capacity to enter into the IVA and did not understand what she was doing. There was ample evidence that she was extremely ill and that she founds the whole proceedings very stressful, but that is very different from saying that she lacked capacity to sign the IVA."

The fresh evidence

53. The fresh evidence filed in the course of this appeal comprises two further witness statements by Mr Fehily and two by Rebecca Fehily, a witness statement by Mr Mummery, and the medical notes relating to Mrs Fehily which bear on her mental condition at the relevant time. I will identify those parts of that evidence which counsel directed my attention to.

54. Mr Sykes drew attention to Mr Fehily's evidence that, due to lack of legal representation, and being a layman, he did not know about mental capacity until the barrister at the Bar Pro Bono Unit advised them of the issue on 7 January 2014, and to his evidence that Mrs Fehily had no role within the business of the Partnership at any level, and did not receive any share of the profits, and was only included as a partner on the advice of their accountant. He also drew attention to Rebecca Fehily's third statement, dated 10 October 2016, the day before the hearing before me, which included this evidence:

"5 My mother has struggled on a daily basis with tasks for as long as I can remember, certainly before 2012. Any "normal" person without traumatic brain injuries would undertake these daily tasks with ease. For instance, if my mother attempted to do the shopping list, she would repeat herself numerously, she would repeat an item on the list again and again, without remembering that she had in fact already mentioned the item. If she looked in the freezer, she would not remember doing so. It is no exaggeration to say that a simple, basic shopping list would take is the best part of at least 3-4 hours.

6 If there was an item that required my mother's signature, something where my signature would not suffice, such as a passport form, she will have the first clue as to what she was signing. I could attempt to explain over a number of hours, but she would still not have any comprehension of what she would be signing."

55. Mr Sykes referred me to the following entries in Mrs Fehily's medical records made by Dr Fairweather:

56. 5 December 2011. "Problem title: Depression NOS. History: see above, needs letter to solicitors acting for mortgage company who are threatening to evict her. Has now struggled to make repayments since Nov 2010. Is also being made "bankrupt" on Friday as was partner in her husband's business which is still an ongoing dispute with tax office. Remains very anxious and tearful at times, emotions close to surface, not sleeping, up every hour through night, difficulty with decision-making…".

57. 12 November 2012: "… things much worse again last few months with panic/anxiety attacks, if there is anything or anyone near house, daughter now having to help look after her. Now taxman says they will bankrupt them re-previous business of husband's. Things did ease up a bit again and got on fine with sertraline last year … still trying to sell various possessions to get money. …". There is then what appears to be a record of questions and answers. One question is: "Trouble concentrating on things such as reading the newspaper or watching television" to which the answer was: "Nearly every day."

58. 4 July 2013. This again includes a list of what appears to be questions and answers, and again includes the question: "Trouble concentrating on things such as reading the newspaper or watching television" and the answer: "nearly every day".

59. Both counsel drew attention to a letter from Dr Fairweather dated 15 April 2016 which said:

"I can confirm that Mrs Elvin Fehily was seen by me on both December 5, 2011 and November 12, 2012.

On December 5, 2011, I assessed her to be depressed, I noted she reported anxiety and tearfulness, the suffering sleep disturbance and had difficulty with decision-making. I prescribed her with antidepressant medication at that time.

On November 12, 2012 she reported deterioration of her panic and anxiety to me I can confirm that at that time in response to questioning she reported sleep

disturbance and difficulty with concentration and the diagnosis of depression was again made. She was treated again with antidepressant medication at that time.

I did not make any formal assessment of her mental capacity or cognitive function at that time. As a generalist I am unable to comment further on her level of understanding of a contract at that time."

60. Mr McCulloch drew attention to the fact that the Supervisors' solicitors had corresponded with Dr Fairfield's surgery, but had been unable to obtain any further evidence about Mrs Fehily's mental condition and emphasised the complete absence of any further medical evidence to support the contention that Mrs Fehily lacked capacity.

The approach to this appeal

61. DJ Parnell's judgment involved the assessment and balancing of a number of pieces of evidence to determine whether a legal test was satisfied. In those circumstances, I would be entitled to interfere with his decision only if he took into account immaterial factors, omitted to take account of material factors, erred in principle or came to a conclusion which fell outside the generous ambit within which reasonable disagreement is possible: *Assicurazioni Generali SpA v Arab Insurance Group* [2003] 1 WLR 577 at [12] and [16], *Aldi Stores v WSP Group* [2008] 1 WLR 748 at [16]-[17]. This was, rightly, common ground between counsel.

62. Fresh evidence cannot be admitted on an appeal without an order from the court under CPR r.52.11(2). The applicable principles are summarised in *Civil Procedure* 2016 at [52.11.2]. In deciding whether to admit fresh evidence, the appeal court must strike a fair balance between the need for concluded litigation to be determinative of disputes and the desirability that the judicial process should achieve the right result, so as to give effect to the overriding objection in CPR r.1.1(1) to deal with cases justly and at proportionate cost, which includes dealing with cases fairly and expeditiously. There are three matters that must be considered: (1) could the evidence have been obtained with reasonable diligence for use at the hearing in the court below; (2) is the evidence such that if it had been adduced in the court below, it would probably have had an important influence on the result of the case (although it need not been decisive); (3) is the evidence credible (although it need not be incontrovertible)?

63. Mr Sykes accepted that the fresh evidence could have been adduced, with reasonable diligence, in the County Court, but relied on the fact that Rebecca Fehily had been unable to obtain legal assistance after the initial help given by Ms Powers, and the importance of the outcome to Mrs Fehily, who will lose her home if the appeal is dismissed. Mr McCulloch did not consent to the application, but nor did he wish to make any submissions in opposition to it. I have considered the fresh evidence and give my ruling on whether it should be admitted below.

The criticisms of DJ Parnell's judgment

64. It was, correctly, common ground between counsel that the burden of proof was and is on Mrs Fehily to prove that she lacked capacity to enter into the IVA.

65. Mr Sykes made the following criticisms of DJ Parnell's judgment on the capacity issue based on the material before the District Judge:

66. DJ Parnell applied the wrong test in law for determining capacity. Mr Sykes submitted that there were two errors in paragraph 21 of DJ Parnell's judgment. First, it was not the general nature of the transaction, but the actual transaction, that there needs to be capacity to understand. Second, the court should not consider capacity by reference to what advice could be obtained from those available to give advice to her, but rather on the basis that the person received competent advice.

67. DJ Parnell did not take into account the evidence in the third witness statement of Mr Fehily, which had not been challenged, there having been no request that Mr Fehily be cross-examined on the evidence in his statements. Mr Sykes relied on the principle that, where the court is asked to disbelieve a witness, the witness should generally be cross-examined, and a failure to cross-examine a witness may usually be treated as an acceptance of the truth of the evidence: see *Markem Corporation v Zipher* [2005] EWCA Civ 267, [2005] R.P.C. 31 at [58-61].

68. DJ Parnell had been wrong to treat the letter of 26 September 2012 (see paragraph 31 above) as evidence that Mrs Fehily could understand the IVA. It was only evidence that she could understand what bankruptcy was, which required a much lower level of cognitive ability.

69. DJ Parnell had wrongly treated Mr Fehily's letters in September 2012 as evidence that Mrs Fehily had capacity. At the time they were written, the question of Mrs Fehily's mental capacity was not an issue in anyone's mind.

70. Mr Sykes made the following additional criticisms based on the fresh evidence:

71. DJ Parnell placed weight on the fact that the letters from Dr Fairweather in 2011 and 2012 did not mention Mrs Fehily's mental capacity. This was because, as explained in Mr Fehily's fresh evidence on this appeal, the issue of capacity was not something that Mr Fehily thought about until it was raised by Ms Powers in January 2014.

72. In the light of the entries in the medical records referred to in paragraph 55 above, it can be seen that DJ Parnell's criticism of Dr Soe was unjustified. Dr Soe's assessment of Mrs Fehily's capacity was, in fact, supported by those medical records, which made it clear that she had difficulty with decision making.

Did DJ Parnell apply the wrong test to determine whether Mrs Fehily had the mental capacity to enter into the IVA?

The test stated in Chitty

73. The first part of the test stated by DJ Parnell in paragraph 21 of his judgment was taken, accurately, from para 8-070 the 31st edition (2012) of *Chitty on Contracts,* which was the edition current at the date of his judgment; the current edition is in essentially the same terms. *Chitty* said:

> "At common law, the understanding and competence required to uphold the validity of a transaction depend on the nature of the transaction. There is no fixed standard of mental capacity which is requisite for all transactions. What is required in relation to each particular matter or piece of business transacted, is that the party in question should have an understanding of the general nature of what he is doing."

74. Mr Sykes submitted that this "understanding of the general nature of what he is doing" was not correct; it understates the degree of comprehension required.

75. DJ Parnell's additional comment: "I might also add that that understanding will be based on whatever advice can be obtained by the person in question either from professional advisers or by family and friends as to the nature of the transaction", was not taken from *Chitty*; it seems likely it was taken by him from the *Masterman-Lister* case which he referred to earlier in his judgment. Mr Sykes criticised this too, on the basis that it was not the actual advice available to the individual, but hypothetical correct advice, that needed to be considered.

General principles relevant to ascertaining capacity

76. I was referred by counsel to the following authorities which consider the question of mental capacity in a number of different contexts: *Banks v Goodfellow* (1869-70) L.R. 5 Q.B. 549 (Queen's Bench Division; capacity to make a will), *In the Estate of Park* [1954] P 112 (Court of Appeal; capacity to marry), *Bennett v Bennett* [1969] 1 WLR 430 (Ormrod J; capacity to marry), *Mason v Mason* [1972] Fam 302 (Sir George Baker, P; capacity to consent to a divorce decree), *In re Beaney, decd* [1978] 1 WLR 770 (Martin Nourse QC; capacity to make a gift of house, the donor's only asset of value), *In re K* [1988] Ch 310 (Hoffmann J; capacity to make an enduring power of attorney), *In re C* [1994] 1 WLR 290 (Thorpe J, capacity to refuse medical treatment), *Masterman-Lister v Jewell* [2002] EWCA Civ 1889, [2003] 1 W.L.R. 1511 (Court of Appeal; capacity to litigate), *Sheffield City Council v E* [2004] EWHC 2808, [2005] Fam 326 (Munby J; capacity to marry); *R. v Cooper* [2009] UKHL 42, [2009] 1 WLR 1786 (House of Lords, capacity to consent to sexual activity), *Haworth v Cartmel* [2011] EWHC 36 (Ch) (HHJ Pelling QC, capacity to deal with a statutory demand, a bankruptcy petition and to defend bankruptcy proceedings), *Dunhill v Burgin* [2014] UKSC 18, [2014] 1 W.L.R. 933 (Supreme Court, capacity to litigate).

77. I was also referred to *Re Roberts* [1978] 1 WLR 653, which is one of the cases cited by *Chitty.* However, that case was not concerned with the test for capacity, but rather with the effect of alleged incapacity on marriage after s.2 of the Nullity of Marriage Act 1971. The Court held that the effect of s.2 was that a marriage entered into by someone without mental capacity was voidable and not void, and it remained valid unless and until set aside.

78. The following principles which are apparent from those authorities set the context for the issue raised by Mr Sykes. First, in order to understand a proposed transaction, a person needs the mental capacity to recognise the issues that need to be considered, to obtain, receive, understand and retain relevant information, including advice, and to weigh the information (including that derived from advice) in the balance in reaching a

decision: *Masterman-Lister* at [26], see also *Cooper* at [24], where Lady Hale said that, to be able to make a decision, a person must not only be able to understand the information relevant to making it but also be able to weigh that information in the balance to arrive at a choice.

79. Second, the question of whether a person lacks capacity is issue specific, to be judged in relation to the particular decision or activity in question and not globally. A person may have sufficient capacity for one type of decision but not another. Some transactions are more complicated and important than others. E.g. a person may have sufficient capacity to instruct solicitors on the conduct of a personal injury action, but not to administer, even with advice, the large sum of money likely to be awarded as damages. A person may have sufficient capacity to decide to authorise someone else to deal with their property on their behalf, but not sufficient capacity to themselves make decisions about what should be done with that property. A person may have capacity to consent to a simple medical procedure but lack capacity to consent to a more complex one. A person may have capacity to conduct a modest personal injury claim but not a very substantial one: *Re K*, *Masterman-Lister* at [27 and 62], *Sheffield City Council* at [38-49], *Burgin* at [13].

80. Third, the question may also be time specific, if a person's capacity varies over time. In that case, the court will need to consider the question of capacity in relation to specific times when decisions were required from the person asserting incapacity, taking into account the nature and complexity of those decisions: *Haworth* [43] and [55].

81. Fourth, the question is whether the person had the ability to understand the transaction, not whether they actually understood it: *Re Beaney* at 773A-B, *Haworth* at [74]. In *Manches v Trimborn* (1946) 174 LT 344, Hallett J said: "the question in a case of this kind is not whether the consent was accompanied by reason or deliberation, but whether the person was capable of exercising the reason and deliberation necessary for a true consent." In *Re Smith (Deceased); Kicks v Leigh* [2014] EWHC 3926 (Ch), [2015] 4 All ER 329 at [27], Stephen Morris QC, sitting as a deputy High Court judge said: "Thus the overall test is one of *ability* to understand, rather than actual understanding. If the maker of the gift does not in fact understand the transaction, in circumstances, where its general purport has not been fully explained, that does not establish lack of capacity. The test is whether he or she would have understood it, if the consequences had been fully explained". Having said that, if the person did understand the transaction, then obviously they had capacity to understand it, so that evidence of their actual understanding may be highly relevant.

82. Fifth, the fact that a person needs help in understanding the transaction does not prevent them from having the capacity to understand it. Few people have the capacity to manage all their affairs unaided, and whether they are capable of managing their property and affairs depends on whether they are capable of taking, considering, and acting upon appropriate advice. In a case where a person needs advice to enable them to understand the transaction, the question is whether they have: (1) the insight and understanding to realise that they need advice; (2) the ability to find an appropriate

adviser and instruct them with sufficient clarity to get the advice; and (3) to understand and make decisions based on that advice: *Masterman-Lister* at [18] and [75].

83. Mr Sykes submitted, and I agree, that in a case where a person needs advice and assistance to enable them to understand the transaction, the question of capacity is to be assessed by reference to the complexity of the transaction proposed, and the advice and assistance that they need to understand it, not the advice and assistance that they actually received, otherwise a person's capacity: "… would depend on whether she had received good advice, bad advice or no advice at all": *Burgin* at [17].

84. Mr McCulloch emphasised the importance of medical evidence, drawing attention to what was said by Kennedy LJ in *Masterman-Lister* at [29]: "The final decision as to capacity, it is agreed, rests with the court but, in almost every case, the court will need medical evidence to guide it.". I agree. Except in a very clear case, the court does not itself have sufficient expertise to know whether a person's medical condition is such that they lack the requisite capacity. This is reflected in rule 7.45 of the Insolvency Rules 1986, which says that if someone applies for an order under rule 7.44 appointing a person to represent an incapacitated person, the application must be supported by a witness statement made by a registered medical practitioner as to the mental or physical condition of the incapacitated person. That was not engaged in the present case, because the rule 7.44 order here was made by the court of its own motion. But it does emphasise the importance of expert medical opinion evidence to guide the court.

How much understanding is required?

85. I need to consider in more detail the level of understanding of a proposed transaction which a person needs to be able to achieve, because it was Mr Sykes' submission that the test stated in *Chitty* and adopted by DJ Parnell was wrong. In one respect, it is wrong, because it directs attention to the understanding that the party actually has. As I have said, that is not the right question. The question is what understanding they would be capable of having if given the advice and assistance that they need. However, Mr Sykes' criticism was not directed to that aspect of the test, but rather to the part that identifies the degree of understanding which a party must be capable of having as: "an understanding of the general nature of what he is doing". He relied on a passage in the judgment of Chadwick LJ in *Masterman-Lister* which quoted with approval from two earlier judgments. The first was that of Thorpe J in *In re C* [1994] 1 WLR 290, of which Chadwick LJ said: "Thorpe J rejected what had been described as "the minimal competence test" - the capacity to understand in broad terms the nature and effect of the proposed treatment - in favour of a more specific test. The second was that of Hoffmann J in *In re K* [1988] Ch 310, where Hoffmann J said, in the case of an enduring power of attorney, that it would not be sufficient if the donor only realised it gave the attorney power to look after his property.

86. Mr Sykes also criticised DJ Parnell's statement that the person's understanding "will be based on whatever advice can be obtained by the person in question either from professional advisers or by family and friends as to the nature of the transaction". He suggested that this wrongly directed attention to the actual advice available, rather than hypothetical sound advice. I agree that the right question is whether Mrs Fehily would

have been able to understand the proposed IVA if she received such advice and assistance as she needed, rather if she received such advice and assistance as were, in fact, available to her. But I do not think that the criticism was justified, as DJ Parnell did not refer to the actual advice received by or available to Mrs Fehily, and in any event no part of DJ Parnell's assessment of the evidence involved consideration of advice received by or available to Mrs Fehily.

Is the test in Chitty wrong?

87. In *Masterman-Lister*¸ Chadwick LJ said at [58]: "The authorities are unanimous in support of two broad propositions. First, that the mental capacity required by the law is capacity in relation to the transaction which is to be effected. Second, that what is required is the capacity to understand the nature of that transaction when it is explained." He did not expand on what was meant by "the nature of the transaction".

88. Similar phrases are used in other authorities. In *In the Estate of Park,* Singleton LJ reviewed a number of previous authorities, and concluded at 127 that:

> "The question, I think, is this: Was the deceased on the morning of May 30, 1949, capable of understanding the nature of the contract into which he was entering, or was his mental condition such that he was incapable of understanding it? To ascertain the nature of the contract of marriage a man must be mentally capable of appreciating that it involves the responsibilities normally attaching to marriage."

So he considered that understanding "the nature of the contract" involved understanding the responsibilities attaching to the contract. In the same way, in *Sheffield City Council v E,* Munby J stated the test for capacity to marry as being the ability to "understand the nature of the marriage contract", which he said meant an ability to understand the duties and responsibilities that normally attach to marriage: [2005] Fam 326 at [68].

89. In *Re Beaney,* Mr Nourse QC used a similar phrase. He referred to *Gibbons v. Wright* (1954) 91 C.L.R. 423, a decision of the High Court of Australia presided over by Sir Owen Dixon C.J., which Mr Nourse QC said: "…. is of value for its review of the cases, including those to which I have referred, and its statement that the principle is "… that the mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of that transaction when it is explained".

90. *Gibbons v. Wright* is cited in a footnote in *Chitty* as supporting its statement of the law. The case concerned transfers and mortgages of land, which if they took effect, would have severed a joint tenancy held by two sisters. The jury was asked whether the sisters were "capable of understanding the effect of" the deeds which they executed, and the jury answered: "no". In its judgment, the High Court said that the questions asked of the jury had "referred to the broad operation of the deed, as distinguished from its precise terms." The Court said: "The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation

to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation". That is exactly the test stated in *Chitty*.

91. Later in its judgment, the Court commented on what it meant by "the nature of the transaction":

> "Ordinarily the nature of the transaction means in this connection the broad operation, the "general purport" of the instrument; but in some cases it may mean the effect of a wider transaction which the instrument is a means of carrying out: *Manches v. Trimborn* (1946) 174 LT 344, at p 345. In the present case, it was necessary, we think, that the two sisters should have been capable of understanding, if the matter had been explained to them, that by executing the mortgages and the memorandum of transfer they would be altering the character of their interests in the properties concerned, so that instead of the last survivor of the three joint tenants becoming entitled to the whole, each of them would be entitled to a one-third share which would pass to her estate if she still owned it at her death. This is apparently not what the learned Chief Justice put to the jury. It was the direct effect of the instruments according to their terms, and not the resultant severance of the joint tenancy, that seems to have been referred to by the expression "the effect of the deed", in the questions ultimately formulated. But a jury which found the sisters incapable of understanding the direct effect of the deeds could hardly have found them capable of understanding the indirect effect of the deeds in severing the joint tenancy. We shall therefore consider the case on the footing that the appellant has established that, at the respective dates of the mortgages and the memorandum of transfer, the sisters lacked that capacity to understand which was necessary for the complete validity of the instruments".

92. The case of *Manches v. Trimborn* (1946) 174 LT 344 referred to by the High Court concerned a claim against the defendant, an 86 year old woman, on a cheque she had drawn payable to the plaintiff in respect of a debt owed to the plaintiff by her neighbour and friend, as part of a very involved transaction or series of transactions. Hallett J said that, if he had been directing a jury, he would have told them that the test was: "that the degree of mental incapacity which the defence would have to establish to their satisfaction, was such a degree of incapacity as would interfere with the capacity of the defendant to understand substantially the nature and effect of the transaction into which she was entering." He held that the defendant had the capacity to understand that she was signing a cheque, that the effect of the cheque was to transfer money from her to someone else, for the benefit of her friend and neighbour, but that she did not have capacity to understand "substantially the nature and effect of the transaction into which she was entering", that being the wider transaction of which the cheque formed part.

93. In my view, the decisions in *In re C* and *In re K* involved applying the test stated in *Gibbons*. The first of those cases concerned a person diagnosed as a chronic paranoid schizophrenic. He suffered from ulcerated foot which had become gangrenous and a surgeon advised treatment by amputation of the leg below the knee, failing which his chance of survival was small. The person refused his consent to amputation and the

issue was whether he had capacity to make that decision. On the applicable test, Thorpe J said this ([1994] 1 W.L.R. 290 at 295):

> "Mr. Gordon argues for what he calls the minimal competence test, which he defines as the capacity to understand in broad terms the nature and effect of the proposed treatment. It is common ground that C. has the legal capacity to initiate these proceedings without a next friend, within the terms of R.S.C., Ord. 80. Mr. Gordon contends that the capacity to refuse treatment is no higher and is equally no higher than the capacity to contract. I reject that submission. I think that the question to be decided is whether it has been established that C.'s capacity is so reduced by his chronic mental illness that he does not sufficiently understand the nature, purpose and effects of the proffered amputation."

94. So the expression "minimal competence test" was one chosen by counsel, not Thorpe J, and the submission that he rejected was that that the capacity needed to refuse life saving medical treatment was no higher than the capacity to initiate the proceedings and no higher than the capacity to contract. Thorpe J considered this was not the right approach. Rather, it was necessary to focus on the actual proposed transaction and whether C had sufficient mental capacity to understand the nature, purpose and effect of it. That seems to me to follow from the fact that the test of capacity is issue specific, as stated by the High Court in *Gibbons*.

95. As to *In re K*, Hoffmann J said there ([1988] Ch 310 at 313):

> "It is well established that capacity to perform a juristic act exists when the person who purported to do the act had at the time the mental capacity, with the assistance of such explanation as he may have been given, to understand the nature and effect of that particular transaction".

96. The suggestion there that capacity should be assessed by reference to "such explanation as he may have been given" is not, I think, consistent with the later decision in *Burgin* that capacity does not depend on the actual explanation received by a person, but on their ability to have the requisite understanding if given the sort of explanation that they need. But the final part of the sentence, "to understand the nature and effect of that particular transaction", accords with the test stated in *Gibbons* and adopted in *Chitty*.

97. When Hoffmann J applied that test to an enduring power of attorney, he identified the key characteristics of such a power that a person must understand:

> "Finally, I should say something about what is meant by understanding the nature and effect of the power. What degree of understanding is involved? Plainly one cannot expect that the donor should have been able to pass an examination on the provisions of the Act. At the other extreme, I do not think that it would be sufficient if he realised only that it gave Cousin William power to look after his property. Mr. Rawson helpfully summarised the matters which the donor should have understood in order that he can be said to have understood the nature and effect of the power. First, (if such be the terms of the power) that the attorney will be able to assume complete authority over the donor's affairs. Secondly, (if such be the terms of the

power) that the attorney will in general be able to do anything with the donor's property which he himself could have done. Thirdly, that the authority will continue if the donor should be or become mentally incapable. Fourthly, that if he should be or become mentally incapable, the power will be irrevocable without confirmation by the court."

98. That was an application of the test explained in *Gibbons,* with Hoffmann J identifying what were the essential features of the enduring power that the person making it needed to be capable of understanding.

99. The authorities, then, state that in order to have mental capacity, a person must be capable of understanding the "nature of the transaction" or the "nature and effect of that particular transaction" or the "nature of the contract". What this means is that the person has the ability to absorb, retain, understand, process and weigh information about the key features and effects of the proposed transaction, and the alternatives to it, if they are explained to the person in broad terms and simple language.

100. Mr Sykes submitted that a person must be able to understand every aspect of a transaction, if it was explained to them, at least to the extent that aspects of the transaction would be understood by a person of ordinary intelligence, to the extent that elements of the transaction play a part in the decision making process.

101. In my view, there is a distinction between the key features of a transaction, and ancillary, incidental or procedural aspects of it. I think that the requisite capacity is to understand the key features. It is not necessary that a person has capacity to understand every detail of the proposed transaction. In *Banks v Goodfellow*, at 567, Cockburn CJ, delivering the judgment of the court, quoted with approval from an American judgment: "It is not necessary that he 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." Hoffmann J said in *Re K, "...* one cannot expect that the donor should have been able to pass an examination on the provisions of the Act". In *Masterman-Lister,* Chadwick LJ said at [79]: "a person should not be held unable to understand the information relevant to a decision if he can understand an explanation of that information in broad terms and simple language".

102. In conclusion, I think that the law is as stated by the High Court of Australia in *Gibbons v Wright.* The summary of the law in *Chitty,* taken from that case, is accurate, although it would be possible to misinterpret it as only requiring the capacity to form a general impression of the nature of a contract, rather than the capacity to absorb, retain, understand, process and weigh information about the key features and effects of the contract, and the alternatives to it, if explained in broad terms and simple language.

103. Although it would be possible for someone not familiar with this branch of the law to misinterpret the test stated in *Chitty¸* if they did no more than read the relevant paragraph in the textbook, I do not think that DJ Parnell did that. DJ Parnell referred earlier in his judgment, when considering litigation capacity to *Masterman-Lister,* so it is clear that he had that decision in mind. That is the leading modern case on the test for deciding if a person has mental capacity. He identified in his judgment the key

features of the IVA and I think, reading his judgment as a whole, that he did have in mind the need to assess whether Mrs Fehily had the mental capacity to understand and weigh those features, and the alternative to the IVA, namely that the bankruptcy petition would proceed to a hearing. I therefore reject the argument that DJ Parnell failed to apply the right test for assessing Mrs Fehily's mental capacity to enter into the IVA. I am satisfied that he applied the right test.

Did DJ Parnell err in failing to refer to the evidence of Mr Fehily and Rebecca Fehily?

104. It is true that DJ Parnell did not refer specifically to the details of the evidence of Mr Fehily about his impressions of Mrs Fehily's mental condition. It is also true that that evidence had not been challenged, there having been no request that Mr Fehily be cross-examined on the evidence in his statements. However, as explained in paragraph 84 above, except in a very clear case, the assessment by the court of a person's mental capacity must be made with the assistance of expert medical evidence, and not on the basis of a description by people with no medical qualifications of their impressions. The evidence from Mr Fehily (and indeed Rebecca Fehily) before DJ Parnell, which I have summarised above, was not to the effect that Mrs Fehily was incapable of understanding anything. Importantly, in relation to the IVA itself, Mr Fehily's evidence was that Mrs Fehily "… struggled to understand what it was she was signing", not that she failed to understand the main terms of it, and: "My wife has never fully understood the implications of signing the IVA", not that she had failed to understand the key features and effects of the IVA, and the alternative to it, namely the bankruptcy petition proceeding.

105. DJ Parnell said that he had read all the witness statements, and I do not think he can be criticised for not specifically referring to the evidence about the impressions that Mr Fehily had formed of Mrs Fehily's mental capacity.

Did DJ Parnell err in placing weight on Mrs Fehily's reaction to the voicemail message?

106. Nor do I think that DJ Parnell can be criticised for wrongly treating evidence of an ability to understand what bankruptcy is with an ability to understand the IVA. As I read DJ Parnell's judgment, he placed weight on Mrs Fehily's reaction to the voicemail message (see paragraphs 31 and 42 above) because it tended to corroborate the impression given by Mr Mummery's evidence that Mrs Fehily understood the nature and effect of the IVA, namely that it provided time for the Fehilys to sell assets to satisfy their debts and that, if the Fehilys did not comply with their obligations under the IVA within the time allowed by it, they would be made bankrupt. That was an assessment that DJ Parnell was entitled to make.

Was DJ Parnell wrong to treat Mr Fehily's letters in September 2012 as evidence that Mrs Fehily had capacity?

107. DJ Parnell was, in my judgment, entitled to place weight on the letters in September 2012. The impression they gave was that there had been a deterioration in Mrs Fehily's medical condition which meant that, at that time, she would not be able to attend a meeting, because she was, for the moment, medically unable to discuss any matter with regard to the IVA. DJ Parnell thought that implied that this incapacity was not a

permanent situation, and that her condition might improve to the point that she would be able to have a meeting to discuss the IVA. That was an assessment he was entitled to make.

Was DJ Parnell wrong to place weight on the fact that none of Dr Fairweather's letters up to January 2013 mentioned Mrs Fehily's cognitive impairment?

108. DJ Parnell placed weight on the fact that the letters from Dr Fairweather in 2011 and 2012 did not mention Mrs Fehily's mental capacity. The first letter from Dr Fairweather which said anything about Mrs Fehily's mental capacity was her letter in January 2013 which referred to "extreme neurological and cognitive impairment".

109. Mr Sykes said that, with the benefit of the fresh evidence from Mr Fehily, it was possible to see that this criticism was unfair. Mr Fehily's fresh evidence says that the issue of capacity was not something that Mr Fehily thought about until it was raised by Ms Powers in January 2014.

110. The difficulty with that argument is that Ms Powers gave that advice in January 2014, a year after Dr Fairweather first referred to Mrs Fehily's mental capacity. So I do not think that the fresh evidence on this point affects DJ Parnell's assessment, which he was entitled to make, that if Dr Fairweather had been concerned about Mrs Fehily's mental capacity in 2011 and 2012, as well as her physical condition and emotional vulnerability, one would expect that to have been mentioned in the letters in 2011 and 2012, and not to have appeared for the first time in January 2013. It seems clear that Dr Fairweather was writing those letters to assist the Fehilys in persuading creditors, or the Supervisors, not to treat them harshly. DJ Parnell was entitled, in my view, to draw the inference he did from those letters.

Was DJ Parnell wrong to give Dr Soe's report no weight?

111. DJ Parnell held that he could put no weight on Dr Soe's letter. In his skeleton argument, Mr Sykes suggested that this was not justified, based on the evidence before DJ Parnell. He did not maintain this position in his oral submissions, and rightly so. DJ Parnell was entitled to make the assessment he did of Dr Soe's letter based on the material before DJ Parnell. In his oral submissions, Mr Sykes argued that the medical records which have been produced in evidence on this appeal give support to Dr Soe's assessment and show that DJ Parnell should have given weight to Dr Soe's assessment.

112. I have summarised the medical records in paragraph 55 above. They say nothing, in my judgment, which justifies departing from DJ Parnell's assessment of Dr Soe's letter. The note made on 5 December 2011, shortly before the IVA was proposed, says that Mrs Fehily remained: "…very anxious and tearful at times, emotions close to surface, not sleeping, up every hour through night, difficulty with decision-making…". Having difficulty with decision making is not the same as being unable to comprehend, with appropriate assistance, the key features of the IVA.

113. The note made on 12 November 2012 makes it clear that Mrs Fehily's mental state was worse than it had been: "… things much worse again last few months with

panic/anxiety attacks", and so is not a guide to her mental state at the time of the IVA. Mrs Fehily is recorded as saying that she had trouble concentrating on things such as reading the newspaper or watching television nearly every day, but that again is not the same as being unable to understand, with appropriate assistance, the key features of the IVA. The note made on 4 July 2013 is to the same effect, and takes matters no further forward.

Conclusion on the capacity issue

114. Having considered the fresh evidence carefully, I do not think I should admit it. As Mr Sykes accepted, it could have been adduced in the County Court. The medical notes, in my view, would not have had an important influence on the result of the case. Nor, in my view, would the fresh evidence from Mr Fehily about the reason why Dr Fairweather did not mention Mrs Fehily's mental capacity until January 2013.

115. As to the additional evidence from Mr Fehily and Rebecca Fehily about their impressions of Mrs Fehily's mental condition, I can see no justification for admitting that. The only part of that evidence which adds in any significant way to the evidence given by them in the county court proceedings is Rebecca Fehily's evidence, in a statement filed only the day before the appeal hearing, months after the time allowed for Mrs Fehily to file further evidence. In that, she said: "If there was an item that required my mother's signature, something where my signature would not suffice, such as a passport form, she will have the first clue as to what she was signing. I could attempt to explain over a number of hours, but she would still not have any comprehension of what she would be signing." That gives a very different impression of Mrs Fehily's mental capacity to the evidence filed in the County Court, which I have summarised above. It is quite inconsistent with the impression that Mrs Fehily made on Mr Mummery on 13 January 2012: see paragraph 29 above.

116. Therefore I do not think it would be right to admit that evidence. Even if I had admitted it, weighing it with all the other evidence, I would have given it little weight and would not have considered that it justified my interfering with the conclusion reached by DJ Parnell. In the absence of reliable medical evidence, I do not consider that the evidence, taken as a whole, establishes that it is more likely than not that Mrs Fehily lacked the mental capacity to enter into the IVA.

If Mrs Fehily lacked capacity to understand the IVA, did that make it void?

117. If, however, that is wrong, and Mrs Fehily lacked the mental capacity to understand the key features and effects of the IVA and the alternative to it, if explained to her, I nonetheless consider that the IVA is binding on her.

118. A voluntary disposition, such as a will or deed of gift, is void if the person entering into it lacks the requisite mental capacity to understand the transaction. So too is a power of attorney: *Gibbons v Wright.* At common law, a marriage entered into by a person without mental capacity was void but could be ratified if the person acquired capacity: see the Law Commission's report on Nullity of Marriage (Law Com no. 33, 3 December 1970, para 11). The Nullity of Marriage Act 1971 made such a marriage

voidable, and that remains the position under s.12(c) of the Matrimonial Causes Act 1973.

119. However, a contract entered into for consideration by a person without the mental capacity to understand the transaction is not void. It is valid and binding unless the other contracting party was aware of her incapacity (or, possibly, ought to have been aware), in which case the contract is voidable, and the incapacitated person has the right to rescind the contract: see *Chitty on Contracts* (32nd ed) [9-075 to 88], *Imperial Loan Co Ltd v Stone* [1892] 1 QB 599, and *Hart v O'Connor* [1985] A.C. 1000.

120. An IVA is created by a statutory process which leads to a binding composition in satisfaction of a debtor's debts, or a scheme of arrangement of the debtor's affairs, taking effect between the debtor and his creditors. Under s.260(2) of the 1986 Act, an approved arrangement takes effect as if made by the debtor at the creditors' meeting, and binds every person who in accordance with the rules had notice of, and was entitled to vote at, the meeting (whether or not he was present or represented at it) as if he were a party to the arrangement.

121. An IVA is not a contract, but it is closely analogous to a contract and gives rise to rights that have the characteristics of contractual rights. It has been said that: "The effect of an approval of a scheme of arrangement by creditors in the normal case is effectively to subsume the claims of creditors in the arrangement where there is a contractual release of those claims against provisions in the scheme to pay a dividend on those claims from assets which have been placed in the scheme": see *Re Wisepark Ltd* [1994] BCC 221, at 223D per Evans-Lombe J. In *Johnson v. Davies* [1999] Ch. 117, at 131-2, Chadwick LJ said that he considered that: "… voluntary arrangements should be treated as—and have the same consequences as—consensual deeds of arrangement". Peter Gibson LJ agreed with that analysis in *Raja v Rubin* [2000] Ch 274 at 286. A similar approach was applied by Mr Warren QC, sitting as a deputy High Court Judge, to a company voluntary arrangement in *Commissioners of Inland Revenue v Adam & Partners Ltd.* [2000] B.C.C. 513 at [18-20]. In *Lloyds Bank plc v Ellicott* [2003] BPIR 632, at [51], Chadwick LJ said: "… the IVA takes effect as a contract between the debtor, Mr Ellicott, and those of his creditors who are bound by its terms under statute…". In *Narandas-Girdhar v Bradstock* [2016] EWCA Civ 88, [2016] 1 W.L.R. 2366, at [34], Briggs LJ said: "An IVA which has been approved in that manner operates by analogy with a contract between the debtor and all his or her creditors".

122. Mr Sykes relied on *Re Plummer* [2004] BPIR 767. In that case, amendments were proposed to an IVA at the creditors' meeting, at which the debtor was not present. Three weeks later, the debtor agreed to those amendments. Registrar Baister held that the debtor's assent at the meeting was an essential prerequisite to modifications being voted on at a creditors' meeting. A meeting could be adjourned to enable consent to be obtained, but if that did not happen subsequent consent was immaterial. S.258(2) provides that the creditors' meeting may approve the proposed voluntary arrangement with modifications, "but shall not do so unless the debtor consents to each modification." That meant that: "…. the debtor's consent is condition precedent for the approval of the proposal subject to any modifications proposed". As the binding effect

of an arrangement under s.260(2) only applies to an arrangement approved at a creditors' meeting, the Registrar held that there was no valid IVA. The debtor's subsequent agreement could not change that. Although a district judge in a previous case had been right to say that an IVA was "essentially a contract" between the debtor and the creditors, nonetheless "it must be one entered into subject to the statutory regime".

123. It was argued that the failure of the chairman of the meeting to adjourn it to seek the debtor's consent was a "material irregularity at or in relation to" the creditors' meeting for the purposes of s.262, which allows a debtor to apply to the court for an order revoking any approval at the meeting if there is such a material irregularity. Under s.262(3), there is a time limit for making an application for such an order of 28 days from certain specified dates, which had long passed by the time the issue arose. S.262(8) says that, except pursuant to s.262(1-7), an approval given at a creditors' meeting is not invalidated by "any irregularity at or in relation to the meeting". So if the giving of consent to the modifications after the meeting was an "irregularity at or in relation to the meeting", the debtor could not rely on the irregularity. The Registrar rejected that argument because the defect was not an irregularity, but a fundamental failure to follow the statutory procedure: "… there is a difference between circumstances which may be described as a material irregularity and something which invalidates approval or means that approval was simply never achieved".

124. On that latter point, the Registrar's decision was overruled in *Narandas-Girdhar v Bradstock* [2016] EWCA Civ 88, [2016] 1 W.L.R. 2366. The Court of Appeal held that s.262(8) did apply even where the irregularity would, apart from s.262(8), render the IVA a nullity, provided it was an irregularity at or in relation to the creditors' meeting. However, Briggs LJ said, at [53], that s.262(8) has no application to "defects in compliance with the statutory scheme antecedent or extraneous to the summoning or conduct of the meeting".

125. The Court of Appeal were not concerned in *Bradstock* with the first aspect of the decision in *Re Plummer,* namely that the debtor's consent to a modification must be given at the creditors' meeting, and not afterwards. However, I do not think that the Registrar's decision on that aspect of the case gives any support to Mr Sykes' submissions. The Registrar was concerned with the requirement in s.258(2) that the creditors' meeting shall not approve the arrangement with modifications unless the debtor consents to each modification. He interpreted that as requiring that the consent must be given at the meeting, not afterwards. That tells one nothing about the position where the debtor communicates a proposal for a voluntary arrangement or communicates her consent to a modification, but, unknown to the creditors, lacks the mental capacity to understand the proposal or the modification.

126. In my view, the essentially contractual nature of an IVA means that the same approach to mental capacity must be applied as to a contract. An IVA is not void on the grounds of the debtor's mental incapacity.

127. It is less clear whether an IVA would be voidable, if the creditors knew of the debtor's incapacity, and whether, if so, that would fall within s.262(8) as an irregularity "at or in relation to the creditors' meeting", so that the arrangement would stand unless an

application was made under s.262 within 28 days. I need not consider what the law would be in that situation, however, as even if Mrs Fehily did lack capacity to enter into the IVA, it has not been argued that the creditors were or should have been aware of that.

The partnership issue

128. If I had held that Mrs Fehily lacked capacity to enter into the IVA, and that her lack of capacity rendered the IVA void, I would have needed to have considered the question of whether annulling the bankruptcy order would be futile, because the underlying debt would still remain in existence. Mr Sykes argued that there was evidence before DJ Parnell, and further evidence on this appeal, that Mrs Fehily was not in reality a partner, and so not liable for the partnership debt. That was not an argument advanced before DJ Parnell, and so it was not addressed in his judgment.

129. Given my decision on the capacity issue, I do not need to determine that issue, and I can see no advantage in my doing so.

Conclusion

130. I therefore dismiss the appeal.