

Neutral citation number : [2019] EWHC 2362 (Ch)

IN THE HIGH COURT OF JUSTICE

D30BM013

BUSINESS AND PROPERTY COURTS IN BIRMINGHAM

PROPERTY TRUSTS AND PROBATE LIST (ChD)

Birmingham Civil Justice Centre
The Priory Courts
33 Bull Street
Birmingham
B4 6DS

10 September 2019

IN THE ESTATE OF BERYL PARSONAGE (DECEASED)

BETWEEN

IAN PARSONAGE

(acting as personal representative in the estate of Beryl Parsonage (deceased))

Claimant

-and-

(1) DUNCAN PARSONAGE

(2) TOMAS PARSONAGE

(3) SIAN FOLLEY

(4) ALISON TAYLOR

Defendants

Representation

Ms Claire van Overdijk instructed by Talbots Law Limited for the Claimant

Mr Richard Dew instructed by Samuels Solicitors for the First Defendant

The Second, Third and Fourth Defendants did not contest the claim

Hearing dates : 28-30 November and 3-4 December 2018, 21 January 2019

JUDGMENT

I direct that pursuant to CPR 39APD6 paragraph 6.1 no tape recording shall be made of this judgment and that copies of this version shall stand as authentic and be treated as the official transcript

Introduction

- 1 Mrs Beryl Parsonage ('BP') was born on 13.10.29 and died on 18.11.15, aged 86 years. She had four children, Sian, the third defendant ('D3'), Alison, the fourth defendant ('D4'), Ian, the claimant ('C1'), and Duncan, the first defendant ('D1'). Tomas Parsonage, the second defendant ('D2'), who is D1's son, is one of BP's eight grandchildren. All of BP's grandchildren are now adults. BP's husband, Keith Parsonage ('KP'), pre-deceased her on 9.11.95.

- 2 The litigation concerns, first, the validity of BP's last will, which was executed on 9.1.11 ('the 2011 Will'). C1 seeks an order for a decree of probate of the 2011 Will in solemn form and, consequentially, an order removing the caveat (No.79367) entered by D1. The validity of the 2011 Will is challenged by D1 on the grounds that BP lacked capacity (1) to know and understand the nature and effect of the 2011 Will, (2) to know and understand the size of her estate, and/or (3) to know and appreciate the claims to which she ought to give effect. The underlying factual basis of the challenge is the severity or extent of BP's dementia and the circumstances in which the 2011 Will was prepared and executed.

- 3 The 2011 Will is very short. After revoking all earlier wills, appointing C1 and D3 as trustees and executors, and providing for payment of debts, executorship expenses and IHT, the estate falls into residue to be divided equally between BP's four children, with a per stirpes provision in the event, which did not happen, of any child(ren) predeceasing BP. The 2011 Will was drafted by an experienced solicitor, Jonathan Mott ('JM') of Southwell Mott, a two partner firm comprising JM and his wife and having its office in Lichfield. JM took BP's instructions over the telephone on 6.1.11 and sent a draft will under cover of a letter dated 7.1.11 reminding BP of the terms of her then current will¹ and its rationale as he understood it from BP's previous instructions. The 2011 Will was executed as drafted by JM in the presence of two long-standing acquaintances and neighbours of BP, Kathleen Wigley ('KW') and Patrick Gavin ('PG') as witnesses. D4 was also present.

- 4 In the event that the Court declines to make the order sought by C1, there is a further issue for decision, namely whether the earlier will executed by BP on 4.2.10 ('the 2010

¹ The 2010 Will, see [4].

Will') is invalid for want of knowledge and approval. The 2010 Will was drafted by and executed in the presence of JM. The essence of C1's challenge to the 2010 Will is that its terms are such, and are so contrary to BP's known and expressed wishes and intentions, that BP must have executed it under a misapprehension as to the lifetime benefits, if any, conferred on her children other than D1 by KP and herself. The source of the misapprehension is alleged to be D1, assisted or supported by D3, but there is no allegation of undue influence.

- 5 The 2010 Will is quite different in its provisions. After revoking all earlier wills, D1 and D3 are appointed as executors. BP devises her freehold home, which had been the family home, at 9 Norton Hall Lane, Norton Canes, Cannock, Staffordshire ('9NHL') to D1 and bequeaths £35K to each of her four children, with a per stirpes provision. Then, after payment of debts, executorship expenses and IHT on all property passing under the 2010 Will, the residue is divided into two shares one of which is bequeathed to D2 and the other to D3.
- 6 BP had made at least one will before the 2010 Will. This will had been executed in or before 2000. Documentary evidence, a letter dated 22.12.00 from Gardner, Iliff & Dowding, solicitors in Cannock whom BP and KP had instructed then and previously when requiring legal assistance confirmed that this will was held for safe keeping following a then recent visit by BP. D3's unchallenged evidence was that BP wanted to destroy this will because it had been made at a time when there was a rift with C1 and he had been excluded. D3 said she had accompanied BP to collect this will before BP first instructed JM.
- 7 This may explain, at least in part, the timing of BP's original instructions to JM in September 2009. BP appears to have been reflecting on the provisions made by her then last will and no longer considered them to be her true dispositive wishes in relation to her estate. It is common ground that BP did destroy this will. BP's visit to JM in September 2009 led JM to prepare a draft will which provided for an equal division of BP's net estate between her four children, with a per stirpes provision. The will drafted by JM in September 2009 and forwarded to BP under cover of a letter dated 30.9.09 is in identical terms to those of the 2011 Will except that D1 and D3 were the proposed executors in the 2009 draft whereas C1 and D3 are nominated as executors in the 2011 Will. JM's covering letter noted that BP was to look out the details of 9NHL and other land jointly owned by BP "with her sister-in-law and brother-

in-law”². Between then and 4.2.10 BP’s instructions changed to what became the 2010 Will.

- 8 It is common ground that, in the event that neither the 2011 Will nor the 2010 Will is valid, BP died intestate. In the events that have happened, and as it so happens, the result of an intestacy will be the same as that provided for by the 2011 Will.
- 9 For many years prior to BP’s admission to a care home on 25.3.11 she lived at 9NHL. Norton Canes is a village in the Cannock Chase district of Staffordshire. D4 lived next door, at 7 Norton Hall Lane (‘7NHL’), for more than 30 years, and C1 and D3 were also long time near neighbours. D1 also lived in Norton Canes. Neil Dunford (‘ND’), a cousin of BP’s children and a witness for D1, was BP’s other neighbour, at 11 Norton Hall Lane, for more than 30 years.
- 10 The written evidence makes reference to the family as close, however it also refers to family disharmony. C1 fell out with KP when C1 left the family forestry business in the early 1990s to obtain better paid employment; this may explain BP’s earlier will which is said to have excluded C1. Prior to BP’s death, C1 and D1 appear to have got on well enough with each other and to have trusted each other. D4 had a poor relationship with both C1 and D1 for many years prior to BP’s death. Both D4 and D3 were close to and, to varying extents, assisted BP as she came increasingly to need it, and provided company for BP. In oral evidence D3 described BP as her best friend. This was certainly true until BP became forgetful. The evidence points to BP then relying on D4 more than D3; to D3 finding it increasingly difficult to cope with BP’s diagnosis and symptoms of dementia, in other words, coping with the loss of her best friend; and, to D4 assuming and discharging the role of primary carer for BP.
- 11 BP’s four children are now divided over the 2011 Will and the 2010 Will. They are in two camps and the sibling relationship between C1 and D1 has collapsed into one of distrust. D4 has sided with C1; she participated in the trial as a witness for C1, not as an active or represented party. D3 has sided with D1; she participated in the trial as a witness for D1, not as an active or represented party.
- 12 It is common ground that BP’s estate is not insubstantial. There is limited evidence as to its actual value before me. Under cover of a letter dated 7.1.16 D1’s then solicitors

² Presumably a reference to the land identified at [12] below and referred to as the Nearby Land which had in fact been sold in 2005.

sent C1's solicitors a schedule of BP's assets and liabilities said to be based on information D1 had diligently collated as BP's attorney under a joint lasting power of attorney ('the LPA') and supported by underlying documentation. BP's estate was said to comprise 9NHL valued at £225K with additional unvalued land at the rear, savings and investments worth in excess of £163K, and liabilities, including IHT but excluding funeral expenses, said to be less than £3K. In round terms a net estate worth in the order of £400K. BP's savings and investments were derived in part from the sale to Persimmon Homes in January 2005 of a plot of land at the rear of 5, 9 and 11 Norton Hall Lane³ owned by BP and two relatives on the Dunford side of the family for development ("the Nearby Land").

- 13 There is also an overage entitlement, secured by a legal mortgage, in relation to the Nearby Land. The minimum amount of the overage is £400K and BP's entitlement is a half-share. In round terms, BP's estate's share of the overage entitlement is now expected to generate not less than £200K and possibly in the order of £500K. Thus, BP's overall gross estate is likely to be worth in the region of £600K to £900K. Apart from funeral expenses the only significant liability will be IHT. Thus, the overage agreement may cause BP's estate to increase by 50% or potentially more than double in value. There was little evidence at trial about the overage agreement. C1's understanding was that outline planning permission for the Nearby Land, which he described as a 1.3 acre plot, has been secured and detailed planning permission is in the process of being sought. D1 disclosed the charge which secured the overage agreement rights against the Nearby Land. D1's oral evidence was that the Nearby Land was land-locked and he had negotiated a package with a neighbouring farmer that provided suitable access and that thereafter negotiations with Persimmon Homes were conducted by a member of the Dunford side of the family. D1 also understood that planning permission was in process.

The relevant law

- 14 Ms van Overdijk, counsel for C1, and Mr Dew, counsel for D1, submitted, and I agree, that where testamentary capacity is in issue in a probate case the court applies the common law test as expressed by Cockburn CJ in Banks v Goodfellow (1870) LR 5 QB 549 at 565 rather than the law as to lack of capacity as stated at sections 2 and 3 of the Mental Capacity Act 2005.

³ The land at the rear of 7 Norton Hall Lane was within the land owned by BP and described as land at the rear of 9NHL.

- 15 Having observed that for the due exercise of the power of testamentary disposition the possession of intellectual and moral faculties common to human nature should be insisted upon as an indispensable condition, Cockburn CJ continued :

“It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effect; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made”.

Thus, there are four requirements concerning mental capacity which must be satisfied at the time when exercising the power of testamentary disposition. A testator must (1) understand the nature and effect of a will, that he is directing how and to whom his estate is to be disposed of upon his death; (2) understand the extent of his property for disposition; (3) understand the nature and extent of the claims upon him, both those whom he chooses to include in and those whom he chooses to exclude from his will; and, (4) in the context of the claims upon him, not be affected by mental disorder or condition which results in him making one or more dispositive provisions which he would not have made in a sound state of mind.

- 16 The testator in Banks v Goodfellow had a history of mental illness and had been subject to delusions (that he was molested by a man long dead and that he was pursued by evil spirits which he believed to be visibly present) for some 20 years prior to making the will in question in December 1863 and thereafter until his death in 1865. From September 1863 the testator suffered a succession of epileptic fits and his medical attendant considered him insane and incapable of transacting business over the whole period; against that, and importantly in the view of the court, there was evidence of the testator transacting business affairs and conducting and concluding property negotiations and giving instructions to an attorney for his will and executing a will drafted upon taking those instructions. The critical question was whether the testator was fit or whether unsoundness of mind operated upon the testator’s testamentary capacity at the time of testamentary disposition. A jury had found at trial that it had not. Cockburn CJ, sitting with three of the other four Judges of the Court of Queen’s Bench refused a new trial.

- 17 Ms van Overdijk also referred to the decision of Mr Nicholas Strauss QC, sitting as a Deputy High Court Judge, in Simon v Byford [2013] EWHC 1490 (Ch) at [156]-[158]. Referring to Banks v Goodfellow, Mr Strauss QC said :

“156. ... First, it is clear from *Banks v Goodfellow* and the earlier authorities, and from many subsequent decisions, that the law upholds the right of elderly people to leave their property as they choose, even if their mental faculties have declined considerably. This must include many cases in which they can no longer remember all the circumstances relevant to the division of their property between the people they wish to benefit; to make this a qualification for testamentary capacity would be inconsistent with the case law”.

Referring to the third of the four requirements, a testator’s ability to understand the nature and extent of the claims upon him, Mr Strauss QC said :

“157. ... while I think that there may be cases in which [this] requirement can only be met if the testator is capable of understanding, and possibly only if she does understand, the different provisions of an earlier will, this is not such a case. It must be a matter of degree, and in this case the previous will was 9 years earlier, and the differences were slight; the beneficiaries under both wills the obvious ones, and all received substantial gifts under both wills. Nobody was omitted. It would be different if the testator was unable to remember the identity of the beneficiaries under a previous will, whom she would still be likely, if reminded, to wish to benefit ...

158. ... [Counsel] cited in argument the example of someone in possession of all his mental faculties who knew that he had a previous will, but had forgotten its provisions and could no longer find it. Such a person would obviously have testamentary capacity. [The testator] was in a stronger position. She was reminded of the previous, unequal, will and could have asked to see it to remind herself of its provisions. So in my view she was capable of accessing the information, but chose not to do so. Also, as I have found, she did actually understand her previous will benefited Robert in some way but now wished to treat her four children equally”.

- 18 Mr Strauss QC’s decision in *Simon v Byford* was upheld on appeal⁴. Giving the substantive judgment of the court, Lewison LJ agreed with Mr Strauss QC’s decision to place most weight on what happened on the day when the disputed will was made and observed that, in a case where the testator was not medically examined and a solicitor was not present, the Court of Appeal would be slow to interfere with findings of fact as to testamentary capacity and want of knowledge and approval based on the judge’s appreciation of the evidence as a whole.
- 19 In relation to the second of the four requirements, Ms van Overdijk submitted that the testator need not know the precise value of his estate or its components, but must be able to appreciate its approximate value and the relative worth of the assets it comprises. Ms van Overdijk referred to the judgment of Mr Stephen Smith QC, sitting as a Deputy High Court Judge, in *Scammell v Farmer* [2008] EWHC 1100(Ch) at [97] where a general indication of the extent of the estate which was “not very wide of the mark” and included as the principal asset property at a time when market values were not static and could not be stated with any precision.

⁴ [2014] EWCA Civ 280

- 20 Mr Dew drew attention to the Court of Appeal's decision in Hoff v Atherton [2004] EWCA Civ 1554 at [35] and [49] for the proposition that, depending on the mental powers of a testator, there may be cases where the court will require evidence to establish that the testator had earlier testamentary dispositions in mind in order to test whether the different dispositions under the new will were truly intended. Mr Dew submitted that this was a point relevant to both capacity and knowledge and approval. Mr Dew further submitted that this is consistent with the approach in Simon v Byford. I agree. Neither decision lays down a hard and fast rule; each looks to apply a principled approach to the particular facts and circumstances of the case. What is crucial is that the testator's understanding meets the requirements identified in Banks v Goodfellow, including as to the soundness of the testator's mind.
- 21 In the context of capacity to understand the nature and effect of making a will, Mr Dew referred further to Hoff v Atherton and to the judgment of Chadwick LJ at [58] :
- " ... there will be cases in which a testator's capacity to understand the effect of what he is doing is limited by defects in memory or comprehension; so that – absent some proper assistance by way of reminder or explanation – it cannot be said that "his mind and memory [were] sufficiently sound to enable him to understand the business in which he was engaged at the time he executed his will"".
- 22 Addressing the law as to capacity in the context of the the circumstances in which BP executed the 2011 Will, Mr Dew submitted that, in a case where the persons present at the time of execution of the 2011 Will have said that BP executed the 2011 Will without any assistance, the Court must have in mind (1) whether BP was capable of understanding the 2011 Will, including that it revoked the 2010 Will, and the reasons she had given for the 2010 Will; (2) whether BP did know and understand that she was revoking an earlier will and the reasons she had given for that earlier will; and, (3) whether the evidence as to the process by which the 2011 Will was produced and the absence of any evidence regarding that process means that the Court simply cannot conclude that it is a valid will.
- 23 As to the burden of proof, Ms van Overdijk referred to Key v Key [2010] EWHC 408 (Ch) in which Briggs J, as he then was, observed at [97] :
- "The burden of proof in relation to testamentary capacity is subject to the following rules. (i) While the burden starts with the propounder of a will to establish capacity, where it is duly executed and appears rational on its face, then the court will presume capacity. (ii) In such a case the evidential burden then shifts to the objector to raise a real doubt about capacity. (iii) If a real doubt is raised, the evidential burden shifts back to the propounder to establish capacity none the less".

It is uncontroversial that this is a case in which the burden has shifted back to the propounder.

- 24 As to want of knowledge and approval, again it is essential to the validity of a will that the testator actually knew and approved of its contents. In Hoff v Atherton, Chadwick LJ observed at [64] that the requirement of knowledge and approval is that a testator :
“ ... did understand what he was doing and its effect”.

Further, in Gill v Woodall [2011] CH 380, Lloyd LJ explained at [71] that the requirement of knowledge is that the testator knows what is in the will and the requirement of approval is that the testator accepts the will as setting out the testamentary intentions he is to give effect to by execution.

- 25 In Gill v Woodall, Lord Neuberger MR observed at [14] and [16] :

“14 ... As a matter of common sense and authority, the fact that a will has been properly executed, after being prepared by a solicitor and read over to the testatrix, raises a very strong presumption that it represents the testatrix’s intentions at the relevant time, namely the moment she executes the will”.

....

“16 There is also a policy argument ... which reinforces the proposition that a court should be very cautious about accepting a contention that a will executed in such circumstances is open to challenge. Wills frequently give rise to feelings of disappointment or worse on the part of relatives or would-be beneficiaries. ... If judges were too ready to accept such contentions⁵, it would risk undermining what must be regarded as a fundamental principle of English law, namely that people should in general be free to leave their property as they choose, and it would run the danger of encouraging people to contest wills, which could result in many estates being diminished by substantial legal costs”.

- 26 As to the correct approach to determining a challenge to a will based on want of knowledge and approval, both Ms van Overdijk and Mr Dew referred to the judgment of Lord Neuberger MR in Gill v Woodall at [22] and submitted that, in a case such as this where there has been a trial over several days examining the character, state of mind and likely wishes of the testatrix, the circumstances in which the will was executed, and other relevant circumstances (here the testatrix’s mental condition), a two stage test ((1) do the facts raise a prima facie case of want of knowledge and approval and excite the suspicions of the court, and (2) if so, have those suspicions been allayed?) is of questionable value. The course the Court should take is to :

“consider all the relevant evidence available and then, drawing such inferences as it can from the totality of that material, it has to come to a conclusion whether or not those propounding the will have discharged the burden of establishing that the testatrix knew and approved the

⁵ That the will could not or was unlikely to represent the testatrix’s intention or the testatrix was in some relevant way mentally affected.

contents of the document which is put forward as a valid testamentary disposition. The fact that the testatrix read the document, and the fact that she executed it, must be given the full weight apposite in the circumstances, but in law those facts are not conclusive, nor do they raise a presumption”.

- 27 Mr Dew also drew attention to the more recent decision of the Court of Appeal in Hawes v Burgess [2013] EWCA Civ 94. Mr Dew referred in particular to three paragraphs in the judgment of Mummery LJ, with which Patten LJ and Sir Scott Baker agreed, which address both capacity and knowledge and approval :

“13 In answering [the two questions as to arousal and dispelling of suspicions] in a particular case the court has to consider and evaluate the totality of the relevant evidence, from which it may make inferences on the balance of probabilities. Although talk of presumptions and their rebuttal is not regarded as specially helpful nowadays, the courts realistically recognise that, for example, if a properly executed will has been prepared on instructions and then explained by an independent and experienced solicitor to the maker of the will, it will be markedly more difficult to challenge its validity on the grounds of either lack of mental capacity or want of knowledge and approval than in a case where those prudent procedures have not been followed”.

....

“57 ... it is, in my opinion, a very strong thing for a judge to find that the Deceased was not mentally capable of making the 2007 Will, when it had been prepared by an experienced and independent solicitor following a meeting with her; when it was executed by her after the solicitor had read through it and explained it; and when the solicitor considered that she was capable of understanding the will, the terms of which were not, on their face, inexplicable or irrational”.

....

“60 My concern is that the courts should not too readily upset, on the grounds of mental capacity, a will that has been drafted by an experienced independent lawyer. If, as here, an experienced lawyer has been instructed and has formed the opinion from a meeting or meetings that the testatrix understands what she is doing, the will so drafted and so executed should only be set aside on the clearest evidence of lack of mental capacity. The court should be cautious about acting on the basis of evidence of lack of capacity given by a medical expert after the event, particularly when that expert has neither met nor medically examined the testatrix, and particularly in circumstances when that expert accepts that the testatrix understood that she was making a will and also understood the extent of her property”.

- 28 In Hawes v Burgess the Court of Appeal upheld the trial judge’s approach in taking into account as relevant to a finding of want of knowledge and approval that one child of the deceased, without the knowledge or involvement of her two siblings, had been instrumental in arranging for her mother’s will to be drafted by, discussed with, and executed in the presence of a solicitor and had provided inaccurate information about sums paid or to be paid during the testatrix’s lifetime to one of her siblings. That, coupled with evidence of deteriorating physical health and diminishing capacity, sufficed for a finding that it was not affirmatively shown that the 2007 Will represented

the testamentary wishes of the testatrix and an overall conclusion of want of knowledge and approval.

- 29 Addressing suspicious circumstances, Ms van Overdijk referred to a passage in Theobald on Wills at [3-023] :

“ ... Another instance [of suspicious circumstances] is where a person was active in procuring the execution of a will under which he takes a substantial benefit by, for instance, suggesting the terms of the will to the testator and instructing a solicitor chosen by that person. However, circumstances can only raise a suspicion of want of knowledge and approval if they are “circumstances attending, or at least relevant to, the preparation and execution of the will itself””.

In relation to the 2010 Will Ms van Overdijk submitted that it is clear that the court should be assiduous to look behind the engagement and involvement of an experienced solicitor and consider the actual understanding of the testatrix as to her circumstances, including the benefits that had been conferred on her children by KP and herself, and the claims upon her.

Approach to the evidence

- 30 The relevant events took place the best part of a decade before the trial. The witnesses to the 2011 Will and JM, who was involved closely in the 2010 Will and in the drafting of the 2011 Will, made their statements more than five years after the events and the parties made their statements later still, over the course of 2017 – 2018. As a solicitor JM had maintained records according to his firm’s practice. None of the other witnesses base their witness statements on their own contemporaneous documentary records.
- 31 Contemporaneous medical records provide a chronological insight into BP’s deteriorating mental health; but, of themselves, they do not provide the answer to questions as to the state of BP’s mental health and understanding at the time she executed the 2011 Will or the 2010 Will. Assistance has also been given by expert medical evidence. However, the detailed evidence as to BP’s mental health at the critical time, early January 2011, is given mainly by the parties and close family members. This is essentially recollection or reconstruction based.
- 32 There is a significant body of modern judicial pronouncement, both in the cases and in commentary, providing guidance and warnings as to how to approach witness evidence.

- 33 In Onassis v Vergottis [1968] 2 Lloyds Rep 403, Lord Pearce considered the assessment of a witness' oral evidence :

"Credibility involves wider problems than mere demeanour which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person, telling something less than the truth on this issue, or, though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so, has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by overmuch discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness, and motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process and in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part".

- 34 In The Ocean Frost [1985] 1 Lloyds Rep 1, at p.57, Robert Goff LJ stressed the importance of having regard to the documentary evidence, objective facts, witnesses' motives and overall (or inherent) probabilities when attempting to decide whether a and/or which witness is telling the truth :

"Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, references to the witness' motives and to the overall probabilities can be of very great assistance to a Judge in ascertaining the truth."

- 35 Also in 1985, Bingham J, in his article The Judge as Juror : The Judicial Determination of Factual Issues, Current Legal Problems 38, drew attention to three matters he considered important to testing the reliability of a witness's evidence : (1) the consistency of the witness's evidence with what is agreed, or clearly shown by other evidence to have occurred; (2) the internal consistency of the witness's evidence; and, (3) consistency with what the witness has said or deposed on other occasions. Bingham J considered the credit of a witness in matters not germane to the litigation to

be of less significance, and the demeanour of a witness to be an unreliable pointer to honesty.

- 36 More recently, in Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm), at [15]-[22], Leggatt J considered problems of assessing the reliability or truthfulness of recollection evidence in commercial cases. Leggatt J's observations have been considered and applied in other types of case. After addressing the fallibility of human memory and the impact of civil litigation, which itself subjects the memories of witnesses to powerful biases, both by the processes involved in preparing witness evidence and, in particular, where the witnesses have a stake in the litigation, Leggatt J concluded that the best approach for a trial judge to adopt is to base factual findings on documentary evidence and known or probable facts and inferences to be drawn therefrom. The purpose of witness evidence, written and oral, in a trial is more to subject the documentary evidence to scrutiny and to evaluate the witness's motivations, personality and working practices.
- 37 Also relevant, in my view, to the evaluation of a witness's evidence is the non-exhaustive, but telling, list of indicators identified by Lewison J in Painter v Hutchinson [2007] EWHC 758 (Ch) at [3]. Indicators of unsatisfactory witness evidence include : evasive and argumentative answers, tangential speeches avoiding the question, blaming legal advisers for documentation (pleadings and witness statements), disclosure and evidence shortcomings, self-contradiction, internal inconsistency, shifting case, new evidence, and selective disclosure.
- 38 This selection from the authorities seems to me to demonstrate an established approach to fact finding. The court takes as a platform for fact finding reliable contemporaneous documentary evidence. It adds to that known, established or agreed facts, probable facts (both inherently probable and by inferences properly drawn from known, established or agreed facts), and then builds further with witness evidence which is consistent or compatible with that underlying body of reliable documentary evidence and is not tainted or flawed by other indicators of unreliability.

Third party evidence as to the making of BP's wills

- 39 JM was professionally engaged in relation to the preparation of both the 2010 Will and the 2011 Will. JM was also involved in the execution of the 2010 Will but not the 2011 Will. KW and PG, long-standing acquaintances and neighbours of BP, were the witnesses to the 2011 Will.

John Mott (JM)

- 40 BP contacted JM about making a new will in September 2009. From JM's evidence it appears that an initial appointment was made for 25.9.09 but this was altered by D1 to 30.9.09. D1 confirmed that this was to fit in with his work shifts and enable him to transport and accompany BP to and from the appointment. D1 had previously engaged JM for other legal work, on D1's evidence several property transactions and his divorce, over the course of a number of years and had recommended him to BP.
- 41 In his Larke v Nugus response JM refers to not being able to locate the file for the 2010 Will. He was able to access electronic copies of certain documents including a file note of a telephone call from BP on 2.11.09, but not of the appointment on 30.9.09. JM's evidence was that he had "a clear recollection of the circumstances surrounding the making of this Will". Unfortunately, paragraph 8 of his statement contains an obviously incorrect recollection of what occurred when he met BP on 30.9.09; JM's account includes reference to discussions and instructions which formed no part of the will drafted on 30.9.09 but were the basis for the later draft which became the 2010 Will. More reliable evidence appears from JM's telephone attendance note of 2.11.09. When giving his oral evidence JM readily accepted the error in his Larke v Nugus statement.
- 42 Based on JM's evidence, including his oral evidence, I make the following findings relating to JM's involvement in the making of and knowledge of the surrounding circumstances of the 2010 Will :
- (1) BP was introduced to JM by D1, who was an existing client of some years;
 - (2) BP contacted JM's firm initially and made an appointment for 25.9.09;
 - (3) D1 changed BP's appointment to 30.9.09, in oral evidence D1 explained that this was to fit in with his shifts and enable him to transport and accompany BP to and from the appointment;
 - (4) on 30.9.09 JM saw BP alone to discuss her proposed will;
 - (5) at that time, BP's instructions were for her will to divide her entire net estate equally between her four children and that D1 and D3 were to be her executors;
 - (6) JM drafted a will in those terms and sent it to BP on the same day for her approval;
 - (7) JM also noted in a covering letter that BP was to look out the details of 9NHL and other jointly owned land;

(8) five weeks later, on 2.11.09, BP telephoned JM. The gist of BP's instructions was "... [BP] advised [JM] that she had a problem with her Will because she wanted to ensure that all four children were treated fairly. Two of them had been gifted houses and one of them had been gifted a plot of land but [D1] had received nothing. To ensure fairness she was wondering whether she should give her own house at [9NHL] to [D1]. This is apparently quite a big house and I suggested that perhaps the fairest way would be for her to establish the current price of a building plot and she could then leave a sum of money to [D1] equivalent to the value of a plot, with the rest of her estate being divided equally between all four children". JM noted that BP thought this was a good idea and that she would speak to an estate agent who had acted in the sale of the Nearby Land to developers earlier;

(9) JM prepared what became the 2010 Will on 2.2.10 and BP made an appointment to see JM on 4.2.10. There is no documentary evidence as to how the instructions for this revised draft will, which did not follow JM's suggestion to bring about equality for D1 and then treat all four children equally, came to be communicated to JM, and JM could do no more than say that he imagined that BP must have gone back to her original thought;

(10) on 4.2.10, JM saw BP alone and satisfied himself that the 2010 Will reflected BP's wishes. JM assumed that the devise of 9NHL to D1, rather than a gift of the value of a building plot, was BP's conclusion that her original plan was more appropriate than JM's suggestion. JM and a secretary employed by his firm then witnessed BP's execution of the 2010 Will. JM understood that the gift of residue to D2 was also to benefit D1 and address the imbalance in treatment between D1 and his siblings; and,

(11) JM was not informed by BP that she had seven other grandchildren in addition to D2 and JM did not think to ask BP about her remoter issue.

43 Pausing here, and amplifying the above findings, when BP mentioned the fact that she had been party to the sale of the Nearby Land to developers it does not appear to have triggered any thought on her part about the overage agreement or that it was or might be relevant. Further, there does not appear to have been anything in what she said that alerted JM to the possibility of an overage agreement or the possibility of further consideration being or accruing due to BP from the development sale. JM's attendance note when taking instructions from BP for the 2010 Will shows that he was informed, seemingly as an aside, of "... a piece of land that had been sold off to Developers earlier". The tenor of JM's notes and letters to BP, including the later letter of 7.1.11 enclosing a draft of what became the 2011 Will, is consistent with JM understanding from BP's instructions and his questioning of and discussions with her

that her estate essentially comprised 9NHL and cash in the order of £160K which was sufficient to cover pecuniary bequests of £35K to each of her children and pay the estate's liabilities, including IHT, and leave some residue.

- 44 In fairness to JM, it is not apparent from the evidence that BP recalled anything about the overage agreement when making either the 2010 Will or the 2011 Will. Given the approach, evident from his attendance records and correspondence, that JM took to discussing the disposition of 9NHL or its value with BP and the fact that he knew of the sale of a parcel of land for development, it is striking that there is no record of mention of the overage agreement or consideration of what might fall into residue under BP's wills. I think it very unlikely that there would have been no note of a discussion about the overage entitlement had JM appreciated, or been alerted to the prospect, that such existed, even as a contingent asset. All of this coupled with BP's overarching expressed intention "to ensure that all four children were treated equally", as to which there is no evidence of a change of intention on BP's part noted by JM, and the distortion to the equal distribution of BP's estate once the overage agreement is factored into the bequest of residue to D2 and D3, leads inevitably and overwhelmingly to findings by inference that (1) JM was not told and did not know about the overage agreement in relation to the Nearby Land and understood the sale to Persimmon Homes to be a fully completed transaction, and (2) BP did not have the overage agreement in mind when considering and executing what became the 2010 Will.
- 45 BP's failure to inform JM of the overage agreement may also explain why JM did not know that D2 was not BP's only grandchild. I think it probable that, had JM been aware that BP's residuary estate might be of significant value, he would have questioned her about other generations of her family and discussed more deeply the appropriate gift of residue. Mr Dew, counsel for D1, described JM as "old school" and very experienced at taking instructions for wills and ensuring that wills were properly executed. I accept that as entirely fair. I also note here that, during cross-examination, D3 said that she did know that land had been sold for development but did not know much about the sale and had not been aware of the overage entitlement or uplift. Given that D3 and BP were very close, at least at the time of the 2010 Will and before, that tends to confirm that BP was not aware of that potentially significant contingent asset when making the 2010 Will or the 2011 Will.
- 46 Returning to JM's dealings with BP, after execution of the 2010 Will JM next encountered BP in the context of certifying a lasting power of attorney executed by BP

on 21.9.10 ('the LPA'). The certificate of understanding at Part B of the LPA was completed by JM on 5.10.10. Prior to the trial JM had not understood that the LPA might arise for consideration in the trial. After giving evidence at trial, JM searched for and provided what he described as a reconstituted file. This showed that D1 telephoned JM on 21.9.10 to discuss whether it was appropriate for BP to make a lasting power of attorney and provided information which prompted JM to send an email to D1 stating that "now is the appropriate time for [BP] to enter into [the LPA]". D1 then made an appointment with JM for BP on 5.10.10. D1 drove and accompanied BP to the appointment with JM together with the LPA (referred to by JM as "the paperwork that [D1] had brought in").

- 47 The file note states that JM saw BP alone. JM was told that all four children had been involved in the process of considering the LPA and that they had agreed that D1 and C1 should be the attorneys. JM's file note confirms that he was satisfied as to BP's understanding of the LPA and that BP said that she wished to enter into the LPA while she still had the capacity so to do. JM also recorded that BP said that her sister, Iona Fitzgerald, was also making a lasting power of attorney and had encouraged BP to make her own. JM's certificate at Part B of the LPA serves to provide relevant evidence as to BP's level of understanding and capacity in relation to her financial affairs in early October 2010. The LPA is stamped as registered at the Office of the Public Guardian on 7.1.11.
- 48 Pausing again, JM's late evidence about the LPA sheds light on the evidence of the parties and Beverly Jones ('BJ') as to the making of the LPA and when each of the children knew about the LPA. I bear in mind that JM recorded that D1 telephoned JM on 21.9.10 to discuss whether it was appropriate for BP to make the LPA, and that D1, not BP, was in possession of the LPA when BP met JM on 5.10.10. As a further point of context, referred to below in my review of BP's medical records, BP had seen her GP on 15.9.10⁶ in connection with memory loss.
- 49 C1's evidence was that, at the time, the first he knew of either the GP's appointment on 15.9.10 or the LPA was when he received a telephone call from BP, in a distressed state, on 21.9.10 during which BP said that D1 was with her and asking her to sign the LPA. BP telephoned C1 and asked him to come over, which he did. D1's evidence included that he could not say that he was not with BP on 21.9.10 when C1 arrived; that at that time he was concerned about BP's mental health; and, that he called in on

⁶ See [66] below.

BP every day. D1 said that his partner, BJ, completed the details of the person giving the LPA and of the attorneys, who were identified as D1 and C1 jointly. BJ's evidence was that she had left the LPA form with BP on the previous day (20.9.10) so that she could think about who should be the attorney(s) and returned on the day that BP signed the form to complete the attorney details as BP might instruct and to witness BP's signature. BJ said that she was sure that she then left the form with BP after completing the details, sure that BP had sent the form off personally, and sure that before Christmas 2010 BP had told her that there was a backlog in dealing with LPAs. BJ also said that she raised her own concerns about BP's capacity with D1 in the latter part of 2010.

50 Considered in the context of JM's contemporaneous notes about the LPA disclosed during the course of the trial, BJ's evidence about leaving the LPA with BP from 20.9.10, being sure that BP posted it, and being sure that BP had mentioned a backlog is called into question. It is striking that JM noted on 5.10.10 that D1, not BP, brought in the "paperwork" (i.e. the LPA) together with BP. Further, after JM signed the certificate at Part B, BJ witnessed D1's signature at Part C and D1 witnessed C1's signature. The most likely course of events is that D1 left JM's offices with the LPA and, after his signature had been witnessed by BJ, D1 took the LPA round to C1 for him to sign Part C. Whilst BP could, doubtless, have been given the LPA and have posted it, I regard it as logical and highly probable that, after obtaining and witnessing C1's signature on 5.10.10, D1 did not return the LPA to BP for posting but that he did or arranged that. My finding is that D1 had physical control of the LPA at all material times after BP signed it on 21.9.10 and that BJ's evidence about leaving the LPA with BP, BP telling her that she had posted the LPA, and BP referring to a backlog is all unreliable evidence. The question then arises : why would BJ give such emphatic evidence about BP retaining and posting the LPA? The logical explanation is that that served to distance D1 from the making of the LPA and remove the scope for adding this to C1's case that D1 was controlling and manipulative. It does not follow from this that I should reach such a conclusion but this comparison of objective contemporaneous evidence from JM with BJ's evidence provides a marker.

51 Returning to JM's evidence, on 6.1.11 BP telephoned with instructions to make a new will. BP's instructions were that she wanted to divide everything equally between her four children and to substitute C1 as a co-executor in place of D1 with D3 remaining as a co-executrix. JM's file note of the conversation includes that JM reminded BP of her

rationale for the 2010 Will (“3 out of her 4 children had received either plots of land or property already and ... [D1] was the only child who had not benefitted”).

52 In oral evidence JM said he had no doubt that BP was the caller. He also said that although he could not be sure that BP was alone when she telephoned, if he had suspected that she was being prompted he would have terminated the call. I accept that evidence and am satisfied that JM would, as part of his ordinary practice as an experienced solicitor, have been sensitive to whether his client was being prompted and that, if JM had reason to doubt whether BP was the caller or suspect that she was being prompted, his contemporaneous note would have reflected as much. JM’s evidence is relevant because it corroborates D4’s denial in cross-examination that she made the telephone call posing as BP or alternatively instructed BP as to what to say to JM. I accept D4’s evidence on this point and reject that line of cross-examination as unfounded.

53 JM was asked whether he had concerns about BP’s capacity in January 2011. He said that he had expected BP to come to his office to execute the 2011 Will and would then have considered capacity and, further, that if concerns as to capacity had arisen during the telephone conversation on 6.1.11 he would not have prepared and sent the draft will reflecting the revised instructions. Elaborating on his experience at assessing capacity in answer to questions from Mr Dew, JM said that he had drafted many hundreds of wills, of which many had been for elderly testators, and that he had experience at and was able to spot persons suffering from declined mental capacity. In addition, he said he was generally alert to the risk of duress and sought reasons to justify unusual bequests. In answer to questions from Ms van Overdijk, JM said that he considered his role in drafting a will to be proactive rather than reactive.

54 To meet BP’s new instructions JM revived the draft prepared and sent to BP on 30.9.09. After amending the draft to reflect the substitution of C1 for D1 as an executor, he sent it to BP under cover of a letter dated 7.1.11 in which he again reminded BP that the 2010 Will was drafted in a way to reflect the unequal treatment of D1. JM elaborated on his understanding of BP’s estate and instructions for the 2010 Will as follows :

“You instructed me that because of this you wished your home at [9NHL] to be gifted to [D1] but as far as the rest of your estate was concerned, having balanced up the matter making the gift to [D1], you then wished each of your children to receive the

sum of £35K, with the residue to be divided between your grandson Thomas (sic) and your daughter Sian”.

JM continued that he awaited further instructions and reminded BP of his requirement that to take instructions he would expect to see her alone.

- 55 JM received the 2011 Will in executed form back from BP on 11.1.11. This arrived with a covering letter dated 9.1.11 (‘the 9.1.11 Letter’). JM’s evidence was that he was surprised that the 2011 Will had been executed and that he had not been asked to prepare a formal will in final form and meet BP to go through the will and then witness her execution of it. This was so unusual in his experience that he decided not to charge his usual nominal will drafting fee and he set the file aside as he thought there might be a dispute. The person likely to raise a dispute on the facts as JM then understood them would have been D1, whom JM knew as a client in other matters.
- 56 The 9.1.11 Letter is written in a steady, fluent, upright hand. The body of the letter uses upper and lower cases appropriately. BP’s own address, the date, and C1’s address (which JM had requested and which was stated differently and incompletely in the draft will he had prepared) were in upper case. There are some spelling mistakes⁷, but many multi-syllable words are correctly spelt⁸. BP explained that she had executed the 2011 Will in the presence of two independent witnesses and that she had known these persons for many years. BP (incorrectly) understood D1 to be a personal acquaintance of JM and noted that as her solicitor she expected complete confidentiality. BP referred to the telephone conversation of 6.1.11 and to having mentioned then that her children other than D1 had all paid the then current market value for their property or land and had not received gifts. BP concluded by asking for any fee note to be sent to her home and saying that she would deal directly with JM’s fees. As to dealing with JM’s fees, BP’s method of payment of JM’s fees would have been by cheque and this closing statement in the 9.1.11 Letter asserts her confidence that she can still draw and sign cheques, an ability which D1 had denied and been shown to be wrong about in cross-examination.
- 57 If written by BP and expressing her independent thoughts, as to which there is an issue, the 9.1.11 Letter would provide good evidence of BP’s appreciation that she was giving directions as to the disposition of her estate upon her death, of the formal requirements of executing a will, of the legitimate calls on her testamentary

⁷ “acquaintance”, “currant”, “aquired”, and “fee’s”.

⁸ E.g. “Independent witnesses”, “confidentiality”, “including”, and “conversation”.

dispositions, and of her reason for no longer wishing to hold to the 2010 Will. The hand writing style and expression seem to me to be similar to other earlier and later authenticated examples of BP's handwriting (in particular the sentences in the Mini Mental State Examinations ('MMSE') taken by BP on 10.11.10 and 11.3.11). I shall consider the question, raised by D1, of whether BP was influenced in what she wrote or dictated to in the course of considering the medical (including expert) evidence.

58 As to JM's evidence relating to his dealing with BP after the 2010 Will and in connection with the 2011 Will :

(1) it raises questions as to some of D1's conduct and the reliability of his and BJ's evidence;

(2) it provides good evidence that BP had capacity in early October 2010 and that she was coherent and not obviously lacking capacity when giving instructions for the 2011 Will;

(3) it provides good evidence that at the time of reformulating her testamentary instructions BP was reminded orally and in writing of the detail of and reasons for her then current will, the 2010 Will;

(4) it provides some support for the propositions that BP was acting of her own accord and had capacity a few days before she executed the 2011 Will; and,

(5) it provides some support for D4's position that she did not orchestrate or interfere in BP's revocation of the 2010 Will and instigation of a will more favourable to herself and much less favourable to D1, D2 and D3.

All of this is relevant to assessment of BP's testamentary capacity and her knowledge and approval over the period 6.1.11 to 9.1.11.

Patrick Gavin (PG) and Kathleen Wigley (KW)

59 PG and KW witnessed BP execute the 2011 Will. Each made a witness statement in 2016, a few months after BP's death but five years after the relevant event. Neither gave oral evidence. The hearsay notice served on behalf of C1 stated that PG was 88 years old and in ill health and that KW suffered from Alzheimer's disease. No medical evidence was served to support these grounds. Mr Dew, for D1, submitted that, in the absence of substantiated reasons for not proffering PG and KW as witnesses for cross-examination, no weight should be attached to either witness statement.

60 PG is in his late 80s, he was a policeman for 25 years and then a solicitor's outdoor clerk before retiring. KW is in her mid 80s. Each had been neighbours of and had

known BP for 40 years. The 2011 Will was executed at KW's house. Both PG and KW referred to BP executing the 2011 Will in their presence and before they witnessed it. Each referred to the events and the visit as an ordinary event with nothing exceptional occurring to make it memorable. Each expressed the view that BP was her normal self.

- 61 Both PG and KW referred to D4 having been present and KW refers to D4 having brought BP to her house in order to execute the 2011 Will. In her evidence D4 said that she had accompanied BP because she had had a painful toe. This is supported by BP's GP records which note that a toe injury was dressed at the surgery on 10.1.11 and inspected but did not need dressing on 12.1.11⁹.
- 62 I do not regard PG's and KW's evidence as being of no value or weight. It serves to confirm that the 2011 Will was duly executed and that no memorable circumstances or events occurred during the process of executing the 2011 Will. It carries some corroborative weight.

BP's medical history

- 63 In addition to raising a family and maintaining the family home, BP was a qualified nurse and worked as such for much of her life. For BP's generation nursing was a vocation. Her nursing career included becoming a matron and caring for the elderly. From her vocation she was well acquainted with the effects of dementia.
- 64 In 1960 BP registered with the GP practice in Norton Canes which became the Norton Canes Practice, she was then aged 31 years.
- 65 There are extensive medical records for BP in the trial bundle.
- 66 The first relevant medical event was BP's visit to her GP on 15.9.10. The GP's note made by Dr Parekh reads :
- "Memory loss symptom short memory loss, forgets where she puts keys, bakes lot of cakes for family when nobody has asked, keeps ringing family but does not recall that she rang, safe in house, does become upset easily, manages DLAs ok, lives on her own, forgets about her medications which daughter now manages, mini mental – day, date, year, PM, recall address all wrong. Ref PRIORITY =3".

⁹ See [74] below.

67 Even this first relevant note was the subject of disagreement between BP's children. It was common ground that BP was accompanied to the GP's surgery and during the appointment. C1 and D4 denied having taken BP and D3 had no recollection of any visit to an appointment with Dr Prakesh. However, the points raised accord most closely with concerns of D3 at that time and for this reason, coupled with (1) the fact that D3 did not actually deny taking BP to this appointment and (2) the proximity in time between this appointment and the promulgation of the LPA and the closeness between D1 and D3, I think it most likely that it was D3 who accompanied BP on this occasion.

68 There is also disagreement as to the accuracy of what was stated to the GP. It is unclear whether the note is of BP's first hand account to her GP or of a commentary by the accompanying child, D3, or a mixture of both. The first is unlikely because there was a body of credible contradictory evidence at trial. For example, there is good evidence that BP had for many years misplaced her keys and that this was overcome by BP using a large safety pin to attach her keys to her clothes; thus, the note may be of a historic problem for which a solution had been devised. That said a history of misplacing keys does reflect on BP's memory faculties. As to forgetting about medication, it transpired in oral evidence that the issue was not that BP forgot to take medication but that, because of her arthritis, BP could not readily extract her medication from its blister sealed packaging. There were differing family recollections of whether BP cooked unwanted food and the extent to which BP was then forgetful about having called family members and, at that time, would redial their number repeatedly. As to the recollections of BP's children, of course these events happened years ago and at a time when there was no thought given by family members to keeping a record of BP's mental state, accordingly inconsistencies are highly likely. As to the mini mental test, at the time of this appointment BP was aged 80 years and had been retired for many years. For a retired person, inability to specify a day or month, or even the name of the PM may not be surprising; inability to recall the year or one's own address is rather different. However, the GP's note contains no indication that BP's mental state had reached or passed the point at which she lacked the requisite understanding for making a valid will. Moreover, and as noted above, JM had met and assessed BP in the context of certifying her ability to make a valid lasting power of attorney shortly afterwards, on 5.10.10.

69 On 6.10.10 BP saw Dr Tosounidou at a specialist Older People Clinic. D3 and D4 accompanied BP to the clinic. D3 said in evidence that she had no recollection of this

but did not deny having accompanied BP. Dr Tosounidou's onward specialist referral letter records that BP had a one year history of gradual memory loss and a problem with short-term memory but was able to live alone. Reference was also made to the family having already had an appointment made with a solicitor for a power of attorney, thus D4 must have learnt of the LPA at this point if not told previously by BP or a sibling. Dr Tosounidou thought a diagnosis of Alzheimer's likely and referred BP to Dr Acey, a consultant psychogeriatrician.

- 70 Dr Acey saw BP with D3 and D4 on 10.11.10. By then BP had had a CT scan which revealed some atrophy within the temporal lobes. Dr Acey's report to Dr Tosounidou began with a recitation of some reported problems (telephoning D3 and D4 several times a day, losing keys, forgetting she has seen people, forgetting who people are, and post getting in a mess). Dr Acey noted that BP was cheerful and did not feel she had any problems and that she scored 22/30 on a MMSE and commented that BP's functioning may be more impaired than the MMSE score suggests; Dr Acey did not give reasons for this conjecture. Dr Acey noted the results of the CT scan and opined that the picture appeared to be more senile dementia than vascular dementia. Dr Acey's view was that BP was safe and functioning at home with the support of her daughters and would be seen again in four to five months with a view to considering treatment for BP's memory loss.
- 71 Each of D3 and D4 said that the other took the lead in providing background information to Dr Acey. D4 said that D3 had made things out to be worse than they were and D3 said that D4 always took the lead. As to that, Dr Acey's letter was copied to D4 but not to D3. There is a significant body of evidence, including telephone records, to support the proposition that BP was frequently telephoning her children, including D3 and D4, at this time. On the other hand, BP was functioning independently. She lived alone and bathed and dressed herself. From about this time D4 was cooking a meal for BP on a daily basis, but this was said to be more a matter of providing company because BP was lonely and not because BP was unable to cook. The medical records show that D4 telephoned Dr Acey some days later, on 18.11.10, to discuss BP's condition and Dr Acey's diagnosis. Dr Acey's note includes that D4 felt that D3 had not accepted the situation and was making BP worse than she was. D4's evidence was that she did not want to talk about BP's condition in front of her and this supports the likelihood of the general description of BP having been given by D3 rather than D4.

- 72 Pausing here and as to BP's post getting in a mess, by the time of the LPA BP was receiving assistance from BJ and D1 in handling her post and paying her bills. BJ is an experienced business manager. BJ was critical of BP for replacing post, once read, in its envelope, but I do not regard that as a sign of failure or inability to deal with post in a domestic situation; for example, at that time the postmark could be helpful in dating when an item of post was likely to have arrived and replacing an item of post in its envelope after reading may have been simply a matter of habit. D1's evidence was that by mid to the latter part of 2010, i.e. by about this time, BP had become unable to write cheques. As already noted, the MMSEs¹⁰ show that BP had steady and fluid hand writing in November 2010 and March 2011. Moreover, the documentary evidence includes cheques signed by BP through to 24.3.11 (notwithstanding that the LPA was registered on 7.1.11).
- 73 Given the differences of view between BP's children as to BP's symptoms, subject to consideration of the expert medical evidence, I am inclined to place less weight on the commentary or biographical history given to doctors where it is not clear that the source is BP herself or is otherwise not supported by objective evidence, and more inclined to accept the MMSEs as accurately indicative or reflective of BP's mental functionality.
- 74 The next medical entry relevant to BP's mental state is a further out patient appointment with Dr Acey some three months later, on 22.2.11. BP's GP records show that, in the meantime, BP had a blood test on 8.12.10, a consultation with Dr Parekh on 13.12.10 which may have been about BP's steroid medication being reduced, and that a toe wound was dressed on 10.1.11 but had dried and did not require further dressing on 12.1.11.
- 75 On 22.2.11 Dr Acey noted that BP's memory appeared to be gradually getting worse, particularly short-term memory. BP was reluctant to consider day care but was keen for a trial with appropriate medication, Donepezil, to inhibit degradation of communication between the brain cells. Dr Acey passed BP to the Community Mental Health Team to try to persuade BP to accept day care and a Community Psychiatric Nurse ('CPN') was to introduce BP to the proposed medication and monitor its effect. At that point Dr Acey's intention was that the CPN would take over monitoring BP and her medical care.

¹⁰ See [79] below

- 76 On 7.3.11 the CPN made an appointment to visit BP. D4 informed the CPN that there had been a big deterioration in BP's condition. On or about 18.3.11, the CPN completed an action plan for BP based on a diagnosis of dementia. The plan recorded an MMSE score on 11.3.11 of 23/30. The aim of the intervention was to enable BP to function at her optimum and to monitor the effect of the new medication. The CPN was also to support D4, who was noted as the main carer, and D3 in managing behaviours. The CPN also made lengthy notes of her visit to BP and her daughters on 9.3.11 and again on 11.3.11.
- 77 On 9.3.11 the CPN recorded that she had seen BP with both daughters, with D3 arriving after D4. The CPN recorded that D4 was obviously stressed by the burden of BP's constant telephone calls and ringing her door bell. The CPN's notes include, after recording that D4 was stressed and that D3 arrived later, that things had changed in mid-January. The notes indicate that BP wanted to remain at home and wanted D4 to live with her; that some days were better than others for BP; that BP was more reliant on D4 than D3; and, that D3 had become impatient with BP. Other concerns included that BP could be aggressive vocally, but, despite BP's tendency to wander, there were no road safety concerns. The notes indicate that Donepezil medication had been stopped because it appeared to make BP more agitated; but it was agreed to restart medication which happened as from 9.3.11. BP appears to have understood this and was noted as saying "I hope it works".
- 78 On 11.3.11 the CPN visited BP at her home alone. The CPN noted that BP maintained good eye contact, was polite and pleasant, repetitive in her conversation, acknowledged the support given by all family members and D4 in particular ("I couldn't manage without her"). BP also recognised that D4 needed a break and was willing to accept help around the home and an assessment by an occupational therapist. The CPN recorded that when she met D3, D3 said that she had fallen out with BP on 10.3.11 and that she no longer recognised her mother as "my mum" any more.
- 79 Also on 11.3.11 the CPN supervised BP's completion of the MMSE test again. BP scored 23/30. The MMSE tests nine areas of mental processing : orientation (chronological and location awareness), registration (noting three items for recollection), attention and calculation (deducting units of seven from 100 and spelling a word backwards), recall (short-term memory recollection of three items previously mentioned), naming (accurate identification of objects), repetition (reading and enunciating a phrase), three stage command (following a simple three stage

instruction), reading comprehension (following a written instruction), writing (composing a sentence), and praxis (copying interlocking shapes). BP was consistently weak (on 10.11.10 and again on 11.3.11) on chronological orientation and short-term recall, but otherwise strong. BP's sentences showed current awareness : "The two young ladies sitting with me are my daughters" (10.11.10), and "Today appears to be a very warm and sunny day – I think this calls for a turn in the garden" (11.3.11). Both sentences were written in a steady confident hand and used upper and lower case correctly throughout and expressed development of one thought to another.

- 80 On 11.3.11 the CPN also assessed BP on the Bayer-Activities of Daily Living Scale. The higher the score (max 10) the greater the person's difficulty with the activity. BP's high scores were in taking medication without supervision, chronology, concentrating on reading, short-term recollection, shopping, managing finances, giving route directions, orientation in an unfamiliar place, using transportation, participating in leisure activities, and performing under pressure. BP had little or no difficulty with managing every day activities, personal care, participating in conversation, going for a walk without getting lost, using domestic appliances, doing two things at the same time, and doing things safely. BP had moderate difficulty with using the telephone, preparing food, counting money, returning to continue a task after a brief interruption, and coping with unfamiliar situations. BP's average score was 6.3/10.
- 81 On 18.3.11 the CPN wrote to BP's GP with an action plan for BP to be assisted within the community. On a 'root cause' analysis, the causative problem was noted as vascular dementia with worsening confusion and agitation and admission was considered appropriate. This was passed on to BP's GP where a change of diagnosis was noted. On the evidence to which I have been referred there does not appear to be a clinical test basis for this change of diagnosis from Alzheimer's to vascular dementia.
- 82 On 21.3.11 the CPN visited BP to introduce an Occupational Therapist; BP was noted as being pleasant and co-operative. D3 and D4 were also present. The CPN then saw D3 and D4 at the latter's home. D4 had been away for the weekend. BP had become disturbed. D3 reported that BP had been found wandering in a nearby field by ND¹¹. D3 had then been with BP at 9NHL but needed to leave her and had locked BP in to stop her wandering off. BP had become agitated and had smashed a glass panel in the front door. BP had said that she became frightened in case a fire broke out. The

¹¹ See [9] above.

CPN recorded that BP had become more settled after D4's return. D4 was due to go away at the end of April and the CPN proposed that BP should go into respite care.

- 83 The combination of BP having signified a willingness to go to a residential home for respite care and the events that occurred when D4 went away for a weekend triggered investigation by Sharon Parsonage, ('ShP') C1's wife, who had been a Senior Adult Social Worker and had experience working with elderly and vulnerable people, to find a suitable residential care home. D3 referred in her witness statement to ShP having found an emergency place at a nearby home, Copperdown. D4, ShP and C1 appear to have been instrumental in arranging the placement. BP is recorded as having vascular dementia (this appears to be based on information provided on admission rather than diagnosis) and as having settled well initially. On 26.3.11 the manager at Copperdown assessed BP as having capacity. BP rapidly became agitated and aggressive. Within a month Copperdown decided that BP had to be moved.
- 84 On 29.3.11 the CPN met the manager at Copperdown. The CPN's meeting notes record it being agreed that BP did not have the mental capacity to make decisions regarding her future care needs.
- 85 BP was transferred to Abbey Court Nursing Home on 12.4.11. On 2.6.11 the CPN gave BP another MMSE to complete; this time BP scored only 16/28 and was noted as being too agitated to write a sentence or complete a copying exercise. On 7.7.11 BP moved to Alma Court Care Home where she remained until her death on 18.11.15.
- 86 Taken in the round, Dr Acey records a gradual decline in BP's mental condition over the treating period. There is a gap in the records over the period in issue in January 2011. There is contemporaneous independent evidence of the CPN being told by D4 on 7.3.11 that there had been a big deterioration and that the CPN had been told on 9.3.11, apparently with both D4 and D3 present, that "Things changed in mid Jan". The MMSE results show no decline in the functions tested between November 2010 and March 2011, with BP's strengths and weaknesses remaining largely constant. The Bayer test results reflected the same weaknesses and compatible strengths, showing BP to be safe, practical and able to engage in conversation but having difficulty with chronology, orientation, managing financial affairs, and concentrating when reading. The particulars of the big deterioration/change noted by Dr Acey and the CPN as reported by BP's family (D4 and D3) were that BP was telephoning and calling round "a great deal"/"all the time".

87 Taking JM's and the contemporaneous medical evidence together, there is nothing in that evidence pointing to independent observation of a significant deterioration in BP's mental state between October/November 2010 and early March 2011. There is evidence of a family report in March 2011 recalling that things deteriorated or changed in mid-January and the deterioration/change cited reflects an increasing burden on the family members caring for BP (D4 and to a lesser extent D3), but not necessarily to a loss of testamentary capacity. However, Dr Acey saw BP in late February 2011 and noted only gradual deterioration in memory, particularly short-term memory. It is common ground that by late March BP had ceased to have capacity.

The family witnesses ~ including the family dynamics and the family's evidence of BP's mental health

88 Each of BP's children gave oral evidence. So too did C1's wife, ShP, D1's partner, BJ, and D2. ND¹² made a witness statement about BP's behaviour in the period July 2010 to March 2011, including over Christmas 2010, and his evidence was admitted unchallenged.

89 The family members' evidence is particularly important in two respects. First, it provides an explanation of the rationale for the 2010 Will and the 2011 Will. Secondly, it provides a commentary on BP's declining mental health from a lay perspective, albeit that two of the four children (D1 and D3) and ShP also have medical or social care experience.

90 I start with Ms van Overdijk's and Mr Dew's overall submissions as to the reliability or otherwise of each of the family witnesses.

91 Ms van Overdijk submitted that C1, ShP, and D4 gave generally reliable evidence and that there is no sound basis for making overall adverse findings as to the evidence of C1 and his family witnesses. She made strongly critical submissions as to D1, including as to his personality and the impact that is likely to have had on his relevant conduct, and some criticisms of his family witnesses, D3 and BJ.

92 Mr Dew criticised C1, D4 and ShP for giving similar and probably rehearsed evidence, for refusing to accept independent contradictory documentary evidence, and for seeking to downplay medical evidence at odds with C1's case. Mr Dew also criticised

¹² See [9] above

C1 for his persistent attack on D1's management of BP's finances and suggestions that D1's management was improper even though no loss to BP was established. Mr Dew acknowledged that D1, D3, D2 and BJ had all been exposed to the case for some time and that that had coloured their evidence. Overall, their evidence was to be accepted as reliable.

93 During cross-examination of the parties both Mr Dew and Ms van Overdijk exposed and highlighted improbabilities and inaccuracies in the evidence they were challenging.

94 I readily accept that there will have been discussion about the case, including the facts of and issues in the case, on both sides of the family divide. While I do not accept that all family evidence was given without ulterior motive, it is not my view that either side's case is a construct created solely to achieve an end or to distort or suppress the truth as that party believes, or has come to believe, it to be. In their principal witness statements both C1 and D1 include commentaries and submissions reflecting their analysis of events and evidence as distinct from recollection. That is understandable, but they are parties, not advocates, and such evidence is of very limited, if any, value.

Ian Parsonage (C1)

95 Mr Dew criticised C1 for seeking to advocate his case rather than give evidence for evaluation by the court. Mr Dew drew attention to (1) references in C1's witness statement to events of which he had no knowledge and passages in which he sought to advance propositions and make submissions; (2) C1's insistence, in written and oral evidence, that his signature had been forged in connection with his and D1's joint authority under the LPA which BP executed on 21.9.10; and, (3) C1's evidence that BP's dementia was not such as to affect her capacity until shortly after she executed the 2011 Will.

96 Ms van Overdijk submitted C1 was a reliable witness and that his oral evidence was consistent with his written evidence and was not undermined by cross-examination. Ms van Overdijk also submitted that C1's evidence as to not signing the LPA and other documents, and as to BP's capacity in early 2011 and her rapid deterioration was supported by the documents and was true.

97 Certainly C1's evidence included conjecture and argument and his focus on D1's management of BP's affairs was not all sustained under the scrutiny of cross-

examination. Further, although in regular contact with BP, he was not at the forefront of caring for her. However, his evidence as to the basis on which he and ShP acquired their home was not shaken on cross-examination and his evidence as to BP's mental condition is not at odds with the independent evidence in medical records and contemporaneous reports or JM's contemporaneous notes and records.

Sharon Parsonage (ShP)

- 98 Mr Dew submitted that, over time and as an afterthought to support C1's evidence and case, ShP had developed her evidence that had BP's mental health been such as to require attention from carers before March 2011 she would have involved social services. Mr Dew submitted that there was no such evidence in ShP's witness statement. In the context of identifying from recollection what BP could or could not do in the period November 2010 into early January 2011, ShP referred to her work as an Adult Social Worker of 28 years' experience and that she understood the effects of dementia and did not notice any significant change in BP's mental health during visits or telephone conversations. ShP's evidence about involving social services is a minor development of that evidence.
- 99 This evidence arose in the course of detailed cross-examination to the effect that ShP was playing down BP's problems which had become apparent over the latter part of 2010 and were clear by Christmas 2010. ShP made clear that she did not challenge anything noted in BP's medical records and reports and that, at the time, she had not been informed of the visits to doctors in September and October 2010. In her written evidence ShP said that in November 2010 D3 had informed her of BP's dementia diagnosis and in cross-examination ShP said that, thereafter, she had this in mind when visiting BP and was assessing her; there were two reasons, concern for BP's own health and the adverse effect the diagnosis had on D3. ShP said that she and C1 visited BP every one to two weeks and were less involved in her life and therefore less aware of her condition on a day by day basis than D3 and D4.
- 100 ShP disagreed with the suggestions that BP served cold tea and inedible food and maintained her written evidence about sharing a cup of tea (which was hot) when visiting and being given and eating cakes baked by BP. ShP's evidence was that BP's impairment in late 2010 and into January 2011 was mild. She drew attention to BP living independently, speaking and writing coherently, and making decisions. ShP acknowledged that BP mislaid a brooch which was a Christmas present to her at Christmas 2010 but she did not agree with D3's evidence that BP had somehow

muddled up the presents for the family (in cross-examination D3 clarified her evidence to this effect as referring to only two or three presents). As to recognising people, ShP said that BP knew who she and her family were and also said in written evidence that BP would walk over to her home when D3 had closed her curtains and locked her back door during the day.

- 101 In answer to questions by Mr Dew, ShP said that she knew Dr Acey from her work and regarded him as a good consultant, but she had not recommended him as the consultant for BP. She was not aware at the time that BP needed to see a consultant.
- 102 Challenged in detail on BP's ability to make a will in early January 2011, ShP's evidence was that BP was able at that time to use the telephone, give instructions to a solicitor, deal with correspondence, understand and organise the process of executing a will with witnesses, write a letter, and take post to the post box without getting lost. On the specific question of whether BP could have written the 9.1.11 Letter unaided, ShP said that she could not say one way or the other.
- 103 My conclusion on ShP's evidence about BP is that ShP sought to answer Mr Dew's questions directly and truthfully. She did appear nervous, but that is not an unusual feature of lay witness evidence, and she was not evasive or hesitant in order to afford herself thinking time.

Alison Taylor (D4)

- 104 Mr Dew described D4 as a deceitful and dishonest witness. He drew attention to D4 possessing but withholding BP's address book (which contained a reference to the LPA); D4 attending medical appointments with BP and, therefore, not credibly being able to believe that BP was fine; and, D4 refusing to accept the CPN's note of what D4 had said.
- 105 Ms van Overdijk submitted that there was no significance in the very late disclosure of the address book because, apart from a single reference to the LPA, it was common ground that it was irrelevant and, although a party, D4 was a non-participant in the litigation and was not represented or legally advised; and, as to D4 attending medical appointments and her contemporaneous understanding of BP's declining mental health, D4 was plainly concerned for BP because she sought to speak directly with those attending to BP but not in her presence.

- 106 I agree with Ms van Overdijk and do not regard the criticism of D4 relating to BP's address book as of any significance. As to medical appointments, D4 denied attending the first appointment on 15.9.10 and I have found that she was correct in that. Other denials were as to whether she or D3 made statements noted in the medical records. Significantly, D4 both accepted that the statements noted were made, maintained that most were made by D3 in BP's presence, and she acknowledged that she had been present when the statements were made and had not gainsaid them. The medical records include that D4 did telephone after appointments principally to discuss BP's health which supports her evidence that she preferred not to speak to medical practitioners about BP in her presence and also to raise the impact on BP of, in D4's view, D3's inability to deal with BP's diagnosis.
- 107 Regarding the LPA, D4 said that she was not aware of the LPA at the time it was being prepared. Against that, JM noted on 5.10.10 that BP told him that all four children had involved in the process of considering the LPA and had agreed that C1 and D1 should be joint attorneys. The medical records show that D4 was present with D3 at Dr Tosounidou's clinic on 6.10.10 when Dr Tosounidou was told that there had already been an appointment made with the solicitor regarding the LPA. Although these three strands of evidence may be capable of reconciliation, they indicate to me that it is probable that, by the time of BP's appointment with JM on 5.10.10, D4 did in fact know that BP had recently or was in the process of making the LPA and that if D4 meant to suggest otherwise she was wrong.
- 108 D4 acknowledged that BP went out and walked around the village from one family member's house to another and that telephone calls by BP increased. Even though BP lived next door to D4, D4 said that BP would telephone her daily more than once. D4 understood that BP was very lonely and for that reason, in about late autumn 2010, she increased her daily meal provision for BP from once or twice a week to every day. D4's written evidence included that she had also noticed from the late part of 2010 that BP was starting to become forgetful.
- 109 The impression I have from D4's evidence, which is not dispelled by the evidence of any other family member including D3, is that from October 2010 onwards D4 increasingly shouldered the responsibility for providing care and company for BP. She did so because she had always been close to BP; because her observation of the relationship between BP and D3 led her to conclude that D3 was struggling to cope with the transition of BP from best friend to an elderly parent who would increasingly

need care and attention; and, because it is in her nature to provide support to her family when and where needed. D4's telephone call to Dr Acey on 18.10.10 is a good illustration of D4 appreciating the changing family dynamics and acting positively and sympathetically. D4 increasing the provision of meals to BP is another such example; this increased contact also provided D4 with an informal opportunity to keep an eye on BP.

110 In relation to Christmas 2010, D4 agreed that BP has forgotten to take the turkey out of the freezer early enough for it to defrost properly before cooking but she disagreed with the proposition, based on D1's evidence, that BP forgot to cook the turkey. She also disagreed with the proposition, put in cross-examination based on D3's written evidence, that there had been any significant muddling up of presents by BP, with the exception of a brooch from Auntie Mavis (which had been temporarily lost). D4's evidence included that the presents for her family had not been mixed up. Given D3's retraction on this point in cross-examination I accept D4's evidence about Christmas 2010.

111 In relation to the 2011 Will, D4 said that after Christmas BP had told her that her will was wrong and had asked her to contact JM's firm to see if they were open, which she did. D4's evidence was that BP was aware that she had been diagnosed as suffering from dementia and wanted to settle her will finally while she still could. D4 stated that, apart from the initial telephone enquiry as to Christmas and New Year opening, it had been BP who had contacted JM. D4 denied that she had been the orchestrator of the 2011 Will, denied that she had impersonated BP and telephoned JM on 6.1.11, denied that she had assisted or prompted BP in talking to JM, and denied that she had had any involvement in composing the 9.1.11 Letter. D4 admitted contacting KW and asking her whether BP could come over to execute a will witnessed by KW and if she could ask PG to be present as the other witness. It is common ground that D4 accompanied BP to KW's house and was present when the 2011 Will was executed. D4 said that BP was living independently and was coherent and making everyday decisions for herself at that time. As to BP's ability to post a letter in January 2011, D4 said that the post box was on BP's route to C1's, D1's and D3's home and posting a letter would not have caused BP a problem. D4's evidence supports the proposition that BP would have understood JM's 7.1.11 letter and the draft of the 2011 Will.

112 D4's evidence was that there was a marked change in D4 between mid-February and early March 2011. As the member of the family most in contact with BP and providing

most care D4 noticed the additional burden on her. By early March 2011 D4's increasing commitment to BP had taken a toll on D4. D4's evidence was that at this time her husband was ill and there were other problems in her immediate family. She needed some respite and these mounting pressures coupled with BP's deteriorating condition led to D4 contacting the CPN and social services for assistance with BP's care.

113 D4 accepted that she had discussed the history of events in the context of preparing her evidence and that must be taken into account. However, D4's written evidence as tested and clarified by cross-examination provided what I consider to be an account of BP's physical and mental condition based on careful well intentioned observation on a daily basis. Whether D4 noticed a marked deterioration in BP in mid-January 2011, as the medical notes record, or mid-February 2011 is not material because the 2011 Will was executed in early January 2011 and also because the deterioration described did not obviously go to BP's testamentary capacity.

114 I consider D4 to be a generally reliable witness. The criticisms made by Mr Dew are, in my judgment, overstated and fall well short of what is required to make a finding that a witness is dishonest and/or deceitful. I conclude from D4's evidence set in the context of the family evidence that she had a good understanding of BP's physical and mental condition and care requirements in the critical period of 2010 to 2011 and that I can place considerable weight and reliance on her evidence.

115 There is one further matter in D4's evidence that sheds light on the family dynamics. D4 did not place this event in time in her evidence beyond saying that it was after D1 had left his wife. D4's evidence is that one morning before work, while D4 was upstairs doing her hair, D1 entered her home through the backdoor and "came storming up the stairs, shouting he wanted to know the name of the person his wife was now seeing ... He came into the bathroom, stood right up close to me in a threatening manner and shouted in my face". On D4's evidence her son then came out of his bedroom and sought to defuse the encounter but was physically assaulted by D1. This gave D4 the opportunity to reach the telephone. She called BP who came round immediately and told D1 to leave. This encounter was put to D1 who took issue with the suggestion that he had assaulted D4's son. I regard D4's evidence as an accurate account of this encounter.

Duncan Parsonage (D1)

116 In relation to D1, Ms van Overdijk submitted that, even allowing for his stated dyslexia, his factual errors as to events and their chronology and simple facts such as the distance from 9NHL to JM's offices, reveal a cavalier attitude to the need for factual accuracy and the basic expectations as to reliability of evidence. Ms van Overdijk was also critical of D1 in relation to the creation and his use of the LPA and D1's management of BP's affairs. Ms van Overdijk was critical of D1 for maintaining that he had been unfairly treated by his parents in relation to property and land in comparison to his siblings and for maintaining that the 2010 Will was BP's own idea. Overall, Ms van Overdijk characterised D1 as controlling, manipulative and, at times, hot-headed and thoroughly unreliable and untruthful.

117 Ms van Overdijk began her closing submissions on the witnesses with a list of specific examples of what she submitted was unreliable and untruthful evidence given by D1. The list included :

- (1) D1 was caught out in his attempt to deny that BP had loaned him £15K towards his share of the purchase and improvement of a property which he repaid. D1 characterised the transaction as an investment by his mother which he repaid with a profit share. He was adamant that he did not need a loan. This was contradicted by an email from his solicitor referring to a loan from BP to D1 and D1 eventually accepted that he had received a loan from BP;
- (2) D1 said in his written evidence that D2 had lived with BP and KP for several years, in fact KP died within three months of D2 going to live with his paternal grandparents;
- (3) following BP's death, D1 had a meeting at Lloyds Bank at which he gave as BP's address his own address and he falsely presented himself and held himself out to be BP's estate administrator for the purpose of taking control of BP's ISA and savings accounts notwithstanding that he knew of the 2011 Will;
- (4) in his witness statement D1 gave 10 examples of BP's behaviour which he placed in 2010 as illustrations of BP's failing memory and capacity. These included BP being unable to write out cheques and suffering from paranoia and believing her children were plotting and thieving when in fact she had misplaced items. Against this there is good evidence of BP having good handwriting into 2011 and of an isolated incident when BP thought KP's books and other items had been taken but they had in fact been packed away. Ms van Overdijk also drew attention to D1's willingness to place events chronologically in his written evidence but disclaim any ability so to do in oral evidence by reason of his dyslexia; and,

(5) at C1's request, Lloyds Bank conducted an inquiry into transactions by the joint attorneys on BP's account between 2011 and 2015 and confirmed that there were some transactions in which D1 had acted alone. D1 described that finding by Lloyds Bank as "absolute rubbish" but that only served to emphasise D1's obduracy and unreliability.

118 In relation to the LPA, D1 said in his written evidence that the idea was proposed by D4 to BP, that BP asked C1 and D1 to be attorneys, and that BP asked BJ to help fill in the LPA form. D1 also said in his written evidence that he did not take BP to see JM to arrange the LPA, he "simply drove her to [JM's firm] once the forms were completed". This is put in context by BJ who referred to completing the form and leaving it with BP on 20.9.10 and by JM whose evidence was that D1 telephoned on 21.9.10 and provided information which caused him to advise D1 that the time had come for BP to enter into a LPA, and that D1 "brought in" the "paperwork" with BP on 5.10.10. In my view, the reality is that D1, not D4, was the instigator. The fact that D1 prompted the LPA is not a matter of criticism. The criticism is that D1 sought in his evidence to distance himself from the making of the LPA. This coupled with his disregard of the requirement that it be exercised jointly adds weight to Ms van Overdijk's characterisation of D1 as controlling and manipulative.

119 It is in this context that D4's evidence of the incident when D1 entered her home and confronted her about who the wife he left was seeing has relevance. D1 did not deny that the incident occurred but he was concerned to refute the allegation that he had assaulted D4's son. Irrespective of what exactly occurred between D1 and D4's son, the incident is an instance of impetuous controlling behaviour and adds further weight to Ms van Overdijk's submissions about D1. I also note here that on more than one occasion during the trial D1 flushed with anger, one occasion was during Ms van Overdijk's closing submissions as she set out reasons for finding D1 to be an unreliable witness.

120 In my judgment Ms van Overdijk's various criticisms are soundly based. Consequently, my general conclusion about D1 is in line with Ms van Overdijk's submission that he is controlling and that where his evidence is not corroborated by independent evidence or consistent with other evidence which I accept it is to be treated with caution.

121 In his written evidence D1 referred to the sale of the Nearby Land in January 2005 and he exhibited a copy of the legal charge by which the vendors' (including BP) interests

in the overage arrangement (referred to in the charge as the Covenant Liability) remained secured against the Nearby Land. In cross-examination D1 explained that he was instrumental in arranging a package with a local farmer who owned surrounding land to provide access to the Nearby Land, which was otherwise land locked. In my judgment, it is no coincidence that D1 was in possession of and exhibited a copy of the legal charge securing the overage agreement. Whether or not BP had it in mind when making the 2010 Will, I have no doubt that D1 has at all material times been alive to this arrangement and its potential value.

- 122 D1 did not accept that BP did or could have written the 9.1.11 Letter. To support this proposition he disclosed two Christmas cards signed by BP using her nickname 'Bill' which are written in very shaky handwriting. I shall return to this and reach my conclusion on the 9.1.11 Letter when considering the expert medical evidence¹³.

Sian Folley (D3)

- 123 Ms van Overdijk was critical of D3's particularised evidence as to her mother's incapacity from mid to late 2010 onwards. Mr Dew submitted that the medical records corroborated the existence of many of the particulars prior to or at Christmas 2010. The particulars included : constantly tidying and writing herself notes; being unable to sort out her own medicine; accusing D3 and D4 of stealing KP's books which had in fact been tidied away into the loft; telling D3 that D4 had entered 9NHL and stolen from her and that she was afraid of D4; repeatedly walking between her children's homes and forgetting who she had just visited; constantly telephoning family members and forgetting who she had called; serving cold tea and losing her cooking skills; losing her way in the village; not remembering her pin number; losing her inhibitions; observed by PG sitting in a window late at night on one occasion and watching traffic on others; losing the ability to knit; and, forgetting to defrost the turkey and muddling up the presents at Christmas. In cross-examination D3 accepted that BP was a tidy person and that the notes could have been written later, ie in 2011; the medicine issue was about BP's arthritis not forgetfulness; D3 admitted in cross-examination that BP had not been told that KP's books had been tidied away; other instances : cold tea, losing cooking skills, forgetting her pin number were based on what D3 had been told by relatives who were not witnesses; and, a number of examples were the subject of contradictory evidence : cold tea, cooking skills and muddling up Christmas presents. In addition, I do not accept D3's evidence that BP was afraid of D4 because after the dementia diagnosis she turned increasingly to D4 and D4 provided increasing support

¹³ See [180] below.

as D3 distanced herself from BP. As to BP looking out of the window at night or watching the traffic, this is not unusual behaviour on the part of a lonely person.

124 D3 sought to explain the rationale of the 2010 Will and speak against the likelihood of the 2011 Will being BP's own wishes on the basis that BP had wanted to benefit both D1, to treat him equally in relation to gifted property, and D2, as the favourite grandchild.

125 In relation to the missing brooch, a Christmas 2010 present from Aunt Mavis to BP, D3 said that she had found it behind a cupboard and had returned it to Aunt Mavis after BP's death. Ms van Overdijk confronted this evidence by producing a death certificate which showed that Aunt Mavis had died in 2013, some two years before BP. In my view D3's evidence was mistaken.

126 In relation to the 2011 Will D3 explained her statement as her assumption that D4 had put BP up to changing her will. D3 persisted in asserting that BP and her sister Iona were not close, based on a 5 year age difference, the distance between where they lived, and the fact that BP tended to telephone her sister not the other way round. However, in cross-examination D3 acknowledged that she had to accept that they were frequently in touch by telephone and discussed a wide range of common interests including the family and sheep farming. Referring to a letter from Iona to D4, D3 agreed that Iona was correct to say that it was D3 and not D1 who had had been first to tell her of her sister's death.

127 In the light of Ms van Overdijk's cross-examination, my conclusion is that D3's evidence as to BP's mental incapacity in the latter part of 2010 is unreliable.

Beverly Jones (BJ)

128 Ms van Overdijk was critical of BJ's assessment of BP's declining mental capacity because it appeared to be based, in so far as examples or reasons were given, on BP's method of dealing with her post which, although it did not accord with BJ's own office practices, was, in my view, not out of the ordinary.

129 In the course of noting JM's evidence and the contemporaneous documents he provided, I have considered the evidence BJ gave about BP's custody of and dealing with the LPA¹⁴. That evidence all preceded the provision of contemporaneous documentation by JM and was shown to be unreliable by what JM provided.

¹⁴ [48] – [50] above.

Tomas Parsonage (D2)

- 130 Unlike the other witnesses who gave oral evidence, D2 did not observe the trial before he attended for cross-examination and he left promptly at the conclusion of his oral testimony.
- 131 D2 is aged 23 years and is BP's second youngest grandchild. There is a significant age range. D2 agreed that, so far as he knew, BP regarded all her grandchildren as equally important and gave cards and gifts to all. D2 was not aware of any preferential treatment. D2 agreed that other grandchildren, certainly Mark and possibly Simon, had strong relationships with D2.
- 132 D2 referred to seeing BP walking around the village and, on one occasion after September 2010, escorting her home. The relevance of September 2010 is that it was the early part of D2's year 10 schooling and, when trying to place the one occasion, D2 could only say that it was at some point in that academic year (which ran beyond March 2011). I note that D2 only escorted BP home on one occasion and that his evidence was not that she needed escorting home then or on any other occasion that he saw her walking in the village.
- 133 In his written evidence D2 referred to the 9.1.11 Letter and expressed his opinion that it was very different from how BP used to write. Her habit was to write on lined paper and her writing tended to be in capital letters and the content was formal and to the point. D2 described the style of the content as rambling and added that she would certainly not have signed off with the phrase "thank you". I do not read that letter as rambling. There are four paragraphs, each addressing a different point : the 2011 Will and the process of its execution, the possible connection between D1 and JM and the expectation of confidentiality, the rationale for revoking the 2010 Will and making a different will, and arrangements for paying JM's professional fees. The language is clear and the sentences are appropriately structured and punctuated. In cross-examination D2 could not say why he included that passage in his statement. D2 thought the layout unusual and that it read strangely when compared to messages he usually received from BP. D2 did not disclose any similar length letters received from BP. When asked a direct question whether or not he accepted that the letter had been written by BP he said that he did agree that she had written the 9.1.11 Letter.
- 134 In his written evidence D2 referred to BP reverting to using cookery books in about summer 2010 and, as her memory failed, making inedible apple pies missing vital

ingredients. Referring back to cookery books as the memory fails suggests to me continuing powers of logical analysis and thought, and self-awareness.

- 135 Faced with the invidious task in cross-examination of justifying the residuary gift to himself in the 2010 Will, D2 explained, as he had done in his witness statement, that as a very frequent visitor to BP she would tell him not to worry about money, which he always took as a general statement, although now he thinks there may have been more to it.
- 136 D2 gave his evidence openly albeit, understandably, nervously. Overall, and perhaps as much for the general picture painted of BP as anything, D2's evidence does not undermine the proposition that, whatever the state of her culinary skills, BP appeared to retain her critical mental faculties through to the time of writing the 9.1.11 Letter, which followed on from execution of the 2011 Will.

Neil Dunford (ND)

- 137 ND is a cousin of BP's children and was a next door neighbour to BP from about 1980 until March 2011. ND gives four particular examples of unusual behaviour on BP's part. First, in July 2010 BP asked ND if he was "settling in ok" notwithstanding that ND had been a neighbour for 30 years; secondly, he recalled seeing BP standing at the bottom of her garden one evening in September or October 2010 and commenting that it was late for BP to be out, to which she replied "Is it?"; thirdly, in December 2010 she signed a Christmas card "Beryl Parsonage at number 9"; and, fourthly, in on 20.3.11 he found BP wandering and shivering in a field at the back of her house just after dawn on a frosty morning and ND was not sure that BP recognised him. The first three examples may be explained as absentmindedness and do not carry weight of any significance on the question of testamentary capacity. The fourth occurred at a time when all parties agree BP's mental capacity had taken a significant downturn and was at best questionable.

The family witnesses ~ the evidence about gifts of property and land

- 138 An important element in this family's dynamics is said to be the differing extent to which each of the siblings was or was not assisted by KP and/or BP in acquiring a home or land. This is important to the rationale for both the 2010 Will (on D1's case BP's desire to correctly readjust to reflect past inequality) and the 2011 Will (on C1's case BP's later desire to rebalance and correctly reflect the limited extent of inequality of treatment of the siblings).

- 139 This is an issue on which there is a body of contemporaneous evidence to assist with dates of transactions, agreed prices and also with renovation or improvement work undertaken but not expressly with open market value. Valuation evidence has been provided by a single joint valuation expert witness, Timothy Boot FRICS ('TB'). He is the principal of Boot & Son, chartered surveyors, and at the relevant times his father, then principal of Boot & Son, the local estate agent and surveyor, carried out valuations for at least some and possibly all of the transactions in question. TB has not been able to locate the contemporaneous valuation records; that is unsurprising. His valuation evidence is based on drive by assessments, assumptions, and his view of comparable properties for which contemporaneous valuation evidence is available or calculated. To an extent TB has based his valuation work on a house price index of the Nationwide Building Society.
- 140 D1 alleged that C1, D4 and D3 were gifted by KP and/or BP, or received material financial assistance from KP and/or BP in the purchase of, their respective homes or other land. Raising this issue, D1 said that there was a family tradition of the older generation helping the younger generation to get on the property ladder. D1 gave no direct written evidence as to the detail of any help given to his siblings and relied on TB's expert valuation evidence. I do not doubt that D1 is sincere in his belief that C1, D4 and D3 received gifts or material finance assistance, whether he is correct is another matter. C1's evidence included that KP and BP kept their financial affairs private to themselves and that every property transaction was carried out fairly and based on independent valuations, not least because they included family estate sales and independent market valuations were required for IHT purposes.

75 Green Lane ~ C1's home

- 141 In relation to the acquisition of his home at 75 Green Lane ('75GL') in 1979, C1 explained how the property came to be dealt with by KP as an executorship sale and gave detailed evidence as to its poor condition, which included many colour photographs. During cross-examination C1 accepted that he received some benefit through being permitted to defer payment of part of the consideration equal to the sum withheld by the building society mortgage lender (£3K) pending completion of specified works. C1 said in cross-examination that the probate value, which had been given by TB's father, was £6,700 and he had agreed the price asked by KP, which was £10K. At the time the mortgage offer had been £9K subject to a withholding of £3K. Building works costed at £7K had been undertaken for which a grant of £3K was also obtained. C1's evidence was that, at the time, he understood himself to have agreed a price

which reflected open market value. He and ShP undertook much of the repair and building work and the redecoration themselves. There is ample photographic evidence to support C1 and ShP undertaking such work.

142 DI contended that C1 and ShP did receive a significant benefit, beyond the cash flow arrangement, because 75GL was worth considerably more than £10K in its dilapidated and unmodernised state in 1979. To support this D1 referred to and based his case on TB's evidence.

143 For his valuation report TB said that he assumed that 75GL was an unmodernised cottage in poor condition and badly affected by mining subsidence (which he had observed from a roadside inspection, which was the only inspection TB had carried out). He had assumed that the property had been divided into three plots and that there would be planning permission for three dwellings. On that basis TB gave a valuation in 1979 of £22,500. His brief report evidence was expanded upon in answer to written questions and in cross-examination. TB said that his father had valued a half-share in the freehold at 75GL as at 9.1.79 at £3,350 for probate purposes and that half-shares were normally valued at 40% of the full value, thus the full value would have been in the region of £8K. TB also said in his written evidence that the Nationwide House Price Index indicated that by the final quarter of 1979 older style detached properties in the West Midlands increased by 42%, which would have reflected a value of £11,360 for the full freehold without taking into account development potential. TB did not produce a hard copy or screen shot of this index. As noted above, TB also assumed that part of the garden or land at 75GL should be taken to be plots with planning permission for two additional dwellings, which he valued £6,500 each subject to a discounting margin of 15%. TB valued the then existing detached property itself on the basis of being repaired and with a reduced garden at £16K subject to an allowance of £4K for essential repairs. This produced an overall value of £23,050 which TB rounded down to £22,500. TB also produced a table of properties he regarded as comparables, which were said to be consistent with his valuation.

144 In cross-examination TB confirmed to Ms van Overdijk that his actual knowledge of the properties of C1, D4 and D3 did not extend beyond drive-by observations and that his approach to valuation was to look for development potential. This latter point disregards the closeness of the family and their desire to live almost on each other's doorstep.

- 145 I find TB's evidence in relation to 75GL to be of no real assistance. TB appears to have looked to the fourth quarter of 1979 to mark property price movements from the first quarter because 75GL was conveyed in that quarter. However, the mortgage offer was received in July and the price must have been agreed by then. This caused me to check the Nationwide House Price Index for the West Midlands online; pausing here, I note that there is no publicly available index for a sub group of older style detached properties in the West Midlands (as referred to by TB) and take into account that there may be such a specialist index available to professional surveyors, but it was for TB to produce the evidential material he relied upon in order to assist the court. Taking 1979 Q1 as the base, the increase to Q3 was 13.83% and to Q4 was 21.31%. Even if, which I do not accept, the relevant uplift adjustment to value was from Q1 to Q4 of 1979, the general level of increase appears to have been only half that put forward by TB. Next, the idea that part of the garden of 75GL should be assumed to have been divided to accommodate development plots for two additional dwellings is not supported by any contemporaneous material drawn to my attention. Further, in answer to Ms van Overdijk's questioning in cross-examination, TB said that he was not aware that planning permission for additional dwellings would only have been available if the original dilapidated dwelling had been demolished and the whole plot divided for two (not three) dwellings. I also bear in mind that access to market information in 1979, even for professionals, was very different to access to market information in the 21st century and that the valuation obtained for the sale in 1979 was from an experienced surveyor working in the locality. Taking all of this into account, I do not regard it as safe to place any weight on TB's valuation of 75GL based as it is on drive-by evidence and incorrect assumptions. Given the flaws in TB's direct valuation evidence, it is unnecessary to consider the properties TB put forward as comparables.
- 146 When C1 gave his evidence in cross-examination as to the benefit of advantage he received when purchasing 75GL I formed the view that he was probably giving both his honest recollection of the circumstances surrounding and consequences for him and ShP of that transaction and a fair view of how it should be evaluated now. Having read, heard and rejected TB's evidence, I am fortified in that view.
- 147 I conclude on the evidence before me that the only material advantage C1 received was the cash flow advantage of being able to defer payment of £3K pending release of that sum by the building society.

7 Norton Hall Lane (7NHL) ~ D4's home

- 148 D1 also refers to property benefits or gifts conferred on D4 and her husband, Derek Taylor ('DT'). First, there was the conveyance of 7NHL as a plot of land in July 1981. D4 said that in mid-1980 she and DT had decided to sell their then current home and move closer to KP and BP. They had asked whether they could buy the plot of land adjacent to 9NHL which became 7NHL. The plot did not have the benefit of planning permission but DT and D4 were confident that it would be granted. They obtained three open market valuations of the land and gave them to KP; it is not expressly confirmed in the evidence that TB's father provided one of the valuations but he was the local estate agent and valuer and had provided other valuations. D4's evidence was that KP then set the price for the land at £8K. D1 described KP as running a very successful family business; accordingly, I do not think the impact and likely availability of planning permission would have been lost on KP. Planning permission was granted in August 1980. In December 1980, a mortgage offer of £10K was made by the Derbyshire Building Society, addressed to D4 and DT at 9NHL, based on the freehold land and a satisfactorily completed building having a price or value of £20K. D4's evidence was that not less than £12K was spent on building her home at 7NHL, and that, in addition, she and DT carried out part of the construction work themselves, including the plumbing. The land was then conveyed on 26.6.81. As with C1, KP had agreed to defer receipt of part of the price until the release of the sum withheld by the building society subject to satisfactory completion of the building work.
- 149 D1 relied on TB's retrospective valuation of 7NHL at £30K when conveyed in 1981 as having conferred a substantial element of gift in addition to the cash flow advantage of deferral of payment of the agreed price.
- 150 In his report and oral evidence TB attributed £10K to the value of the land at the time of conveyance with planning permission in July 1981 and £20K to the value of the dwelling as constructed. In written questions TB was asked to value the land on the basis that the sale of the land to D4 had been agreed before the grant of planning permission to which his answer was that the conveyance post-dated the planning permission and therefore the sale occurred at a time when planning permission existed. TB's own table of nine comparable properties included four which had asking prices of less than £20K. These are in line with a land cost of £8K and building costs of £12K. There is no alternative evidence before me as to the value of 7NHL as a plot of land before the grant of planning permission.

- 151 It is clear that, as with C1, D4 received a cash flow advantage when purchasing land adjacent to KP's and BP's matrimonial home at 9NHL. It may also be that KP and BP would have thought it likely that there would be medium and long term unquantifiable benefits to them of having D4 as an immediate neighbour. Irrespective of that, the evidence does not point to more than a possibility that KP and BP conferred an element benefit, through sale at a discount on market value, on D4 when she and DT bought the land which is now 7NHL. In my view the probability is that the benefit was confined to the cash flow advantage. Put another way, the evidence does not establish that the land was probably worth more than £8K.
- 152 D1 referred to a further gift to D4 of a small plot of land carved out of 9NHL's garden and transferred by BP to D4 and DT on 11.5.05. D1 said in written evidence that KP had not transferred further land to D4 during his lifetime because he did not trust her, but gave no details to explain that assertion.
- 153 D1 relies on a valuation of this land by TB. TB acknowledged that there is no market evidence of garden land transactions available and his valuation of £5K was based on his experience. In answer to a written question about that area of garden being land locked, TB agreed but said there were other potential purchasers whom he identified as the owners of 9NHL, the owner(s) of 5 Norton Hall Lane, and the owner of farmland immediately to the rear.
- 154 Judging by the approximate plan to the transfer, the land transferred added about 50% of the area of the plot at 7NHL to its rear garden and reduced the plot of 9NHL by 25% of what remained after the then recent sale of the Nearby Land to Persimmon Homes.
- 155 D4's evidence was that DT had cultivated that area of land for her parent's benefit before transfer. D4 said that BP had wanted to transfer that small area of her own land to recognise that BP had been attentive and hospitable to BP as a neighbour, including providing Sunday lunch every Sunday since KP died, i.e. for a decade.
- 156 In 2005 BP was 76 years of age and there is no evidence that she was then in other than good health physically and mentally. Further, there is no evidence that she had any use for that part of her back garden. She had just sold the Nearby Land and received her share in the £100K proceeds. Seen in the context of the family dynamics, the gift is unsurprising.

157 As to the basis for a value of £5K, of the potential buyers the owner of 9NHL was BP, the transferor, an unrealistic assumed purchaser. Further, according to the plan in evidence, the local farmland has no boundary with the land transferred to D4, rather the south-east corner of the transferred land meets the north-west corner of the farmland; it is difficult to see how that small area of land would be of any interest to the farmer. Had the land gifted to D4 (which shares its full south-eastern boundary with the Nearby Land) been of development interest or value no doubt it would have been sought by Persimmon Homes as part of the then recent sale. The plot at 5 Norton Hall Lane already had a substantial garden. As with his evidence about C1's property, I conclude that TB's evidence is of no assistance, not least because he assumes that BP (the transferor) would be a potential buyer at £5K. I also do not regard this transfer as an example in any way connected to an asserted family tradition of the older generation assisting the younger generation in getting on the property ladder.

87 Church Road (87CR) ~ D3

158 The evidence in relation to D3's home is that in October 1986 BP agreed to sell 87CR to D3 for £15K. 87CR was an asset in the estate of BP's late father of which she was administratrix and a/the beneficiary. The property was unmodernised; it did have an indoor toilet and bathroom but did not have off road parking. D3 obtained a mortgage of £6K. The purchase was completed in January 1988. D3 was then divorced. D3 obtained an improvement grant of more than £5K to redevelop and modernise 87CR more than two years later.

159 D1 relied on TB's evidence to support his contention of material gift benefitting D3.

160 TB's valuation of £25K was based on a valuation as at completion in January 1988. TB assumed that 87CR required considerable repair and modernisation. In answer to questions TB said he spent five minutes assessing 87CR from the kerbside and that the properties he selected as comparable were assumed to be of average condition.

161 Even at its best, TB's evidence is loose and at a date more than two years after the price had been agreed.

162 That said, it is clear that D3 did secure a timing advantage of being able to lock in a price in 1986 which was held to completion in January 1988. The Nationwide House Price Index for the West Midlands shows an increase on a property costing £15K in Q3 of 1986 to Q1 of 1988 of 24.54%, which is some £3,680. On that basis D3 was given some support in purchasing a home by BP.

163 Overall, the evidence shows that C1, D4 and D3 received some assistance from KP and BP in purchasing their homes. The assistance in each case was essentially a cash flow advantage. For C1 and D4 the cash flow advantage was linked to a limited sum withheld by the mortgage lender, for D3 it was deferral of the full purchase price. Overall, the evidence falls far short of that required to make a finding that the advantage to any of C1, D4 and D3 was the equivalent to a gift material value or material financial assistance as contended for by D1. D1's belief and case to this effect is misconceived.

The expert medical witnesses and their evidence

164 Expert medical evidence as to BP's testamentary capacity at the time of the 2011 Will was given by two consultant psychiatrists. C1 instructed Dr Hugh Series ('DrHS'), who has been a consultant old age psychiatrist at Oxford Health Foundation NHS Trust and its precursor organisations since 1995. D1 instructed Dr Rajiv Menon ('DrRM') who was a consultant psychiatrist at the Chelsea & Westminster Hospital from 1995 to 2011 and then worked at the St Charles Hospital in London until his retirement in 2014. Each provided a written report in June 2018 and gave oral evidence at trial. In addition, and as is usual, they filed a joint statement which is dated 12.7.18.

165 The experts agreed that BP had no physical health problems that were likely to have affected her testamentary capacity at the relevant time, 6.1.11 to 9.1.11. They agreed that BP suffered from dementia, and that on the medical evidence it was unclear whether the diagnosis was Alzheimer's disease or vascular dementia or a mixture of both, albeit that the distinction would not have been material to the question of testamentary capacity. In oral evidence, and by reference to reviewing the medical records through to March 2011, DrHS thought there to be insufficient evidence of symptoms of vascular dementia and opined that the dementia was probably Alzheimer's or mixed; however, a conclusive diagnosis could only be ascertained by a post mortem which had not been undertaken.

166 The experts agreed that dementia gets progressively worse and that a diagnosis of dementia does not of itself mean that a person lacks testamentary capacity, rather that over time, as the disease progresses and the symptoms become more severe, testamentary capacity is jeopardised. The experts also agreed that in January 2011, because of her dementia, BP would have been more vulnerable to undue influence

DrHS explained that even though the disease is one of steady progression, there may be sudden significant deteriorations caused by external events, such as a change in carer or care regime. DrRM agreed that anxiety affects dementia sufferers.

167 As to BP's understanding in early January 2011, the experts agreed that, with some assistance, BP would have understood the nature of the act of making a will. DrHS was of the view that making a will is a familiar concept and, given the simplicity of the terms of the 2011 Will, BP probably would have understood the nature and effect of that will without assistance. In the joint statement, DrRM considered that BP would have needed assistance even for a simple will. In his report DrRM expressed his concern that BP may have lacked testamentary capacity at the time of the 2011 Will based on her difficulties with orientation and short-term memory. DrRM also expressed his concern that BP did not understand who had appropriate claims on her property/estate because BP did not offer a valid or meaningful explanation for the changes from the 2010 Will. DrRM did not expressly state in his report that in his opinion BP lacked testamentary capacity, but he did make this clear in the joint statement; he said that its omission from his report was an oversight.

168 Both DrHS and DrRM said in oral evidence that older people feel strongly that their affairs need sorting out and may be strongly motivated to write their will. DrRM agreed that the emotional importance of making a will tends to clarify thinking and that making the 2010 Will would have been emotionally important to BP, but he did not consider that BP would have had the same motivation for will making a year later. DrHS considered that the desire to make a will may be a very strong feeling in an older person and that person may neglect or overlook many mundane aspects of everyday life but really want to make, and be motivated when making, a will.

169 Questioned generally about a dementia sufferer making a will, DrHS said that research by distinguished academics in the field led to a view that some cognitive functions are preserved or maintained while others diminish and that the functions in the former category very often centre on what is familiar and those things and persons that the sufferer cares about. It followed from this when applied to BP that the whole process of making the 2011 Will, from deciding to revise the 2010 Will and contacting JM through to executing the 2011 Will, would have been within BP's cognitive functioning capacity. DrRM held a different view. He said that for him the idea of BP telephoning JM on 6.1.11 and initiating a conversation about changing her will and the content of the conversation as noted by JM "did not add up". However, in cross-examination he said

that if JM's file note and evidence as to BP's conversation on 6.1.11 was accepted and there was a finding that BP was not aided for that telephone call, he would agree that she understood the process of writing a will and what was required to complete that process properly. I have so found.

- 170 DrHS considered that BP would not have had a detailed grasp of what comprised her estate, but could well have had a very general appreciation. He considered that BP would have been able to decide that she wanted to make a will, would have realised that she needed assistance from a solicitor, and would have been capable of formulating a reasonably clear idea of what she wanted to do or achieve and what she needed to do to achieve it. Thus, she would have been able to rationalise that she wanted to be fair to her children, which at the time was the rationale for each of the 2010 Will and the 2011 Will, and, recognising that she was coming to the end of her life, wanted to put her affairs in order. DrHS considered it unlikely that without a reminder or prompting BP would have remembered property transactions from many years ago or the detail of the 2010 Will, but, in his opinion, she would have understood the 2011 Will and what it achieves without assistance. DrRM considered that the process of making a will was beyond BP in January 2011 and that she would have been unable to comprehend that she had four domains of assets (a property, other land, investments and cash) and, even if assisted, unable to hold that information for long enough to make a will.
- 171 In relation to JM's letter of 7.1.11 and the enclosed draft of what became the 9.1.11 Will, DrHS thought that the short length and the clarity of expression in the content of both the letter and the draft of the 2011 Will were such that BP would have been capable of understanding them and that she was making a material change to the disposition of her estate. DrRM's reservation was as to BP's ability to retain the information contained therein sufficiently to act upon it without further assistance.
- 172 In their joint statement DrHS and DrRM agreed that BP probably could not have written the 9.1.11 Letter without assistance. DrHS qualified that in the joint statement by adding that BP could have written the 9.1.11 Letter and have understood and approved its contents. DrRM disagreed. He considered that BP's cognitive impairment was greater than it appeared and her level of cognitive impairment was such that she probably could not have written that letter or fully understood its contents.
- 173 In cross-examination, DrHS revised his opinion significantly. He said initially that on further reflection he could not express a firm opinion one way or the other on whether

BP could have written the 9.1.11 Letter without assistance. The first sentence was very complex, but looking at BP's MMSE sentences she clearly thought in that way before and after 9.1.11; the 2011 Will will have been much more important emotionally than MMSE tests, and it was not unlikely that she would have risen to the task. Mr Dew cross-examined DrHS at length and in detail on the 9.1.11 Letter. This caused DrHS to conclude that the more he thought about it in the context of the contemporaneous medical records and the other available contemporaneous evidence, including JM's file, the more likely it seemed to him that BP had written the 9.1.11 Letter without assistance. In relation to the medical records DrHS reconsidered both the sentences written by BP in the MMSEs and the range of cognitive functioning tested by the MMSE test. The MMSE sentences were complex in thought and structure; the areas on which BP scored badly (orientation and short-term memory) were of less significance to testamentary capacity than other areas (executive function, recognition, deduction (both arithmetic and the process of deducing), analysis, copying and composition) on which BP "got a lot right". DrHS was also questioned by reference to the medical records in November 2010 and February 2011, including Dr Acey's letter after seeing BP on 22.2.11; as to which DrHS noted that there was no objective comparison by Dr Acey of BP's condition in November 2010 and in February 2011, and said that, while a gradual deterioration would be expected, neither Dr Acey's report nor the March 2011 MMSE result objectively suggested a worsening of BP's condition. DrHS considered that a change in carer pattern (D4 went on a short holiday in March 2011) and BP's admission to a care home (also in March 2011) initially on a respite basis, may have precipitated a crisis for BP and a sudden material relevant deterioration. Looking at the content of JM's 7.1.11 letter to BP and the 9.1.11 Letter from BP to JM, it was probable that BP knew that by the 2011 Will she was departing from and changing the 2010 Will. The four ideas expressed in the 9.1.11 Letter were simple, it was the structure of the language and its form of expression that was complex and there was contemporaneous evidence that BP thought in that way. In re-examination, DrHS referred to the June 2011 MMSE and BP's very poor performance including her inability or unwillingness to write a sentence. This reinforced his view that the transition from living independently at home to moving into a care home impacted adversely on BP, including by causing her to become agitated and anxious or distressed. This was also manifested in her recorded behaviour and would explain a very quick significant reduction in cognitive functioning and ability.

174 In cross-examination DrRM gave some ground but maintained his conclusion that BP could not have written the 9.1.11 Letter or composed it without assistance. DrRM's

reasons included in particular that the request for confidentiality and the detail of the rationale for changing the terms of the 2010 Will were then beyond BP. DrRM was challenged on his opinion that BP could only have written the 9.1.11 Letter with significant assistance, such as copying or by dictation. In cross-examination DrRM volunteered that that might have been too high a conclusion and added that he was by no means saying that BP was significantly impaired or that she could not give her attention to such a task. DrRM nevertheless thought that the content of the 9.1.11 Letter required working out and was too complex and too sophisticated for BP to have crafted it unaided, but he acknowledged that she would have been capable of giving sufficient attention to the content. Each paragraph was very complex, too sophisticated and too much for someone of BP's level of short-term memory if unaided. Further, DrRM said he was not sure how emotionally significant the 2011 Will was to BP.

- 175 DrRM considered that the family narrative of BP's forgetfulness as recorded in BP's medical records was well consolidated and that overrode the MMSE results when it came to BP's relevant competence, and the MMSE scores masked BP's true level of impairment. DrRM agreed that based on the medical records BP's dementia appeared mild until months after the 2011 Will and that there was a significant deterioration between March and June 2011, but he said he felt that BP's dementia was worse than it seemed.
- 176 Before drawing conclusions on the expert medical evidence, I note here that after approximately 40 minutes of DrRM's cross-examination, which lasted in total for two hours, I noticed him referring to notes he had brought with him into the witness box and had to tell him to stop referring to documents not in the trial bundle.
- 177 In my judgment, DrHS based himself firmly in the contemporaneous evidence and explained his reasoning as to what could be extrapolated from that and what could not. He pieced together BP's personality and cognitive powers in a logical and coherent way which was consistent with the objective contemporaneous evidence and was internally consistent.
- 178 By contrast, the lynchpin for DrRM's opinion was that BP's condition must have been worse than it appeared. How this affected DrRM's evidence is well illustrated by the concession extracted in cross-examination in relation to the 6.1.11 telephone call and the reliability of JM's notes and evidence¹⁵. Further, DrRM's view that BP did not offer

¹⁵ [169] above.

a valid or meaningful explanation for departing from the 2010 Will is at odds with both what JM noted as BP's reasoning on 6.1.11 and BP's express reasoning in the 9.1.11 Letter. DrRM appeared to base his opinion as to BP's likely lack of motivation to write a further will within a year of her then current will on proximity in time, but this disregarded the evidence as to the importance to an elderly person of making a will and putting her/his affairs in order and the evidence that BP had come to hold the view that the 2010 Will worked a wrong which needed righting. In DrRM's evidence the MMSE results had to be explained away whereas in DrHS's evidence he considered the various elements tested by the MMSE and relevant to testamentary functioning and capacity.

179 In my judgment, DrHS's evidence is to be preferred to that of DrRM where they are in conflict. I do not regard DrHS's evidence as undermined by his change of position on the 9.1.11 Letter. On the contrary, I find his detailed reconsideration under testing cross-examination to have been carefully thought about and convincing and to have identified why it is probable that BP was able to write the 9.1.11 Letter. Both experts agreed that based on the medical records BP's dementia appeared mild until between March and June 2011. DrHS provided a cogent explanation for the sudden decline, whereas DrRM based his contrary opinion on what the family reported to the medical practitioners treating BP in preference to, and as overriding, the medical evidence itself.

180 In reaching my conclusions on the 9.1.11 Letter I have kept in mind the two Christmas cards signed by BP which D1 disclosed and relied on as evidence that the 9.1.11 Letter was beyond BP's capabilities. The authenticity of BP's signature as 'Bill' was not challenged. However, the handwriting is completely at odds with the MMSE sentences written both before and after Christmas 2010 and unquestionably evidencing spontaneous thought and writing by BP. Moreover, BP executed the 2011 Will signing her name legibly (albeit with a full stop after each forename). In my judgment, the likely explanation is that given by DrHS, in effect that functioning may be driven by the relative importance of the task. Without doubting the authenticity of BP's signature on the 2010 Christmas cards, I reject the evidence of D1 that BP was incapable of writing the 9.1.11 letter as inconsistent with other factual and expert evidence and erroneous. My finding is that BP probably did write the 9.1.11 Letter

Findings ~ BP's appreciation of her estate

- 181 I start by noting that the independent evidence, specifically that provided and given by JM, has led me to the conclusion that BP herself did not appreciate that her estate included a valuable contingent asset either at the time when she made the 2011 Will or one year earlier when she made the 2010 Will.
- 182 I regard BP's materially incomplete understanding of her estate as being of no significance to the 2011 Will because her objective was to ensure that her entire estate at death was divided equally between her four children. Equality of treatment between her children was BP's overarching objective from September 2009 onwards. By the 2011 Will BP provided that her entire estate should fall into residue and be divided equally between her four children. Thus, looking to BP's descendants, all beneficiaries of the 2011 Will benefit equally.
- 183 However, BP's failure to appreciate the full extent of her estate is of material significance to the provisions of the 2010 Will because equality of treatment between her children was also the governing intention underpinning the 2010 Will. Irrespective of whether or not the underlying rationale for the 2010 Will was well founded, the potential effect of the overage agreement on BP's residuary estate has a material distorting effect on the division of BP's estate between her children (and for this purpose it is immaterial whether D2's legacy is treated as aggregated with D1's benefits).

The 2011 Will

- 184 The first question is whether BP understood the nature and effect of a will at the relevant time, that is on 6.1.11 when she gave instructions to JM and on 9.1.11 when she executed the 2011 Will. Based on the evidence of D4, which I accept, BP was considering her testamentary disposition over Christmas 2010 and reached a conclusion that her then current will, the 2010 Will, was wrong, i.e. it did not reflect her wishes as to how and to whom her estate was to be disposed of upon death because it caused her children to be treated unequally. What sparked that thinking process is not explained by the evidence. What does also appear though is that BP was conscious of the need to act while she had capacity.
- 185 It is clear from JM's note of BP's telephone call on 6.1.11 that he understood BP to intend to make a new will with very different provisions from those of the 2010 Will. He did not have concerns that BP was being coached or manipulated at the time of the

telephone conversation. Further, although JM was not in a position to assess BP's testamentary capacity during the telephone call, nothing occurred during that conversation to alert him to the that BP might lack such capacity. During that conversation BP gave clear instructions by reference to which JM drafted a will for BP by reviving the 30.9.09 draft and altering clause 2 to substitute C1 for D1 as an executor. That draft will was sent to BP under cover of a letter dated 7.1.11. DrRM's evidence, as a result of cross-examination, was that at that time BP understood the process of writing a will and what was required to complete that process properly. That accords with DrHS's evidence.

186 There is no evidence that anyone other than BP received and opened the envelope from JM. There is no evidence that BP did other than read JM's 7.1.11 letter in the context of receiving what became the 9.1.11 Will. That letter is headed "Your Will", in bold font, and refers to the enclosure as a draft of BP's "revised Will".

187 This was acted upon by BP without delay. BP executed the 2011 Will in the presence of two neighbours who knew her well. They were willing to and did make witness statements recounting their recollection of that event and adding that nothing unusual occurred. I attach some weight to the statements of KW and PG as corroboratory evidence notwithstanding that their statements were not tested by cross-examination and their hearsay notices not supported by medical evidence.

188 D4 was also present, but she was needed to escort BP to and from KW's home because BP then had a toe injury. I have accepted her evidence as generally reliable but I do not take it into account on this issue, save to state that the evidence neither establishes nor justifies the drawing of an inference that she put BP up to making this will.

189 I accept DrHS's evidence that in later life people are able to focus intently upon their testamentary disposition.

190 The objective evidence points clearly to a finding that BP knew that she was directing how and to whom her estate was to be disposed of upon her death when she executed the 2011 Will.

191 In addition, by the 9.1.11 Letter, written on the same day as but after execution of the 2011 Will, BP confirmed her understanding of what she had done in her opening

paragraph (where she refers to the 2011 Will in upper case letters by way of emphasis).

- 192 The second requirement under Banks v Goodfellow is that BP should have understood the extent of the property of which she was disposing. Counsel referred to Scammell v Farmer and the gloss that an understanding “not very wide of the mark” will suffice. This is potentially problematic. Having regard to JM’s evidence, it is highly likely that BP did not have in mind or any have regard to the potentially very valuable contingent asset represented by the overage agreement.
- 193 On the other hand, if that is a vitiating factor, it applies to both the 2011 Will and BP’s knowledge and approval of the 2010 Will, which would, because the 2011 Will makes the same provision as on intestacy, complete the circle.
- 194 Viewed another way, what does appear from the 2011 Will is that BP’s testamentary intention was that whatever her estate might be it should all fall into residue and be divided equally between her four children. That is in line with the acknowledgment in Simon v Byford that inability to remember all the circumstances relevant to the division of an estate between the people the testator wishes to benefit is not a vitiating factor. In the particular circumstances of the 2011 Will, my view is that it does not matter that BP did not have in mind a contingent asset which could add some 50% to or more than double the size of her estate because BP’s overarching objective is still achieved..
- 195 Thirdly, the court must be satisfied that BP understood the claims upon her of both those included in and those excluded from the 2011 Will. The logical range of potential beneficiaries were BP’s children and grandchildren. In addition, it is common ground that the principle governing BP’s thinking was fairness to her family, which was equated with broadly equal treatment. It is also clear that BP’s overarching intention was to treat her children equally and, save possibly to a minor extent, not look to the following generation of grandchildren, that would be a matter for her children.
- 196 I pause here to consider the structure of the 2010 Will as BP would have understood it in 2010-2011. It is a matter of record that, although the property market had been buoyant in 2005, the effect of the banking crisis of 2007-2008 was still having a material impact on the housing market in January 2011, thus the value of 9NHL will probably have been less than that put forward by D1’s solicitor in January 2016. As to BP’s other assets, there is no evidence of material change in BP’s other assets

between 2010-2011 and January 2016. In January 2016 BP had £110K in cash and approximately £53K in ISA and other investments with Scottish Widows. Under the 2010 Will 9NHL passed to D1. The four children were each to receive a legacy of £35k, which totalled £140K. Thus, some £23k was left over to pay debts, funeral expenses and IHT with the balance falling into residue. On this basis BP's 2010 Will would have provided approximately £10k to each of D2 and D3 as residuary beneficiaries. In my view this is what BP would have understood she had provided for by the 2010 Will.

- 197 Over Christmas 2010 BP decided that the devise to D1 distorted the governing principle of fairness to her children because, as she explained to JM on 6.1.11 (as BP noted in the 9.1.11 Letter and perhaps JM covered by but did not expressly note in the first sentence of his 6.1.11 telephone attendance note) C1, D3 and D4 had all paid for their property or land at what BP considered to be then current market values.
- 198 In broad terms the factual evidence of C1, ShP, D3 and D4 supported the proposition that they each paid a commercial price for the properties they bought and that there was a logical reason for the land gifted to D4. In addition, the factual evidence was not undermined by TB's opinion evidence as to property values or as to the value of the land gifted to D4. On this basis, the devise to D1 under the 2010 Will was contrary to BP's intention to treat her family equally and regard that as the appropriate way to address the claims upon her.
- 199 The 2011 Will also had the effect of removing the limitation of pecuniary legacies to C1 and D4, removing the combined benefit of the pecuniary legacy and half-share of residue to D3, and completely removing D2 from any benefit under BP's will.
- 200 It is instructive to consider what the outcome would be likely to have been had the 2010 Will remained as BP's last will. D1 would receive 9NHL and a legacy of £35K (in aggregate at BP's death a value of some 290K); C1 and D4 would each receive £35K; D3 would receive £35K plus certainly approximately £10K and not less than a further £100K, and potentially up to a further £250K; D2 would receive certainly approximately £10K plus not less than a further £100K, and potentially up to a further £250K; and, BP's other seven grandchildren would receive nothing. The disparities speak volumes given BP's overarching intention.
- 201 BP's rationale for revising her 2010 Will was sound and it accorded with her overarching objective, which remained constant from September 2009. The totality of

the evidence leads me to conclude with confidence that, when she executed the 2011 Will, BP understood the nature of the claims upon her both those whom she chose to include and those whom she excluded.

202 Fourthly, was BP's mind affected by a mental disorder or condition which resulted in her making dispositive provisions which she would not have made in a sound state of mind?

203 It is not disputed that BP suffered from dementia. I accept DrHS's evidence that it was probably principally Alzheimer's rather than vascular dementia. In my judgment the medical evidence leads to a finding that BP's dementia at the time of the 2011 Will was still mild and that she was still capable of sound thought and decision making, particularly in the context of making a will. I prefer DrHS's analysis to that of DrRM not least because concern about having got the guiding principle of equality wrong in 2010 would have provided a compelling motive for creating a new will only one year later. Further even in February and March 2011 the medical records do not point to concern about BP's capacity. My view of the MMSE's is that they provide a true and useful insight into BP's functioning.

204 Drawing together JM's evidence relating to his dealing with BP on 6.1.11 and his willingness to draft and send her a revised will, the medical records of treating clinicians and the CPN before and after January 2011, the evidence of KW and PG, and the terms of and my findings as to the writing of the 9.1.11 Letter and the MMSE sentences, the only sensible conclusion to reach is that when giving instructions for and when executing the 2011 Will BP's dementia did not adversely affect her testamentary capacity. On the contrary, the dispositive provisions of the 2011 Will were such as BP would have made and did make in a sound state of mind.

205 Specifically addressing the questions posed by Mr Dew as requiring an answer : (1) the evidence of BP's dealings with JM points very clearly to BP appreciating that she was revoking and intending to revoke the 2010 Will, appreciating the reasons she had given for the 2010 Will and considering them to have been erroneous, and being capable of understanding the 2011 Will; (2) the evidence also demonstrates that BP knew and understood that by the 2011 Will she was revoking the 2010 Will and rejecting the reasons she had given for that earlier will; and, (3) the evidence as to the process for the production of the 2011 Will is sufficiently clear to found a confident decision as to testamentary capacity and the absence of any express contemporaneous consideration of BP's testamentary capacity is neither suspicious

nor undermining of a decision that BP had such capacity. In my judgment the 2011 Will is a true reflection of BP's free will in relation to the disposition of her estate at death.

206 The evidence as to BP's knowledge and approval is clear. BP had a constant overarching intention in relation to the will she destroyed in 2009, the 2010 Will and the 2011 Will, namely to ensure that overall her children were treated equally. By overall I mean after taking into account material lifetime gifts and benefits from KP and herself with the effect of her will. She expressed no intention to look to the next generation, her grandchildren, and there is no evidence that she meant to favour any particular individual to a material extent and to the detriment of the others, or, indeed, all her grandchildren instead of her children. Her focus was equality between her children. She was certainly under a misapprehension as to the size of her estate, but that misapprehension has no distorting effect when the terms of the 2011 Will are applied to BP's full estate. The 9.1.11 Letter is cogent evidence that BP knew and approved of the terms and effect 2011 Will and that it reflected her true intentions. That letter does not stand alone, it is consistent with and supported by JM's evidence, once the misconception about materially unequal treatment of D1 is cast aside (as to which the expert evidence of TB fell far short of the mark once subjected to questioning, comparison with reliable factual evidence, and analysis). Even though the prudent precaution of executing the 2011 Will in the presence of a solicitor who would have had the opportunity to assess capacity and test knowledge and approval was not taken, the evidence is strongly supportive of a finding that BP had testamentary capacity and that she knew and approved of the terms and effect of the 2011 Will when she executed it, and I so find.

The 2010 Will

207 The challenge to the 2010 Will is that BP did not understand what she was doing and its effect. In particular, BP was under a misapprehension as to the lifetime benefits conferred on C1, D3 and D4 but not on D1. Full weight is to be given to the involvement of a solicitor, but no presumption of knowledge and approval arises; rather the authorities, particularly Gill v Woodall and Hawes v Burgess make clear that all the available relevant evidence has to be considered and evaluated, including by drawing inferences, and it is for the propounder of the will to establish knowledge and approval.

208 BP's capacity in 2010 is accepted, so too is the principle of testamentary freedom. The 2010 Will was executed in the presence of an experienced solicitor, JM, who, having taken BP's instructions and prepared a will to reflect those instructions, met with her

alone to satisfy himself as to BP's capacity and that the 2010 Will reflected her instructions, and then, once so satisfied, witnessed her execution of the 2010 Will. Moreover, on the facts as explained to JM, the terms of the 2010 Will were not inexplicable or irrational, rather they served to achieve fair treatment of all four children which JM correctly understood to mean broadly equal treatment.

209 However, there are three problems with the circumstances surrounding the 2010 Will which feed into the question of knowledge and approval.

210 First, and as I have found, BP's view that her children other than D1 had been gifted property or land, or even bought land at uncommercially low prices, was not supported by the evidence, rather it was contradicted by the factual evidence, and the expert valuation evidence was unreliable and did not assist the case that C1, D4 and D3 had received lifetime benefits which needed to be adjusted for in the 2010 Will in D1's favour on a material scale in order to achieve overall equality between the children. BP appears to have come to realise that the 2010 Will worked unfairness and inequality between her children, even without herself appreciating the impact of the overage agreement.

211 Secondly, it is clear from JM's evidence that he had no appreciation of the existence or potential value (and proportionate impact on BP's estate) of the overage agreement. In addition, he had an incomplete picture of BP's lineal descendants (knowing only of her four children and one grandchild). Moreover, JM's instructions were that BP intended that the result of her will, taken with any material lifetime gifts, should be equal treatment of her children. This is important because it is evidence (including the benefit to D2) from which to infer and find, as I have, that BP did not have the overage agreement in her mind when thinking about and giving instructions for the 2010 Will or regard her residuary estate (after the devise of 9NHL and legacies totalling £140K) as being of more than modest value.

212 Thirdly, D1 was very closely involved in BP's affairs at the time. In September 2009, BP's initial thought appears to have been that her then current (and now destroyed) will worked an injustice by omitting C1. D3 undoubtedly knew of BP's intention to revoke that will and make a new will. However, it was D1 who took charge of making the arrangements by recommending JM and rescheduling the initial appointment so that he could accompany BP. At that time D1 was also instrumental in prompting the LPA. D1 had been involved in the initial arrangements to package the Nearby Land for

sale to a developer and clearly knew of the overage agreement, he disclosed the charge securing it. D3's evidence, which I accept, was that she did not know that about the overage agreement. I infer from D1's involvement and disclosure that, at all material times, he was certainly alive to the prospect that the overage agreement was potentially very valuable. Nevertheless, BP came to make a will in circumstances where neither she nor the solicitor she engaged appreciated the potential value of the residue.

213 I accept that BP may have intended to benefit D2 with some relatively small bequest, but I do not accept that she would have contemplated a bequest of £100K-£250K to D2 while completely disregarding her other seven grandchildren. Moreover, and more importantly, given the overarching objective of treating her children equally and taking the residuary estate at the lowest estimated potential value of more than £200K, the pecuniary legacies of £35K to C1 and D4 stand to be dwarfed by, and appear more as tokens in comparison to, the residuary gifts to D2 and D3. This works an obvious inequality and unfairness which I am certain BP did not know of, approve of, or intend.

214 Referring again to the contemporaneous evidence for context, the first sentence of JM's attendance note, made when taking BP's instructions on 2.11.09, concluded with the words that BP "wanted to ensure that all four children were treated equally". There is not a word noted by JM about treatment of D2 or of BP intending to benefit her grandchild or grandchildren. Significantly, there is no evidence of a later instruction that BP had decided to treat her children unequally. Thus, when JM met BP and discussed the 2010 Will with her on 4.2.10 he must have done so on the understanding that BP's overarching intention remained unchanged. Indeed, when asked about the residuary legacy to D2 in cross-examination JM said that he understood it to be tied in with the gift to D1; what he did not say was that he understood or thought that BP's governing principle had changed. No less significantly, equality of treatment of her children remained BP's governing intention for the 2011 Will.

215 All of this reinforces my finding that BP had no regard to the overage agreement when contemplating a new will between September 2009 and February 2010.

216 My conclusion on the 2010 Will is that notwithstanding the involvement of JM in the drafting, preparation and execution of the 2010 Will, and keeping in mind the cautions in the authorities about finding want of knowledge or approval where prudent procedures including the involvement of a solicitor have been followed, this is one of

those rare cases where the totality of the evidence points strongly, in my view overwhelmingly on the particular facts of this case, to a probable want of knowledge and approval on the part of the testatrix because she materially misunderstood the nature and extent of her estate, had a misconceived idea that three of her children had received significant lifetime gifts of property or financial assistance in property transactions, and demonstrably failed to achieve her declared purpose of treating her children equally.

217 It appears from JM's evidence that BP decided to favour D1 at some point between 30.9.09 and 2.11.09 and that she settled upon the terms of what became the 2010 Will between then and 2.2.10. It is at least as likely as not that D1 was the source of this misconception, but such a finding is not necessary to the decision to be made about the 2010 Will.

Conclusion

216 My primary finding and conclusion is that the 2011 Will is valid. C1 is entitled to the order sought, including the removal of caveat No.79367. My secondary finding is that BP did not know and approve of the 2010 Will and it is invalid.