

[2021] EWHC 2342 (Ch)

Appeal No. 67 of 2020

Claim No F30LV338

**IN THE HIGH COURT OF JUSTICE**

**HIGH COURT APPEAL CENTRE**

**LIVERPOOL DISTRICT REGISTRY**

On appeal from the County Court at Liverpool

Order of District Judge Lampkin dated 19 November 2020

Before His Honour Judge Cadwallader sitting as a Judge of the High Court

In the Estate of Charles Beswick, deceased

**BETWEEN:**

**PAULA LONSDALE**

Appellant/Claimant

**(1) CARL TEASDALE  
(2) MATTHEW PAUL EVANS  
(3) ALUN RHYS JONES**

Respondents/Defendants

Mr Elis Gomer (who did not appear below) for the Appellant

Mr Michael Barrow for the First Respondent

The Second and Third Respondents did not appear and were not represented

Hearing date: 27 July 2021

## **JUDGMENT**

**Covid-19 Protocol: This judgment was handed down by circulation to the parties and by release to BAILII. The date and time for hand-down is deemed to be 10.30 am on 20<sup>th</sup> August 2021.**

*APPEAL – testamentary capacity – irregularity – burden of proof*

The following cases are referred to in the judgment:

*Banks v Goodfellow* [1870] LR 5 QB 549

*Drysdale v Department of Transport (Maritime and Coastguard Agency)* [2014] EWCA Civ 1083

*In re G (a child)* [2015] EWCA 834

*Michel v The Queen* [2009] UKPC 41

*Prescott v Potamianos* [2019] EWCA Civ 932

*Serafin v Malkiewicz* [2020] UKSC 23

### Introduction

1. This is an appeal from the order of the District Judge dated 19 November 2020 and made in the County Court at Liverpool. By that order, he dismissed the Claimant's claim for the grant of probate in solemn form of the will dated 10 June 2014 of Charles Beswick deceased, who died on 21 April 2018, and instead pronounced for the will of the deceased dated 15 September 2017 in solemn form, and stayed the issue of the grant of probate in respect of the 2017 will until the determination of any appeal or further order. He made an order that the Claimant pay the costs of the First Defendant, who effectively was the person propounding the 2017 will, and the costs of the Second and Third Defendants, who were the executors appointed by the 2014 will. He refused the Claimant permission to appeal. The brief reasons which the learned District Judge gave in writing were as follows: "Correct analysis and weighting of all available evidence to lead to conclusion that testator had testamentary capacity".
2. Following the service of an Appellant's Notice dated 8 December 2020, and after certain case management directions were complied with, Snowden J granted the Claimant permission to appeal that order on three grounds:

- (1) that the District Judge's decision that the deceased had testamentary capacity at the time that he executed the 2017 will was wrong;
- (2) that the manner in which the district judge conducted the trial constituted a serious procedural irregularity; and
- (3) that the District Judge failed to apply the proper burden of proof.

He directed that the appeal should be heard before a High Court or deputy High Court judge in Liverpool and it came before me on 27 July 2021. On that occasion I had the benefit of submissions from counsel for the Claimant and for the First Defendant, and the other Defendants did not attend. I was supplied with an appeal bundle and a supplemental bundle. Among other things, they included a skeleton argument on behalf of the Claimant dated 22 December 2020 and a supplemental Skeleton Argument on behalf of the Claimant dated 19 July 2021, with an appendix.

#### The background

3. The basic facts are as follows. Charles Beswick was married to Florence Beswick. They had two children, William and Paula. Paula had a child called Charles Lonsdale. The deceased had made a will on 10 June 2014. His wife was the principal beneficiary of that will, but she predeceased him on 13 March 2017 and, in the events which happened, and in particular the death of his son on 15 July 2017, his daughter alone (the Claimant) became the principal beneficiary under that will. Everyone accepts that the 2014 will was valid, and in particular that the testator had capacity to make it.
4. However, the deceased then made his will dated 15 August 2017, and signed a letter of intent of the same date explaining his reasons. That will was prepared by solicitors, Savas & Savage of Ellesmere Port, on instructions given orally by the testator, initially

at a meeting arranged by the First Defendant, who was also present throughout. It seems that there were a number of telephone calls between the First Defendant and that firm following that meeting. The will was then duly executed, and witnessed by two trainee solicitors at that firm who had been involved in drawing it up.

5. The 2017 will appointed the First Defendant as sole executor. It referred to him as ‘my long-term friend, who I refer to as my stepson’. After a number of specific gifts, he dealt with his residue in the following way:

“I wish for my residuary estate to pass in full to my friend, Carl Anthony Teasdale, date of birth 7 June 1964; in the event that my friend, Carl Anthony Teasdale, predeceases me, or fails to survive me for a period of 28 days, then I wish for my residuary estate to pass in full to my friend, Mr David Ferguson; in the event that my friend, David Ferguson, predeceases me, or fails to survive me for a period of 28 days, that I wish for my residuary estate to pass in full to the club treasurer of Golden Star amateur boxing club, Princess Road, Ellesmere Port, who is currently Mr James Killcross, but should he leave the post for any reason then I wish my estate to pass in full to any other club treasurer who stands in his place. In the event my estate does pass to any club treasurer of Golden Star amateur boxing club, then the club treasurer is to ensure my estate is used solely for the beneficial purpose of the Golden Star amateur boxing club.”

So far as relevant, his letter of intent of the same date reads as follows.

“I wish to clarify my explicit instructions to leave my daughter, Paula Lonsdale, out of my will. I do not wish for Paula to benefit from my will whatsoever, I do not wish to leave any of my estate to Paula. Nor do I wish for my grandson, Mr Charles Lonsdale, to benefit financially from my will. I wish to leave Charles my watches and stopwatches only. I do not wish to leave him any of my residuary estate. This is because neither of them make any effort to have or maintain a relationship with me.”

6. The Claimant challenges the 2017 will on the ground that at the time it was executed the testator was not of sound mind, memory or understanding, and lacked the requisite testamentary capacity; and/or that the execution of the will was obtained by the undue influence of the first defendant. The allegation of undue influence was not pursued before me.

Particulars of lack of testamentary capacity alleged

7. The particulars of lack of testamentary capacity which were given stated as follows.

“A) From the beginning of 2016 the deceased, who was born on 5 February 1935, was suffering from a significant impairment of cognitive function and up until the death of his wife in March 2017 was almost entirely dependent upon his wife in virtually every aspect of daily living, and

B) Such was the decline in his cognitive abilities that, in January 2017, the DVLA wrote to the deceased’s general practitioner seeking a medical report and certificate as to his fitness to retain his driving licence.

C) On 5 June the deceased’s general practitioner carried out a 6-CIT test on the deceased in order to ascertain the presence or extent of the deceased’s cognitive impairment. The deceased scored 20 out of a maximum score of 28, where any score in excess of ten is indicative of significant cognitive impairment. The deceased’s GP made a referral to the memory clinic, in addition to recording his score and making the necessary referral. The deceased’s general practitioner recorded in his contemporaneous notes of the examination ‘mental state - mood a little low, not anxious or agitated, 6-CIT score 20, struggled with much of test, poor recall, some lack of insight into degree of memory problems’

D) In dealing with and assisting her mother with the care of her father, through 2016, and up to her mother’s death, the claimant observed first hand the extent of the cognitive impairment of her father, and as a qualified nurse, specialising in geriatric care and dementia, she was aware of and recognised her father’s deteriorating mental state.”

In the context of the allegation of undue influence, she set out further allegations which are useful in order to understand this decision, namely that the deceased had met the First Defendant through the Ellesmere Port boxing club, but that they had later fallen out or distanced themselves. It was less than a week after the death of the only son of the deceased, on 15 July 2017, that the first defendant had arranged the meeting with the solicitors for the deceased to give instructions for a new will. She disputes the suggestion, in the letter of intent, that neither she nor her son made any effort to have or maintain a relationship with the deceased, stating that she did so.

The judgment below

8. The *extempore* judgment of the learned district judge refers to the attendance note taken at the meeting between the deceased and the solicitors, and its terms so far as available to him were apparently not in dispute. It read as follows.

“Mr Carl Teasdale was present but all instructions were given by Mr Charles Beswick, the client. In the first instance he wanted to make Carl Anthony Teasdale to be executor, the relationship is a long-term friend who he refers to as his stepson. He explained to me about what has happened before his wife passed away and also after when his wife passed away in terms of his relationship with his daughter has gone sour. That is why he wanted to make sure Paula is not to inherit from the will. I asked him whether or not he wanted to include his grandson, Charles William Lonsdale, as the beneficiary of the actual estate, as at the moment he is only receiving the watches and stopwatches. His response was no, in capitals, he doesn’t see him much either and he’s already got his share of the watches. Advised that to be on the safe side I would need to draft a letter of intent, explaining his reasons to prevent any dispute in the future. I also explained not to destroy the current will until this one has been duly signed, client understood.”

9. There was also before the judge an extract of the GP’s notes confirming an entry on 5 June 2017. It read as follows.

“The problem, memory disturbance. History, medical report received from DVLA requesting information read memory/cognitive problems - patient admits more forgetful/short-term memory issues. Says drives car infrequently, short distances only, and no problems/accident. Mobility quite good. Low mood since wife died a few months ago. Not eating as well as lost some weight. No bowel/GI or chest symptoms. Examination, mental state - mood a little low, not anxious or agitated, 6CIT score 20, struggled with much of test, poor recall, some lack of insight into degree of memory problems. On examination visual acuity right eye 6 out of 18 corrected, left eye 6 out of 18 corrected, together 6 out of 18, 6 out of 18 corrected (with glasses). Comment, advice, patient informed, not safe to drive as a significant cognitive impairment/likely dementia and does not meet visual standards. Must stop driving straight away, for up-to-date eye test. I will inform DVLA on report. Check bloods and ECG and then review read referral to memory clinic to assess further (note patient thinks his daughter alerted DVLA re concerns?). Dementia - advised that she was probably acting in his best interests only”.

There was also a letter from the GP dated 21 June 2018 which I have before me which states in part as follows.

“From my relatively brief assessment in June 2017, I think it is very likely that Mr Beswick was suffering from some form of dementia, affecting his cognitive ability and his insight. I think on balance it is likely that there would have been a degree of impairment of his mental capacity in relation to the purposes of making a will, in accordance with the Banks v Goodfellow criteria... However, it is not possible for me to state with any certainty whether he had testamentary capacity at the time of executing his last will as I did not specifically assess his capacity and understanding in relation to this matter.”

10. The learned District Judge heard evidence from the Claimant. He referred to her cross-examination in the following way in his judgment.

“In cross-examination, which was difficult, the First Defendant appears as a litigant in person with a McKenzie friend, having been given permission for that McKenzie friend, but the first defendant stated that he suffered with dyslexia, and therefore had difficulty in reading the preprepared questions that he had. He gave those to me, and I put those robustly to the Claimant.”

He then summarised the evidence which she gave in cross-examination. In particular, she was asked what evidence she referred to in her statement, when she said, “There is in my view plenty of evidence to suggest my father was confused and suffering from memory issues, among other difficulties”, and summarised her response. He then referred to the evidence given by the First Defendant, and by a number of witnesses on his behalf.

11. After referring to further documents, he turned to the report of the single joint expert, a chartered clinical psychologist and consultant clinical neuropsychologist. He said that it was very helpful in setting out the test that needed to be applied and commenting on the evidence. It is worth summarising and setting out some of that report here. The expert explained that the 6-CIT (the six item cognitive impairment test) is widely used as a screening test within general practice for identifying possible cognitive impairment in the older adult population.

“Over the years this test has been revised and adapted and now used in both general practice as well as in acute hospital settings where there is a need for a quick cognitive screen. The 6-CIT has a well established specificity and sensitivity although like all other cognitive assessments it is not a substitute for specialist psychiatric/neuropsychiatric assessment for the establishment of a diagnosis of dementia. Furthermore a more detailed neuropsychological assessment in conjunction with a psychiatric/neuropsychiatric assessment would form the gold standard for the assessment and establishment of the diagnosis of dementia (possible/probable dementia). Where the result from the cognitive screen identifies possible cognitive impairment, it is routine practice to request blood tests and for a referral for more specialist assessment within a specialist memory disorders service. [The GP] followed this protocol as the deceased’s score of 20 fell close to the top end of the score range on this screen. The lower the score the less the impairment on this assessment measure. The

cut-off score for impairment on this test varies in different settings between seven and eight but usually a score of eight and above indicates that somebody is above the cut-off for cognitive impairment. Unfortunately the deceased did not attend his follow-up assessments and therefore a specialist assessment for dementia was not completed. The diagnosis of dementia was therefore never formally established by a specialist memory disorders service even though Mr Beswick's GP quite clearly identified his concerns about the significant cognitive impairment that the deceased presented with when he was assessed on 5 June 2017. It is also important to bring to the court's attention that at the time of the assessment in June 2017, the deceased's GP makes a specific comment that the deceased appeared to have no insight into the extent of his memory problems.... Loss of insight is a critical marker of severity of cognitive impairment."

The expert remarks that the available witness statements appeared to suggest that the deceased appeared to function independently within the community for a number of months until his admission to hospital and subsequent death, and that this information is relevant because a diagnosis of dementia is not made entirely on the findings of cognitive test results but also on an assessment of the person's day-to-day function. He further commented that the solicitors' failure to seek a medical assessment of the deceased's testamentary capacity at the time of drawing the will had the effect of leaving the will writer with having to make the judgment about the deceased's testamentary capacity without access to the appropriate medical expertise on that matter.

12. He specifically raised the possibility whether the souring of the relationship between the deceased and the Claimant was a symptom of his underlying cognitive impairment and possible dementia. He commented that if the court were to decide that ultimately the strain in the relationship between the deceased and the Claimant was brought on by the deceased's cognitive impairment and his lack of insight into its impact on his functioning, then it stood to reason that the deceased suffered from sufficient disorder of the mind as to poison his affections towards the Claimant.

13. The expert's three concluding paragraphs read as follows.



“ 7.44 In conclusion, there is little objective evidence available to me to indicate that the deceased cognitive empowerment was of such severity as to render him incapable of understanding that he was making a will that excluded his only child from benefiting from his estate while leaving to his grandson a gift from his estate. Further, he also appears to know the extent of his estate at the time he executed his will.

7.45 While the deceased was explicit in his instructions, it is my opinion that the nature of his cognitive impairment and his loss of insight raises concerns as to whether the deceased was suffering from a disorder of mind sufficient to affect his decision-making in relation to the beneficiaries of his estate. This matter is ultimately a decision for the court.

7.46 Given the identified cognitive impairment and the concerns raised by the deceased’s GP, it is my opinion that the absence of the appropriate medical assessment of the deceased’s testamentary capacity at the time of executing the will of the 15 August 2017 raises concerns about the deceased testamentary capacity at that time.”

14. In considering the law the learned District Judge referred in particular to *Banks v Goodfellow* [1870] LR 5 QB 549 and to the 19<sup>th</sup> edition of Williams, Mortimer and Sunnucks on Executors, *Administrators and Probate*. He then had this to say about the burden of proof.

“The burden of proving these cases is often a difficult and knotty problem, but I am grateful to [Mr Shaw, counsel for the Claimant] for, in his submissions, setting out that because of the shifting nature or potential shifting nature of the burden of proof in these cases, where there is a presumption ordinarily that the Will - that the testator had capacity, but that can shift if there is evidence of mental impairment or lack of testamentary capacity on to the person propounding the Will, and I have considered that if we get too bogged down at this stage in that burden of proof it may cloud the issue, and I am grateful to [counsel for the Claimant] for suggesting, and I adopt this, that I adopt an approach of looking overall at the entire evidence. I was invited to approach my judgment on the basis of a review of the entire evidence, making findings and see how that drives my decision without necessarily resolving the burden of proof, and I think that is helpful, and I will refer to the burden of proof in due course, but just to set that out, again referring to Mortimer and Sunnucks, it says this

*“Although those propounding the Will must satisfy the court the testator was of sound mind, yet if the Will is rational on the face of it, and is shown to be duly executed, and no other evidence is offered, the court will pronounce for it, and presume that the testator was mentally competent. Slight evidence of mental incapacity will not disturb this presumption, but when evidence of incapacity is before the court the decision must be against the validity of the Will unless it is affirmatively established that the deceased was of sound mind when he executed it. The burden of proof may shift from one party to another in the course of*

*the case. Where grave suspicion of incapacity arises in the case of those propounding the Will, they must dispel that suspicion by proving testamentary capacity. Thus, where it is admitted by those propounding the Will that the deceased suffered from serious mental illness at a period before the Will, or where the terms are incoherent, irrational or strange, a presumption is raised against it, though not a conclusive one. However, it is not the law that in all cases of doubtful capacity there has to be positive proof of capacity before the court can pronounce the Will.”*”

15. The learned District Judge accepted that the First Defendant’s evidence was given honestly. He accepted, therefore, that there was a close and affectionate relationship around boxing, which was a major part of the deceased’s life; and that the deceased knew he was making a will and he understood the effect of his instructions. The learned District Judge accepted the accuracy of that part of the solicitors’ file note of the terms of which he had been informed. He noted that the will as drafted was detailed and he appears to have accepted that it was discussed sensibly and that the deceased knew that he was executing the will, and that he had explained to various witnesses that he was changing the will, and his reasons for doing so.
16. On the basis of that file note, and on the evidence of the First Defendant and his witnesses to that effect, and on the footing that there was no evidence to override the presumption that the deceased understood the extent of his property at the time of the 2017 will, the learned District Judge accepted that he understood the nature and effect of his will and understood the extent of his estate and the distribution of that estate.
17. The learned District Judge found more difficulty with the question whether the testator was able to comprehend and appreciate the claims to which he ought to give effect. His starting point was that there was no evidence to suggest that the severity of the deceased’s cognitive impairment was such as to render him incapable of comprehending and appreciating those claims at the time of his 2017 will. He set out his reasons for excluding the Claimant. He signed (in the judgment, it is said he prepared, but for present purposes nothing turns on that) the letter of intent. But the

learned District Judge accepted that the failure to seek a medical assessment of his capacity at the time of drawing the will meant that the will writer was left with having to make a judgment about capacity without access to the appropriate medical expertise. He regarded that as a difficult problem, particularly since he had not had any evidence from the attesting witnesses, who are the solicitors who prepared the will, nor yet their full file. He took on board that they were dealing with a man they had never met before and that there was a potential red flag in that he had been brought in by someone who was not in fact his son (as he had described himself on the death certificate) but was an acquaintance. He noted that the new will made substantial changes from the previous will, and cut out his daughter. He considered that the solicitors should have adopted the 'golden rule' of having a further enquiry into his capacity with the assistance of a doctor. He accepted that the record showed that only 2 units of time had been spent when the will was executed. However, he concluded that there was not sufficient evidence to show, or indeed any evidence to suggest, that the severity of the deceased's cognitive impairment made him incapable of comprehending and appreciating the claims to which he wanted to give effect.

18. The judge then turned to the question whether a disorder of the deceased's mind had effectively poisoned his affections towards his daughter, a point on which the joint expert had raised concerns. The judge noted that the testator had failed the 6-CIT test significantly, and referred to the Claimant's evidence that it was she who had been concerned about his cognitive impairment and reported that to the DVLA, and that the testator had been livid about it. He approached the question on the basis that he had to decide whether the souring of the relationship of the deceased with his daughter was a symptom of his cognitive impairment, and he found that it was not. He referred to a number of factors on the basis of which the deceased may have formed the views which

he set out in the letter of intent. He concluded that the testator had a logic and reason for changing his will, and that looking at the evidence overall, the logic was that he had fallen out with his daughter; that he was entitled to form that view and act upon it, and did so.

19. The judge referred to the passage in her statement where she said that there was plenty of evidence to suggest her father was confused and suffering from memory issues among other difficulties. The learned judge said that she had given some evidence ‘on the hoof’ in the witness box, but that he attached little weight to it because

“she clearly has not given the Defendant or the other witnesses opportunity to counter that, and I’m quite sure from their contact with the deceased that they could have countered that evidence by saying how he was. In fact, they do say that, they say he was perfectly capable of looking after himself, et cetera. The evidence she gave thereafter of there being two boiler policies is a common mistake made by anybody, and paying for two house insurances is, unfortunately, why we have Compare the Markets, et cetera. The missing MOT is again a common problem. I think together they may amount to something, but in this case I did not hear sufficient evidence to show that there was evidence from the Claimant that I could attach sufficient weight to, to show that that in itself lead to me making a finding of lack of testamentary capacity.”

20. In conclusion, he states as follows.

“65. So I come to the view [that there is] simply here not enough evidence, the first two limbs of *Banks v Goodfellow* fall away as I have said. The only real prospect for the Claimant would be to show that his mind had been poisoned to the extent set out in that third limb, which the doctor has also flagged up to me in his experts’ report. There is, simply put, no sufficient evidence to show that his mind was poisoned. However you look at that in terms of burden of proof, had I decided that on the basis that it was the Defendant’s burden of proof he would have discharged that burden of proof on the evidence that he has brought and that I have accepted. If I had decided the other way clearly I would have decided that the Claimant had not discharged the burden of proof the other way round. So either way the burden of proof would have been discharged to the effect that I would have found that his mind had not been so poisoned in accordance with *Banks v Goodfellow*, so *Banks v Goodfellow* is confirmed.

66. I do understand how the execution of the will did not follow the golden rule. Those solicitors, as I have said, would have had a very embarrassing day in court, but the will is thorough, it is forensic. Whilst there is normally a presumption that a Will carried out in such a way the solicitors would have satisfied themselves of the testamentary capacity, that presumption cannot apply this case, but I have considered it in light of all the evidence, and find that there is nothing flagged up in the solicitors file that would lead me to any further real enquiry as to whether they believe the testator did not have capacity on that day.

67. I have to step back and look at the evidence as a whole, and I find that simply there is not sufficient evidence to set aside this will. That is probably a layman's way of summing it up, but I have analysed it forensically throughout my judgment, but I want to make it clear to the parties that the testator expressed to Carl Teasdale, to his lifelong friend Mr Ferguson, and to others what he wanted to do this will. I have found that he knew what he was doing, and he had capacity to do it, in spite of what is said in the doctor's report. He failed that CIT test, there is a possibility his mood could have affected that, we have not got the benefit of a further explanation of it. I have not accepted or attached great weight to what the claimant said about his previous issues, although I do accept she was so concerned she reported him to DVLA, but simply put she did not put that in a witness statement and we have not been able to explore it properly, it would appear unfair to do so to the first defendant, who could have compiled evidence to counter it. I have attached little weight to that.

68. The only evidence she has is the [file note], but in the context of the other evidence, the solicitors appointments, what he was saying about the background, about the history of the relationship with the daughter, about the fact that he had formed a view that she had reported him to DVLA that he was upset about that, there is a rationality in what he wanted to do with his will, and in view of all that the will does, in my view, and my finding, what he wanted to do, which was to put the money in the hands of the man he trusted the most, who he had treated as a son, in fact called his son, knowing full well that he could trust him and guarantee that he would put into place the testator's wishes, using it for the benefit of those at the club as he had discussed many times."

#### Appeal criteria

21. In considering this decision I remind myself that this appeal is limited to a review of the decision of the lower court, and that the appeal should be allowed only where the decision of the lower court was wrong, or was unjust because of a serious procedural or other irregularity. I am, however, entitled to draw any inference of fact which I consider to be justified on the evidence.

#### Irregularity

22. The Claimant's primary submission in support of this appeal is that, in his perfectly proper concern to ensure that the First Defendant was not disadvantaged in his presentation of the case, and in particular around his difficulties over cross-examination, the learned District Judge fell into the error of effectively adopting the role of his advocate, specifically in relation to the cross-examination of the claimant. I

was referred to the decision of the Supreme Court in *Serafin v Malkiewicz* [2020] UKSC 23, where Lord Wilson, in a speech with which Lord Reid, Lord Briggs, Lady Arden and Lord Kitchin agreed, referred to the finding in that case that the judge's conduct of the trial was unfair towards one of the parties as being a rare finding, and pointed out that it was one which, when made in respect of the conduct of any judge, however senior or junior, carries profound sensitivity, and that the duty of the court is to appraise it with the utmost care. In that case, *Michel v The Queen* [2009] UKPC 41, [2010] 1WLR 879 was cited with approval where it referred to the passage in which Lord Brown of Eaton-under-Heywood observed that

“The core principle, that under the adversarial system the judge remains aloof from the fray and neutral during the elicitation of the evidence, applies no less to civil litigation than to criminal trials.”

The following passage from *In re G (a child)* [2015] EWCA 834 was also cited with approval:

“the careful and cogently written judgment cannot redeem a hearing at which the judge had intervened to the extent... of prejudicing the exploration of the evidence”.

That, says the Claimant, is precisely what happened in the present case, albeit for the best of reasons, and without there being the slightest imputation of bias on the part of the learned judge.

23. The Claimant points out that the learned District Judge carried out most of the cross-examination of the Claimant. It is evident from the transcript that he did so. The fact is that both parties invited him to do so, including Mr Shaw, counsel for the Claimant at the hearing below. What happened was this. The learned District Judge asked Mr Teasdale whether he had prepared questions and he said he had. Mr Teasdale proceeded to ask some questions. After a little while he seems to have run into some difficulty. The nature of it is not apparent from the transcript, but he said was that he was sorry,

and because of his dyslexia he was struggling to comprehend. The judge asked again whether there was a list of questions that he had. Mr Teasdale said there was. Mr Shaw said, “It might be easier if you [that is, the judge] had the list and were able to formulate the questions better.” That is, he was inviting the judge not just to read the questions in the terms on which they had been written down by Mr Teasdale, but to use the list of questions as a basis for formulating them better. The judge asked, “Would that be helpful?” Mr Teasdale said it would be helpful to him. The judge said he was quite happy to have a list of questions and he would help put them. Mr Teasdale agreed. After he had received them, the judge said “OK. I’m going to just try and formulate some questions.” And he proceeded to do so. I have not been provided with a copy of the questions which the judge was given, but I take it (and there is no suggestion otherwise) that the questions which he then asked were either his reformulation of the questions he had been given, or follow-up questions which arose from the responses, or general questions which the judge had in any event.

24. The Court is of course positively obliged to adopt such procedure at any hearing as it considers appropriate to further the overriding objective: Civil Procedure Rules 3.1A(4). At any hearing where the court is taking evidence, this may include putting, or causing to be put, to the witness such questions as may appear to the court to be proper: *ibid.*, 3.1A (5)(b). Obviously while the court should adjust the level of assistance it gives to a litigant in person in order to equalise the access to justice of all parties, the appropriate level of assistance is constrained by the requirement that the court must at all times be, and be seen to be, impartial as between the parties, and that injustice to either side must be avoided: *Drysdale v Department of Transport (Maritime and Coastguard Agency)* [2014] EWCA Civ 1083.

25. In submissions before me, Mr Gomer made it clear that the Claimant recognised that the learned District Judge was motivated by a wish to achieve precisely that. He went further, rightly in my view, in making it clear that he was not objecting to the judge's undertaking the cross-examination of the Claimant on the basis of the questions which he knew Mr Teasdale wanted to put. That was precisely what he had been asked to do, and everybody agreed that it would be helpful. For my part, I can see that proceeding in that manner, although it carries some risks of misunderstanding, was helpful and proper in the circumstances of this case, and where Mr Teasdale said he was dyslexic and was running into some difficulty, Court time is precious, and a prepared list of questions was provided.
26. The Claimant's more refined objection, however, is that in undertaking this task the learned judge failed to take enough care not to descend, or appear to descend, into the arena, as if he were an advocate for the First Defendant, rather than remaining aloof; and that in consequence the trial was unfair to the Claimant. At points in the argument, it was suggested even that the learned judge abandoned his duty to ensure that the trial was as fair to the Claimant as to the First Defendant. I do not understand this to be a suggestion that he did so deliberately or wantonly, and if it were I would firmly reject it as unjustified by the material placed before me.
27. Mr Gomer prepared an appendix of passages which were said to be objectionable. I have been able to read them in the context of the complete transcript of the oral evidence. But before I deal with them I should observe that Mr Shaw, who is an advocate of many years' experience, and whose duty it would have been to object to any unfairness against his client, whether emanating from the judge or otherwise, did not do so. (At least he did not do so during the evidence, which is when he should have done it if there was unfairness: I do not have a transcript of the submissions). What he



did do was, when the judge objected to part of his re-examination, reply that the Claimant had been cross-examined ‘robustly’ on the point in question, and that he was therefore entitled to explore the answers that she gave in cross-examination on that point; and that when the judge had indicated in cross-examination that the witness would have to stop and he would not allow her to proceed to answer, he must be allowed to give her an opportunity in re-examination to conclude her answer, that is, her evidence. He pointed out that the criticism the judge had made of it went to weight rather than admissibility. The judge allowed the re-examination to continue on that basis, and it did. Mr Shaw made no suggestion of unfairness. It is worth remembering that a transcript tells one nothing of the timing, rhythm or tone of what is transcribed. Mr Shaw was there: in that limited sense he was in a better position than I am now to evaluate any unfairness. It suggests that the judge did not cross-examine in a way which was perceived to be unfair at the time, even if it was regarded as robust by both by Mr Shaw and the judge himself. But if it had been unfair on the basis that answers had been stopped, that was cured, in my judgment, by the course of the evidence in re-examination.

28. The questions the judge asked were fair to be asked, even where the question was whether the witness was making up her evidence ‘on the hoof’. That they were asked from the bench, rather than by the First Defendant, was inevitable, in the particular circumstances of this case. The fact that they were asked and pursued robustly, as they were, did not make the conduct of the trial unfair. In submissions before me, however, Mr Gomer suggested they had been asked with ferocity, and in a hostile manner. That submission was not justified, in my view, by the material before me.
29. The Claimant submits that when the judge asked the Claimant’s barrister (not the Claimant) why the *Larke v Nugus* statement had not been included in the bundle “So

why is it not in the court bundle?... Because you don't want it in?" was an improper suggestion of impropriety, without evidence to support it, which could not have failed to raise concerns about his objectivity. I do not accept that. The document's omission cried out for explanation: Mr Shaw responded, perhaps surprisingly, that he had not thought it was particularly relevant, and the learned judge pointed out that it had been relevant enough for him to plead it. In the cut and thrust of discussion between the bench and the bar, it was not an improper question to ask, and involved no improper insinuation.

30. It seems that the learned judge himself recognised that the robust way in which he was proceeding with the Claimant was one which required some explanation and reassurance, which he attempted to give in the following terms.

“I'm being hard on you, and I'm being hard because it's a litigant in person and I'm asking questions, maybe as strongly as his counsel would have asked. So don't think that I'm prejudging anything with these questions, I am exploring your evidence as it's right to do, okay?”

It is no part of the duty of a judge, in making adjustments to assist a litigant in person in the furtherance of the overriding objective, to approximate his role to that of an advocate on his behalf, even temporarily. I do not see that the judge actually went so far in this case.

31. I do consider that the learned judge erred in preventing the Claimant from fully answering the questions which he himself was putting, particularly about gaps in the evidence in her witness statement, on the expressed ground that the evidence which she was giving in response had not been prefigured in that document. In my view, once the question has been asked, the answer must be heard and taken into account unless some reason it is inadmissible. None of this was inadmissible. As Mr Gomer submitted before me, what weight is to be given to it is a matter for reflection on submissions subsequently. At points the learned judge expressed himself as if allowing the Claimant

to give oral evidence which had not been prefigured in her witness statement or particularised in her statement of case would be unfair to the First Defendant on the ground that he would have no opportunity to respond in any coherent way. If so, that would have been a case management decision, and I should have been cautious in interfering with it. However, Mr Shaw had the opportunity of eliciting that material from the Claimant, albeit in re-examination, and of putting that additional material to the First Defendant and his witnesses; and took it; and the learned judge recognised that he had, as is apparent from paragraph 62 of the judgment. Similarly, appropriate submissions could be made (and no doubt were) as to the reliability of such evidence when the first time it had been mentioned was in cross-examination. In my judgment, such concerns would have been an erroneous basis upon which to have attempted to limit the Claimant's oral evidence. Having taken the decision (which may not have been an easy one) to ask the question, the learned judge should have allowed the Claimant to complete her answer, and on a number of occasions did not do so. In my judgment, that was capable of being a serious irregularity - but, as I have said, it was cured by the judge himself.

32. I did not understand Mr Barrow, for the First Defendant, to seek to support the decision of the learned judge on any ground other than that he had only done what both parties had asked him to do. That is a fair point as far as it goes, as I have already indicated; but it does not go far enough. However, the upshot was, in my judgment, that there was no procedural irregularity which was not cured.

33. If I had found that there had been a procedural irregularity leading to an unfair decision I would have ordered a complete re-trial: *Serafin v Malkiewicz* [2020] UKSC 23. I would not have addressed the other points raised in support of this appeal, since in

doing so I could scarcely have avoided trespassing on the outcome of the re-trial. As it is, I turn to consider them now.

Reversing the burden of proof

34. The second submission made on behalf of the Claimant was that the learned District Judge misdirected himself by reversing the burden of proof. Once a real doubt is raised in respect of capacity, the evidential burden is on the propounder of the will to demonstrate capacity. That is not in dispute before me, and it does not appear to have been in dispute before the judge, who correctly directed himself as to the law by reference to the passage in Williams, Mortimer and Sunnucks, *Executors, Administrators and Probate* to which I have already referred.
35. As already noted, however, he nonetheless acceded to a submission by counsel for the Claimant that, rather than getting too bogged down in the burden of proof when making findings of fact, which might cloud the issue, he should make his findings and then see, in effect, where that left him, without necessarily resolving the burden of proof in relation to capacity. In my view, that is a recipe for confusion. The correct approach would have been to accept that the evidential burden fell upon the First Defendant to prove capacity, because there was ample material before the judge to raise a serious doubt as to capacity, including the outcome of the 6-CIT test, the comments of the GP, the joint expert report, and the factual evidence of the Claimant. It would then have been for the First Defendant affirmatively to prove capacity.
36. The learned judge did indeed make his findings of primary fact and, as I understand it, the Claimant takes no issue with those. The Claimant submits that having done so, and having correctly directed himself on the law, the judge nevertheless ended up by treating the matter as if the burden fell on the Claimant instead of the First Defendant.

37. Certainly, the way in which the learned District Judge expressed himself in his judgment lends some support to this. In paragraph 62 of his judgment he says that he did not hear sufficient evidence, or evidence with sufficient weight, from the Claimant in itself to lead him to find a lack of testamentary capacity. But here, I think, he is referring to the evidence she gave in cross-examination, and, perhaps re-examination, rather than to the evidence upon which she relied as a whole. That was a view to which the judge was entitled to come.
38. More to the point, on the question whether the testator understood the extent of the property of which he was disposing, the learned judge said that he had not come across any information that led him to override the presumption that the deceased did understand that. That is the wrong way round: the presumption was overridden, for the reasons which I have already given, and the evidential burden to prove capacity overall lay on the First Defendant. The judge accepted his evidence, and that of his witnesses, that Mr Beswick knew the extent of his property and the distribution of it, and the nature and effect of the will for which he was giving instructions. Those are findings which he was entitled to make, on the basis of the evidence about those instructions and their detailed and specific nature, the manner in which they were given by the Claimant, and the view of the joint expert. In my view the correct burden of proof in relation to this aspect of capacity was amply satisfied, and I am not prepared to disturb the finding of the learned judge under this head.
39. As to the question whether the testator was able to comprehend and appreciate the claims to which he ought to give effect, the learned judge again said,

“There is no evidence to suggest that the severity of the deceased’s cognitive impairment was of such a nature as to render him incapable of comprehending and appreciating the claims to which he ought to give effect”.

Again, and for the same reason, that is the wrong way round: the evidential burden lay on the First Defendant to prove capacity under this head, not on the Claimant to disprove it. But the evidence that the testator was able to comprehend and appreciate the claims to which he ought to give effect was strong: I refer in particular to the reasons which he gave for cutting out the Claimant and her son as residuary beneficiaries of his 2017 will, and the careful provision which he instructed should be made for other gifts. The learned judge found that the record of these reasons was accurate, as he was entitled to do. On that footing, the burden of proof in relation to this aspect of capacity also was amply satisfied, and I am not prepared to disturb the finding of the learned judge under this head.

40. There remains the question whether a disorder of the mind had poisoned the affections of the testator or influenced him against the Claimant to make provision in his will which, if his mind had been sound, he would not have made; in particular, his decision to cut out the Claimant. The judge framed the question as whether the souring of his relationship with his daughter was a symptom of his cognitive impairment, and found that it was not. He gave the following reasons, in summary.
41. He accepted the First Defendant's evidence that he had an affinity and an affection to the First Defendant. By contrast, he accepted that the Claimant and her father 'buted heads', although they had a close relationship. He referred to evidence from the First Defendant that the Claimant might not have been as attentive as she said; and referred to her evidence that she had attempted to contact the deceased on the phone and to call round, and accepted that she might well have done so. On the other hand, it was agreed that she did report him to the DVLA, and that there was some report to social services, about which the testator was livid, and that he took great exception to its leading to his losing his driving licence. The judge accepted that it was the sincere view of the testator

that the Claimant was breaking into his house and moving things, but made no finding as to whether that was correct, or well-founded, or even rational. Again, he accepted evidence that the testator thought she had misappropriated or misspent certain monies, but made no finding as to whether that was correct or well-founded either, merely stating that it was not in his view completely irrational. The judge referred to, but gave little weight, to the Claimant's evidence of her suspicions as to the cognitive ability of the testator; whereas he appears to have accepted the evidence of the First Defendant's witnesses that he was perfectly capable of looking after himself (that is, I take it, in ordinary life). He did not refer to the Claimant's evidence that the ability to do so might often be explicable by having a support network. Although there were certain matters raised by the Claimant 'which might amount to something', he held that there was insufficient evidence of sufficient weight in relation to those to lead him to make a finding of lack of testamentary capacity.

42. On this question (whether the deceased's mind had been poisoned in consequence of cognitive impairment) the judge did not make a decision about where the evidential burden of proof lay but approached the matter on the footing that either way he did not lack capacity. I do not think it can be said, and counsel for the First Defendant did not argue, that he therefore approached the matter partly on the correct basis. Failing to choose between the two alternatives might well make it impossible, absent a careful and laborious and explicit parsing of the evidence on each alternative basis, of a kind which did not occur and ought to have been unnecessary, to evaluate the evidence correctly.

Whether the decision was wrong

43. To see whether the evidence was correctly evaluated in the present case, and because it is a free-standing ground of appeal, I therefore turn to the question whether the decision

was wrong. I have had firmly in mind at all points that an appellate court should only interfere with findings of fact where they are unsupported by the evidence or where the decision is one which no reasonable judge could have reached. In this case, I am not overturning findings of primary fact but the learned judge's evaluation of the facts; and I must be just as cautious in doing so. The proper approach is summarised in *Prescott v Potamianos* [2019] EWCA Civ 932 in the following terms

“... On a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion.”

The flaw in this case, in my judgment, was the confusion which arose as a result of his adopting the Claimant's invitation not to address the burden of proof. It was that failure which clouded the issue.

44. Had he considered the matter on the basis that the evidential burden had shifted to the First Defendant, I am satisfied that his conclusion would have been the opposite of what it was. The points in favour of the First Defendant in attempting to satisfy the burden of showing that the testator had capacity, such that the souring of the relationship with his daughter which appears to have opened the way to the 2017 will was not the result of a cognitive impairment, are in summary as follows: the good, trusting and quasi-paternal relationship with the First Defendant which the judge accepted existed; the evidence of the First Defendant and his witnesses that the testator was coping in daily life; his anger at having lost his driving licence as a result of the Claimant's having reported him; the genuineness of his belief that the Claimant was breaking into his house and moving things, and had misappropriated or misspent some money; and the rationality on their face of the terms of his will and letter of intent.



45. The main points against the First Defendant can be summarised in the following way.

The testator was no doubt in a vulnerable state, having lost his wife five months before he made the 2017 will, and his son only four weeks before he did so. Only a little over two months before he made the 2017 will he had failed a well-regarded screening test for cognitive impairment, and failed it very substantially, rather than by a narrow margin. There was a significant impairment. The GP noted that he lacked insight into his condition, which was a significant finding. There was no medical basis for going behind these indications, because the testator did not attend the follow-up appointments. If he was angry enough with his only surviving child to change his testamentary provision for her to cut her out in favour of the First Defendant, it seems to have been at least in part on the basis of her having reported him to DVLA so that he lost his licence. That is, or is capable of being, an indication that his cognitive decline and lack of insight into it was the source of much of that anger, since there was no evidence that he had taken on board that she might have acted in his best interests. The joint expert report supported that possibility. The testator also believed that the Claimant had misbehaved in other ways, but the learned judge did not find that he was right, only (at best) that it was not completely irrational. Taken with the evidence already mentioned, beliefs of that kind, absent a finding that they were well-founded, might be thought to detract from the First Defendant's case rather than support it, if the burden of proof lies upon him. Moreover, the solicitors who drew the will were inexperienced, and had not previously met the testator. They did not follow the 'golden rule' in ensuring that they had medical evidence of the testator's capacity. The evidence from their file was incomplete. They were not called to give evidence. They seem to have taken only two units of time, that is 12 minutes, about procuring the execution of the will. There was vivid countervailing evidence from the Claimant as to the extent to

which the testator was able to cope with everyday life from the Claimant, although the judge was entitled to give it reduced weight in view of the way it came out. The apparent rationality of the will and of the letter of intent simply does not address the question whether the deceased's affection towards his daughter had been poisoned as the result of his cognitive impairment, and carries no weight on this point. The joint medical evidence, carefully distinguishing between the limbs of *Banks v Goodfellow*, carries substantial weight and expressed concern as to the testator's capacity under this head.

### Conclusion

46. Having regard to all these points I conclude that, on the correct application of the burden of proof, the Court would and should have concluded that the First Defendant had failed to discharge it, and that accordingly he had failed to satisfy the Court that the 2017 will had been executed with the requisite mental capacity; and that it was the confusion over the treatment of the burden of proof which had opened the door to the error. Counsel for the First Defendant did not seek to persuade me otherwise.
47. Having come to that conclusion, I reject the submission of the First Defendant that a re-trial should be ordered. The delay, expense and use of Court time would be disproportionate, when I have the material safely to substitute my own finding for those of the learned District Judge, given that his primary findings of fact were not challenged, and a specific evaluative flaw with identifiable consequences has been identified. I will therefore make an order granting the appeal, accepting that the 2014 will is proved, and dismissing the counterclaim for proof of the 2017 will. I will consider consequential matters, including costs and a stay for the taking of a grant in respect of the 2014 pending any potential further appeal, at the hearing for the handing

down of this judgment. The parties should agree a form of order or submit competing draft orders. If there is agreement I may dispense with a further hearing.

