Neutral Citation Number: [2017] EWHC 769 (Ch)

Case No: HC-2014-001358

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

IN THE ESTATE OF RICHARD CHICHELEY THORNTON

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 April 2017

Before:

RICHARD SPEARMAN Q.C.
(sitting as a Deputy Judge of the Chancery Division)

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Between:

	(1) HENRY DOMINIC CHICHELEY THORNTON **(2) SUSAN JOY THORNTON** **(3) ANTHONY HYMAN ISAACS** **(4) ANDREW LANG SUTCH**	**Claimants**
	- and –	
	(1) MARY VIRGINIA CHICHELEY WOODHOUSE **(2) LUCY MARGARET CHICHELEY TORRINGTON**	**Defendants**

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Richard Dew (instructed by Charles Russell Speechlys LLP) for the Claimants
The First Defendant did not appear and was not represented
Duncan Macpherson and Francis Ng (instructed by Barlow Robbins LLP) for the Second Defendant

Hearing dates: 22, 23, 25, 28-30 November 2016, and 1, 2, 5-8, 14 December 2016

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Judgment

RICHARD SPEARMAN Q.C.:

Introduction and nature of the dispute

1. This is a probate action concerning the Will dated 16 September 2009 ("the 2009 Will") of Richard Chicheley Thornton ("the Testator" or "Richard"), who died on 21 January 2013.

The Claimants are the executors of the 2009 Will and are, respectively, the Testator's only son from his first marriage ("Henry"), the Testator's second wife and widow ("Susie") and two solicitors ("Mr Isaacs" and "Mr Sutch"). The Claimants seek a grant of probate in solemn form pronouncing for the 2009 Will. Henry, Mr Isaacs and Mr Sutch are also the executors of the Testator's earlier Will dated 27 April 2001 ("the 2001 Will").

2. The Defendants ("Mary" and "Lucy") are the Testator's two daughters from his first marriage, to Jennifer Thornton ("Jennifer"), which lasted from 1958 to 1989. The Testator married Susie in 1989, shortly after his divorce from Jennifer was made final, and they remained married until his death. There were no children of that marriage. Mary entered a caveat in respect of the Testator's estate on 14 May 2013, renewed it on 14 November 2013, and withdrew it on 9 May 2014. However, on the previous day, 8 May 2014, Lucy had entered a new caveat. The Claimants asked Lucy to remove that caveat by 23 May 2014, and, when she did not do so, warned it on 27 May 2014 and began the present proceedings by Claim Form dated 11 September 2014. Mary has taken no part in the proceedings, other than as a witness for Lucy, and was not represented at the trial.

3. Lucy disputes the validity of the 2009 Will, and, by her counterclaim, she seeks (i) a pronouncement in favour of the 2001 Will, (ii) the removal of the Claimants as executors and trustees under whichever Will is held to be valid, and (iii) a grant in solemn form of letters of administration to an independent solicitor with whichever Will is held to be valid annexed. Lucy's case is based on the following grounds:

   (1) The 2009 Will is not formally valid, that is to say it does not comply with the requirements set out in section 9 of the Wills Act 1837 ("Formal Validity").

   (2) The Testator did not know and approve of the contents of the 2009 Will at the time he executed it ("Knowledge and Approval").

   (3) The 2009 Will was procured by the undue influence of Susie ("Undue Influence").

   (4) The Claimants should be removed as executors and trustees pursuant to section 50 of the Administration of Justice Act 1985 or the inherent jurisdiction of the Court ("Removal of Executors and Trustees").

4. The last of these claims was modified during the course of the trial to seek the removal of Susie and Henry alone. This occurred on the eleventh day of the hearing (the twelfth day of the trial, including the day allocated for, and spent on, pre-reading), and after Mr Isaacs and Mr Sutch had been called as witnesses and had been cross-examined. According to her Counsel's written Closing Submissions, however, while Lucy accepts that "she is not able to remove" Mr Isaacs and Mr Sutch, nevertheless "she is concerned that they have been excessively supportive of Susie's position in this case" such that "she would be much more confident …if an additional independent executor and trustee were added … [although

she] would be happy with an appointment made from the private client department of Stephenson Harwood LLP [i.e. the firm of solicitors with which Mr Isaacs and Mr Sutch have each had a longstanding relationship]".

5. During the course of the morning of the first day of the hearing, I caught sight of Mr Isaacs when he stood up to leave court, and realised then that I had previously had some contact with him. First, he was a member of a Solicitors' Disciplinary Tribunal before which I appeared several years ago, representing a solicitor charged with professional misconduct in connection with certain coal miners' compensation claims. Second, and sometime after the Tribunal had delivered its decision in those proceedings, I had spoken to Mr Isaacs briefly about the outcome when I was a guest at the Garrick Club and my host (who knew him because of some remote and complex family connection) introduced me to him. I mentioned these matters to the parties before the midday adjournment, and said that if they gave rise to any concerns then Counsel should raise those concerns with me at 2pm. No concerns were raised at that time, and I proceeded to hear the case that afternoon. I did not sit in this case on the following day because I had a pre-existing commitment to deal with post-judgment arguments in another case.

6. When I resumed sitting in this case on the day after that, however, an application was made on behalf of Lucy that I should recuse myself, on the grounds (in short) that (a) Mr Isaacs and Mr Sutch were members of the Garrick Club, the Testator had been a member of that Club, and other witnesses had some connection to the Club, and (b) the fact that I had been invited to lunch there and no doubt hoped to be invited again gave rise to concerns of apparent bias, on the basis of a possible perception that I would or might be influenced to refrain from voicing criticism of members of the Garrick Club in a way that I would not be inhibited from doing if I had no such connection with it. I dismissed that application, but not before it had taken up an entire day of court time.

7. As the application was not based on any concerns about my previous contact with Mr Isaacs, but instead on the premise that I belonged to a problematic category of Judges (namely, in short, persons who have some connection with the Garrick Club, even if only as occasional guests), I asked Lucy's Counsel why this ground of objection had not been raised in advance of the hearing (for example, when Lucy made an application to Mann J on 16 November 2016 for the trial to be adjourned). If concerns of this kind are raised in advance, it may be possible as a matter of reasonable expediency and without necessarily having to explore in detail whether or not they are well founded, to arrange for the Judge allocated to try the case to be drawn from outside the relevant category. I was told that the objection had not been raised earlier because it had not been thought of earlier. I do not regard this as a satisfactory explanation. In the event, because Lucy's objections to Mr Isaacs and Mr Sutch dissipated during the course of the trial, the principal ground on which the application had been made also fell away.

8. On the tenth day of the hearing, another day of court time was taken up with an

application for permission to amend Lucy's statement of case to plead fraud. Because Lucy's legal team did not feel able to make this application on her behalf, this application involved Lucy dispensing with their services so that she could make it in person, and then re-engaging them after it had been made, and, in the event, dismissed.

9. My rulings on these applications are the subject of separate judgments. I mention them here solely as part of the background relating to the conduct of this litigation.

10. Richard Dew appeared for the Claimants, and Duncan Macpherson and Francis Ng appeared for Lucy. I am grateful to them for their clear and helpful submissions.

The Testator's career, assets, and family

11. Richard was born on 5 July 1931. He was educated at Stowe, read law at Keble College, Oxford, and was called to the Bar before commencing a career in finance.

12. In 1969, Tom Griffin and Richard founded GT [i.e. Griffin and Thornton] Investment Management ("GT"), a successful fund management business.

13. In 1971, Richard set up trusts for each of his three children ("the 1971 Trusts"), into which he settled half his shares in GT. In 1983, Richard left GT following a boardroom coup and sold his shares for around £6m: £3m went into the 1971 Trusts; he gave £1m to the Thornton Foundation, a charity; and he retained the remaining £2m (pre-tax).

14. The sum of £1m which Richard placed in trust for each of Mary, Lucy and Henry in this way in 1983 would be worth approximately £3.25m in present day terms.

15. In 1983, Richard set up what ultimately became Thornton & Co Ltd, a Jersey holding company for his investment management business. A Hong Kong subsidiary was also set up as the principal investment management operating company. The business of Thornton & Co Ltd was sold successfully to Dresdner Bank in 1988.

16. Mr Isaacs assisted Richard in resolving his departure from GT, and Mr Isaacs and Mr Sutch assisted Richard in setting up his new business in 1983. These matters are illustrative of Richard's long-term relationships with each of them, and reflect the fact that these relationships went back decades before his death in 2013. Further illustrations of this, and indeed of Richard's wish that Henry should be one of the executors and trustees of his estate, are provided by Richard's earlier Wills. By a Will dated 15 November 1993, Richard appointed Mr Isaacs and Henry and Anthony Chancellor as executors and trustees, and by a Will dated 21 November 1996, Richard appointed Mr Isaacs, Henry and Mr Sutch as executors and trustees.

17. After 1988, Richard continued to manage the Establishment Investment Trust ("EIT"), a fund based in Luxembourg into which he had made significant personal investments.

Between 1992 and 1998 Richard and Susie lived in Bermuda. During this time, Richard transferred his pension fund to a Bermudan pension fund (the "BPF").

18. On returning to London in 1998, Richard transferred the assets of EIT to a UK company of the same name. EIT was and remains a successful business. The investment manager for EIT is Blackfriars Asset Management (formerly BDT Investment Management Limited) ("BDT"), in which Henry has a management role. Richard attended board meetings of EIT until 2011. Susie then replaced him as director.

19. At the time of his death, Richard owned assets of substantial value, the most significant of which comprised: (a) 3.6m shares in EIT, worth about £7.5m; (b) a half-share in the home in which he lived with Susie, 25 Pelham Place, London, SW7 ("Pelham Place") which he valued at £4m to £5m on 1 December 2008, which is now probably worth substantially more than that, and his interest in which passed by survivorship to Susie on his death; (c) a half-share in a beach house near Melbourne, Australia, which he valued on 1 December 2008 at about Aus$1m (equivalent to about £300,000), and which also passed by survivorship to Susie; (d) about Aus$400,000 in a joint account; (e) an investment portfolio which he valued on 1 December 2008 at about £1m; and (f) the BPF, which he valued on 1 December 2008 at about £3m, the accounts of which for the year ended 5 April 2014 showed net assets of just over US$6.8m, and which does not form part of his estate because it is held on a discretionary trust.

20. There were three children of Richard's marriage to Jennifer: Mary (born in 1959), Lucy (born in 1960), and Henry (born in 1963). Richard and Jennifer separated in 1984, and divorce proceedings were commenced in 1987. These resulted in a decree absolute in 1989 and a clean break in respect of ancillary relief, pursuant to which about £2m was payable to Jennifer, which was later reduced to £1m in light of the FTSE crash.

21. Richard met Susie in 1983 through work. They subsequently began a relationship, and they married very soon after Richard's divorce from Jennifer was finalised. Susie is 14 years younger than Richard and Australian by origin.

22. Susie's perception of Richard's family is that it was dysfunctional, and there is no doubt that relations within it were often strained. I return to these matters below.

23. I also consider in more detail below the attitude that Richard had towards the financial position of Mary, Lucy and Henry. For the moment, it is sufficient to record that, according to a letter dated 16 November 2007 that Richard sent to the firm that later became Charles Russell Speechlys LLP ("CRS"), the solicitors then advising him on his Will who are also the solicitors for the Claimants in the present proceedings, he saw their position as follows:

    (1) Mary's 1971 Trust continued to exist in part. It provided her with an income of

around £60-70,000 per year. Mary owned her family home jointly with her second husband, Andrew Woodhouse ("Andy"). Mary also had a letting house and three holiday cottages. Andy had little income and no realisable capital. Mary had two daughters from her first marriage, Georgina Morton and Caroline Morton, who were adult, and one daughter from her second marriage, Charlotte Woodhouse. Relations between Mary and Andy were strained.

(2) Lucy had taken the money from the 1971 Trust. She was not very good with capital and there was very little left. Lucy worked as a music teacher. She owned her home subject to a large mortgage. Lucy was divorced and had two children, Anna Torrington from her former marriage, who was an adult, and Leo Gabriel Gleeson ("Gabriel"). Richard was paying for Gabriel's school fees.

(3) Henry was the most successful. He took the money from the 1971 Trust. Henry founded BDT which he had run impressively. He was (although he no longer is) married to Nicola ("Nicki") and has four daughters, one of whom was by then 18.

The 2001 Will and Letter of Wishes

24. By the 2001 Will, Mr Isaacs, Mr Sutch and Henry are appointed as executors and trustees. After various pecuniary legacies, the residue of the estate is dealt with in Clause 6. One half is to be paid absolutely to Susie. The remaining half is held on discretionary trust for Susie, Richard's children and remoter issue, the spouses, widows and widowers of the children and issue, Richard's brother and his issue, Richard and Susie's then domestic help, and such charities as the trustees should appoint.

25. The 2001 Will was accompanied by a Letter of Wishes dated 31 July 2001. Paragraph 3 deals with Pelham Place, and records that Richard expects Susie to become the owner of this property outright on his death, but "in the unlikely event that at my death I hold my interest as a tenant in common, then I would wish you to consider transferring my interest to her or, if thought preferable, allowing her the use and occupation .. for so long as she wishes rent free but subject to her maintaining the property". Paragraph 4 deals with the remainder of the estate. It states Richard's belief that the outright gift to Susie of one half of his residuary estate when added to her own resources (including her interest in Pelham Place), would mean that she was "comfortably provided for" and would not have need of "significant further capital or income". It continues: "However, I would want you to ensure that Susie's reasonable needs are appropriately catered for. Subject to these considerations, I would wish my Executors to invest the remainder of my residuary estate with a principal aim of achieving capital growth so that if, for example, for fiscal reasons Susie has an interest in the income from this part of my residuary estate that interest could be modest". It then states:

"You will have the power to advance capital to Susie but, as I say, I doubt if this will be necessary and I would want you to regard the part of my residuary estate not given to Susie outright as primarily for the long term benefit of my grandchildren and remoter issue. As noted in my Will I have at present 9 grandchildren namely the four children of Henry, the three children of Mary and the two children of Lucy. You will have a discretionary power to advance capital to them or for their benefit which I would want you to feel free to exercise without some special regard to Susie's position unless in your estimation there is some unforeseen reason for doing so, but I consider my grandchildren should not have access to capital sums of material amount until they reach the age of 25 or more. I am particularly anxious that my grandson Leo Gabriel should be adequately provided for so as to ensure that he has a good education.

Although I would like my grandchildren to be the principal beneficiaries of that part of my residuary estate not given absolutely to my wife Susie, I am, however, conscious of the fact that whilst my daughter Mary and my son Henry are, I believe, well provided for, my daughter Lucy may need to be helped financially bearing in mind that she is now divorced and has the responsibility of bringing up on her own two children. I therefore would want my Executors and Trustees to bear in mind particularly her and her family's needs which I consider should be given some priority over the interests of my other grandchildren. Clearly circumstances may change and as Trustees you must exercise discretions at the relevant time and in the light of all appropriate considerations. I would, however, wish you to consider that Lucy should be supported so that she has a reasonable level of income.

Subject to the foregoing, I would want you to treat each of my grandchildren as having an equal interest in the discretionary trust fund.

I hope that my three children will feel able to put aside any painful differences and difficulties as have existed so that they can in future live happily and in a friendly manner with each other and that they will accept that these wishes reflect my equal affection for each of them."

The 2009 Will and Letter of Wishes

26. By the 2009 Will, Susie was appointed as an executor and trustee in addition to Mr Isaacs, Mr Sutch and Henry. There were various minor changes to the 2001 Will, including to the pecuniary legacies. The major changes related to the residue of the estate, and were contained in Clauses 9 and 10. In sum, instead of giving Susie an absolute interest in half of the fund and providing that the remaining half is held on a discretionary trust, the 2009 Will provides that the half of the residuary estate that is not devised to Susie absolutely is held on trust to pay the income to Susie for life subject to an overriding power of appointment in favour of Susie or (in broad terms) the same discretionary beneficiaries as are identified in the 2009 Will.

27. The 2009 Will was accompanied by a Letter of Wishes also dated 16 September 2009.

28. Paragraph 2 deals with the Nil Rate Band Discretionary Trust established by Clause 6 of the 2009 Will and contains the following guidelines as to how the discretion under Clause 6 is to be exercised:

> "2.1 My priority is to ensure that Susie is able to maintain our current standard of living.
>
> 2.2 However, I anticipate that Susie will have sufficient assets of her own and from the residue of my estate to enable her to do so and therefore assets from this fund should be used for the other beneficiaries of the trust. Since I believe that my children have already received sufficient financial support, I would principally like assets to pass to my grandchildren or their children.
>
> Although I principally wish assets to pass to younger generations, I would not want children to receive too much capital while they are still relatively young. For this reason, unless there are overwhelming reasons such as education or housing needs, I would prefer that any capital entitlement be deferred until they are 25."

29. Paragraph 3 deals with Pelham Place, and is in identical terms to Paragraph 3 of the 2001 Letter of Wishes.

30. Paragraph 4 deals with the residuary estate, and begins with the same wording as Paragraph 4 of the 2001 Letter of Wishes. There is then a change of wording to reflect the fact that (in contrast to the 2001 Will) under the 2009 Will "The remaining half of my estate is left in life interest trusts for Susie". The remaining wording, so far as relevant to the present case, contains changes which are largely immaterial. However, the reference to Lucy being divorced and having the responsibility of bringing up two children on her own is followed by the typewritten words "on modest means"; the words "and in the light of all appropriate considerations" have been deleted in manuscript at the end of the sentence beginning "Clearly circumstances may change"; and the sentence "I would, however, wish you to consider that Lucy should be supported so that she has a reasonable level of income" has been deleted in manuscript. These deletions (together with an earlier manuscript deletion of the words "but, as I say, I doubt this will be necessary and") have been initialled "RCT" by Richard.

31. The 2009 Letter of Wishes contains two paragraphs headed "Bermudian pension fund" which have no equivalent in the 2001 Letter of Wishes. These read as follows:

> "In addition, when exercising your discretion under the discretionary trust over my residuary estate, I would also like you to liaise with the trustees of my Bermudian pension fund. I would wish distributions made from the pension fund to be taken into account when making distributions from the discretionary trust, so that the principle of equality of distributions is applied across both my

residuary estate and the pension fund.

The trustees of the pension fund have similar powers to yours and I have prepared a similar letter of wishes to accompany the pension fund. My principal aim for the pension fund is for it to continue as a dynastic trust for the benefit of future generations of my family. As such, I would wish the distributions made soon after my death to be chiefly from my residuary estate rather than the pension fund. I have also been advised that, for tax reasons, it would be preferable for distributions to be made to beneficiaries who are resident in the UK from my residuary estate rather than the pension fund. Assets from the pension fund could then be retained to be distributed to members of my family who are resident outside the UK."

The BPF Letter of Wishes

32. On 17 September 1996, Richard wrote to the BPF trustees a letter which "is intended as a statement of my wishes with respect to the Pension Fund established on the 26th day of March, 1996 between E.T. Investment Management Limited as the employer and you as the trustee".

33. The letter continues as follows:

> "By the terms of the Trust Deed constituting the Pension Fund, any funds still in the trust at the time of my death will be held on discretionary trust for the benefit of my relatives and dependents and in the exercise of your discretion under that trust, you may have regard to any instrument expressing my wishes. This letter is intended to provide you with guidance as to my wishes. It does not impose any trust or legal obligation on you, nor is it intended to bind or fetter you in the exercise of the powers and discretions vested in you under the terms of the Pension Fund.
>
> So as to assist you in understanding the wishes expressed in this letter, it is important for you to be familiar with my family situation. Above all else, I am concerned about the future welfare of my present wife, Susan, and you should always regard this as my most paramount consideration. I have set out some of my thoughts in this regard below. I also have three grown children as a result of my first marriage, Mary Woodhouse, Lucy Torrington and Henry Thornton. On the event of the breakdown of my first marriage I entered into a clean break settlement with my first wife, which should take care of all her future needs. A settlement established in 1971 gave to each of my children a starting capital of £1,000,000.
>
> Mary has three daughters. Her fund (still held in the 1971 settlement) has increased to a comfortable level and she has no immediate financial concerns. Henry has four daughters. Unlike Mary, he took his initial fund whilst working overseas and greatly increased its value. He is also successful in his own career. Unfortunately, Lucy has not been so fortunate. She used her fund to make a number of investments in property, as a result of which she has much less than

her brother and sister. She also took her fund whilst living overseas. In addition, she divorced within six months of her daughter's birth, since when she has produced a son out of wedlock. At present, Lucy's future does not look financially stable.

Against this backdrop must be seen my principal concern to ensure the continued comfort after my death of my wife, Susan. Although provision will be made for Susan out of my United Kingdom estate, I wish to ensure that she has sufficient income for her needs, particularly in view of the fact that she is considerably younger than me and may well have a lengthy widowhood.

In view of all of these considerations, my wishes are as follows. To the extent that it is possible to do so, I would like to see the trust assets remain offshore. I would ask you to liaise with my wife and with the executors of my estate, Mr. A.H. Isaacs and my son Henry Thornton, to determine her financial requirements and whether trust assets should be made available for her benefit. Those assets remaining in trust should, if feasible in the context of prevailing family circumstances, be retained as a fund for the following purposes.

It is apparent that the needs of my children at the time of my death may be disproportionate and it is not my wish to leave any of my children, particularly Lucy, impecunious. However, I am also aware that it is unfair to benefit Lucy, at the expense of Mary and Henry, where Lucy's situation may be largely self-induced. For this reason, I would prefer that the trust assets be used principally for the education and advancement of my grandchildren. I would hope that you would liaise with tax advisors and my executors to ensure that any benefit to be conferred upon my grandchildren, or my children should you deem this to be appropriate in the circumstances, be structured in the most advantageous manner possible.

I realise that the wishes expressed in this letter confer upon you a very broad discretion, in consultation with my wife and executors. In my estimation, this is far preferable to making decisions today which may be completely inappropriate after I am gone…"

34. On 13 November 2008, Richard sent a letter of wishes in the same terms to the BPF Trustees. The reason for this may be that new BPF Trustees had been appointed.

35. As a matter of record, however, there was no change in Richard's wishes so far as concerns the utilisation of the BPF in the event of his death between 1996 (before the 2001 Will was made) and thereafter, including before and after the 2009 Will was made. In addition, the following points can be made about the BPF Letter of Wishes:

    (1) The documents make clear that Richard wanted and expected his estate and the BPF fund to be considered symbiotically. This also accords with common sense.

    (2) The BPF enjoyed offshore tax status. In addition, it was regarded by Richard as

potentially more of a dynastic asset that his United Kingdom estate.

(3) In these circumstances, leaving aside those special considerations regarding the BPF, his wishes in relation to the BPF and the estate were likely to be similar.

(4) The elements of the BPF Letter of Wishes, which are, in my judgment, reflected also in Richard's attitude towards the members of his family and his United Kingdom estate over very many years before the 2009 Will was made, as evidenced by the extensive documentary record which is discussed below, include the following: (a) Susie's welfare is a "paramount consideration" and her continued comfort after Richard's death is a "principal concern"; (b) while the provision made for Susie out of Richard's United Kingdom estate is extensive and may (among other things) provide "sufficient income for her needs", it is also expected that consideration will be given to whether trust assets should be made available to her to meet "her financial requirements"; (c) there is recognition of the tension between, on the one hand, the desire that, although her needs may be greater than those of Mary and Henry, Lucy should not be left "impecunious", and, on the other hand, providing benefits to Lucy which have the effect of treating her unfairly vis-à-vis Mary and Henry, especially in light of the consideration that "Lucy's situation may be largely self-induced"; (d) there is a preference for trust assets to be used principally for the benefit of future generations; and (e) there is a desire to reduce the tax predations on the assets.

Is the litigation pointless?

36. If the 2009 Will is held to be invalid, that will mean that the 2001 Will is operative. Subject to appropriate steps being taken within two years of Richard's death, that result would give rise to a potential liability to pay substantial inheritance tax ("IHT"). In order to avoid that consequence, Henry, Mr Isaacs and Mr Sutch have exercised the powers that they have under the 2001 Will to appoint the same life interest in favour of Susie as she enjoys under the 2009 Will in respect of that half of the estate that is not devised to her absolutely. The concept of taking such a step is not novel, either generally or in the context of the present case. It was expressly envisaged, for example, in a letter that Mr Isaacs (who was then still at Stephenson Harwood) sent to Richard on 7 June 2006 in relation to the 2001 Will, which stated: "You give half your estate to Susie outright … and the other half will be held on discretionary trusts with a view to your Trustees determining within two years of your death what should happen to the remaining half … The use of a discretionary trust within the two year period enables the Trustees to rearrange matters to their best advantage including making appropriate use of the exemption in favour of a surviving spouse".

37. There are some differences between the 2001 Letter of Wishes and the 2009 Letter of Wishes, and I consider that it is reasonable for Lucy to regard the tenor of these

differences as being less favourable to her. For example, the deletion of the sentence "I would, however, wish you to consider that Lucy should be supported so that she has a reasonable level of income" may be said to be to her potential disadvantage.

38. In the overall scheme of things, however, I consider these matters are relatively peripheral. The Letter of Wishes is only an expression of the Testator's wishes, as indeed is reflected in the language of this deleted sentence; the expression of particular anxiety that Lucy's son Gabriel "should be adequately provided for so as to ensure that he has a good education" has been retained; the recognition that "Lucy may need to be helped financially bearing in mind that she is now divorced and has the responsibility of bringing up on her own two children" has also been retained and, indeed, bolstered by the addition of the words "on modest means"; and all that is said regarding Lucy has to be viewed in the context that "the part of my residuary estate not given to Susie outright [is] primarily for the long term benefit of my grandchildren and remoter issue".

39. Accordingly, whether or not Lucy succeeds in this litigation will have no effect either (a) on Susie's entitlements in respect of the estate or (b) on the entitlement of Lucy (or for that matter Lucy's children, including Gabriel), which will remain discretionary.

40. The other significant difference between the 2009 Will and the 2001 Will concerns the appointment of Susie as an executor and trustee. If Lucy succeeds in her challenge to the validity of the 2009 Will, that will have the effect of removing Susie from these roles. Whether, from Lucy's perspective, that is likely to serve any useful purpose depends in part on Lucy's stance towards Henry, Mr Isaacs and Mr Sutch. For example, it would be one thing if Lucy's objections related to Susie alone and another if she had objections to all these persons on grounds which are, in substance, the same. Until well into the trial hearing, Lucy sought the removal not only of Susie but also of Henry, Mr Isaacs and Mr Sutch. By the end of the trial, Lucy's objections focussed on Susie and Henry alone, and, as far as I can see, were such that, in her view, she had equal grounds for objecting to Henry alone as to Henry and Susie together. In addition, Lucy remained concerned at the extent to which Mr Isaacs and Mr Sutch had, as she saw it, sided with Susie in this litigation – so that even their continued involvement was not un-worrying.

41. In these circumstances, it seems to me that, even viewed from Lucy's perspective, the removal of Susie as an executor and trustee is unlikely to produce any tangible benefit for Lucy. The likelihood that it will make any practical difference to her is further reduced, possibly to vanishing point, if, as each of the Claimants contends, but as Lucy does not accept with regard to Susie and Henry and seems reluctant to accept with regard to Mr Isaacs and Mr Sutch, they will each fulfil their functions conscientiously, in accordance with what they understand and believe to be Richard's wishes and intentions, with impartiality, and without bias or prejudice so far as concerns Lucy.

42. At all events, I am unable to see that Lucy will have accomplished anything of value to her

unless she succeeds in her claim for Removal of Executors and Trustees. However, Lucy was no more willing to accept this than to accept (as I suggested more than once during the course of the trial) that the claim relating to the formalities of the 2009 Will was not only unpromising but also unlikely to add anything to her other claims (because, if they succeeded, she had no need of the claim relating to formalities, whereas that claim was unlikely to succeed in the event that her other claims did not).

43. In response to Mr Dew's contention that Lucy's stance in this litigation is pointless for the above reasons (and because, as he submitted, her case was hopeless on all fronts), Mr Macpherson suggested that, if the success or failure of Lucy's case did not matter, the Claimants could easily have conceded some or all of that case. For example, Susie could have agreed to step aside as an executor and trustee. In my view, this misses Mr Dew's point. As far as the Claimants are concerned, Richard's wishes and intentions are clear, and ought to be respected. The achievement of that end is the essential purpose of their claim, and for this reason the claim is not pointless. It does not follow that Lucy will gain anything of value if she defeats the claim, either wholly or in part.

44. However, if there is merit in any of Lucy's contentions, she is entitled to ask the Court to rule in her favour. The possibility that the outcome will not make much, if any, practical difference to Lucy or others whose interests she claims to represent (for example, so far as regards Susie's life interest) is not a ground for avoiding a full trial.

The witnesses

45. There is a wealth of contemporary documentary material in the present case. For this reason, the significance of the oral evidence in this case is not as great as it is in many cases in which similar issues arise. Nevertheless, the oral evidence forms an important part of the evidence of fact. It is therefore necessary for me to assess its reliability.

The Claimants' witnesses

46. Susie, Mr Isaacs and Mr Sutch gave oral evidence, and called as witnesses of fact Claire Harris, David Hunter, Sir David Cooksey, Harry Wells, the Reverend Canon Gulliford, and the Reverend Gyle. I also received a statement of Stephen Cooke which was admitted under the Civil Evidence Act 1995.

47. I consider that Susie gave reliable evidence. I base this assessment not only on her demeanour, which I had a good opportunity to observe as she was subjected to prolonged cross-examination over many hours, but also having regard to the extent to which it accorded with both the evidence of the Claimants' other witnesses, who I found to be reliable and the contents of the contemporary documents. I mention below specific aspects of her evidence in the context of considering those documents.

48. Mr Dew submitted, and I agree, (a) that Lucy failed in her attempt to show that Susie had

an abusive and controlling relationship with Richard, and that Richard was unable or unwilling to counter her wishes, (b) that, having regard to all the evidence before me, it is not credible that Susie forced Richard to appoint her as an executor and trustee of the 2009 Will when he did not want to do so, and there is cogent independent evidence as to why he might want to do so, (c) that, whatever may be said about Susie's behaviour in 2011 and 2012, when she was under enormous stress which was exacerbated by the unreasonable conduct of Lucy and Mary and to some extent other family members, it does not establish that she bullied or controlled Richard at that time, and (d) that it would be unsafe to assess the situation that prevailed in 2009 in light of later events.

49. Mr Macpherson submitted that Susie's evidence was untruthful in a number of respects, and that this meant that there was an overwhelming probability that it was untruthful in key respects. I do not accept either the premise or the conclusion. So far as concerns the conclusion, it does not follow that because an individual's evidence is unreliable in some respects it is also unreliable in others. Accordingly, even if were the case that, for example, and contrary to my findings below, Susie had threatened to instruct new lawyers and doctors unless Henry was removed as an executor and trustee (as Richard is recorded as reporting to Withers LLP ("Withers") in the attendance note dated 17 June 2009), it would not follow that she is not to be believed when she says that, after she had withdrawn her objections to Henry's appointment on 22 June 2009 (as recorded in Mr Cooke's attendance note of that date), she did not prevail upon Richard to make the changes that were eventually made to the 2009 Will and Letter of Wishes in comparison to the 2001 Will and Letter of Wishes, and that he made those changes of his own volition.

50. Mr Isaacs and Mr Sutch were also very reliable. Both are distinguished City solicitors.

51. Mr Isaacs was at Stephenson Harwood LLP (formerly Stephenson Harwood & Tatham) all his working life. He became a solicitor in 1960, a partner in 1964, senior partner in 1987, retired as a partner in 1996, and remained a consultant until 2009. He was also, among other things, a member and at one time the President of the Solicitors Disciplinary Tribunal. He was first instructed as Richard's solicitor in 1983, and acted as such for the following 20 years. Among other things, Richard sought his advice in relation to his Will executed in 1996 and the 2001 Will. The two men became good friends, and after Mr Isaacs retired as a partner he continued to see Richard socially. Richard had created the Thornton Foundation in 1983, and in 1984 he asked Mr Isaacs to become a trustee of that charity. Richard and, later, Henry managed the charity's investment portfolio, with success, such that it was able to give away over £100,000 per annum. Henry was a trustee from an early stage and Susie from 1989. Mr Isaacs and Richard met regularly in their capacity as co-trustees of the Thornton Foundation.

52. Mr Isaacs said that Richard was "highly intelligent, very forceful, upfront and determined to get his view across", and that until October 2012 (a) Richard demonstrated these characteristics in any discussions or meetings he had with Richard including those

concerning his testamentary wishes, and (b) acted as a competent and decisive chairman in control of meetings of the Thornton Foundation. Mr Isaacs stated that Richard had discussed his testamentary wishes with him over many years following Richard's marriage to Susie in terms which are, in my judgment, entirely borne out by the contemporary documents which I discuss in detail below. He also stated that he believed that Susie had expressed views regarding Richard's estate planning, but not in a manner that he regarded as being unusual for a spouse.

53. Mr Isaacs' belief is that the last time he discussed family affairs with Richard prior to the execution of the 2009 Will was at lunch in August 2009. It is his recollection that "Richard said that Withers had queried whether Henry might have some conflict of interest as Trustee and Susie had thought that it might be appropriate for her to act as a suitable replacement for him", that Mr Isaacs expressed "some reservations about these suggestions" but that "this was not legal advice", and that Richard said that he would think about things further. Mr Isaacs stated that, at this time, he saw no evidence of any weakening or fragility in Richard's mental state.

54. Mr Isaacs told me in cross-examination that Richard "Was all doom and gloom one day and positive the next. He would often test his advisers by trying them with propositions … He once sacked me because he couldn't get hold of me only to say that he didn't want to sack me later the same day … His instructions changed from time to time … That was one of his endearing features but also infuriating. I'm not surprised by the description that he drove Susie nuts – he drove me nuts sometimes … Acting for him was a bit of a nightmare. He tossed lots of ideas around, but eventually came to a reasoned, sensible conclusion … One day he might say the world would collapse; the next, it would be fine". Mr Isaacs also said that he was not surprised that Susie should have been appointed as an executor and trustee under the 2009 Will "once it was decided on Mr Cooke's advice that she should be, as it's logical for the life tenant in many cases to be a trustee, and is very common practice as I understand it". Further, with regard to the position of both Henry and Susie as executors and trustees, and the suggestion that it would be better or at least easier if they were removed, Mr Isaacs said it was necessary to manage the position created by the 2009 Will and that "You might gain something in the administration of the trust, but you would also lose something … You would lose an awful lot if you didn't have family members/beneficiaries as trustees. The trustees of this trust take their duties very seriously".

55. Mr Sutch is a partner in Stephenson Harwood, which he joined almost 40 years ago, and was senior partner from 2002 to 2012. He specialises, in particular, in advising investment funds and investment managers, and he began working for Richard and his various businesses in 1984 and continued to do so until at least 2002. Mr Sutch was first appointed an executor of one of Richard's wills in 1996, and was made an executor of all his subsequent wills, although they did not discuss Richard's testamentary arrangements in

any detail, and Mr Sutch did not know anything about his intentions for the 2009 Will. He saw Richard socially, among other things after Richard proposed him for membership of the Garrick Club in 2003, and Richard discussed his family, and especially his children, in terms similar to the contents of Richard's contemporary documentation.

56. Mr Sutch described Richard as "bright, energetic, loyal and mercurial". He also stated: "He could lose his temper. I think he liked to test and challenge people; it was a bit of a game to him. In the times I saw him over the years [i.e. up to about 2011 or 2012], he always seemed switched on and was able to converse sensibly and knowledgeably".

57. Mr Isaacs and Mr Sutch have known one another, and Mr Isaacs in particular has also known Henry and Susie, for many years. Mr Isaacs, Mr Sutch and Henry have been acting as interim administrators for Richard's estate pursuant to a grant pending suit dated 4 April 2016 that was authorised by Deputy Master Cousins following a hearing on 22 February 2016 (which Lucy contested). Mr Sutch states, in terms which echo Mr Isaacs, that he will "exercise my discretion fairly, with integrity, sound judgment and impartiality, giving all due respect to Richard's wishes and the position of the beneficiaries. I bear no animosity towards any of Richard's children or grandchildren and would exercise my discretion as an independent Trustee" and that he will be able to apply his familiarity with Richard's business and family affairs and his knowledge of legal and business matters, as well as his professional integrity, to his role as Trustee.

58. Mr Hunter has been in the investment business since 1957, and first met Richard in a business context in the early 1960s. They became great friends. Mr Hunter went to Richard's wedding to Susie in 1989 and he and his wife then saw a lot of them, with the two couples going on holiday together over the 20 years before Richard's death. Richard was mercurial, but this was part of his charm. During 2009 and 2010 Richard appeared to Mr Hunter to be in good mental health: "alert, interested, and just the same as always". Even after falling ill with septicaemia in early 2011, although Richard was never quite physically the same his mental faculties did not appear to have diminished.

59. Sir David Cooksey, who first met Richard in 1998, and who was a director of EIT from July 2002 to 2015 and its chairman from 2011 to 2015, gave evidence to like effect. Richard had a near perfect attendance record at EIT board meetings until the financial year ending in March 2011, his contribution "was always powerful and to the point", and "his mind was both active and alert from a business perspective". Sir David and, I believe, his former wife became good friends with Richard and Susie, and Sir David never witnessed any controlling behaviour on Susie's part; on the contrary: "I remember a balanced relationship of mutual respect between two strong characters".

60. Harry Wells, a chartered surveyor and investment trust chairman, is the current chairman of EIT, and first met Richard in 1979. He described Richard as "an extraordinary man with a great intellect and commanding knowledge and grip of investment markets,

macroeconomics and companies in which he invested"; "a decent and honest man"; and "a committed philanthropist in a very discreet way"; but also as someone who "did not tolerate fools and held strong views". At the last board meeting of EIT that he attended, by telephone, on 8 March 2011, Richard "made valuable contributions to the investment debate" and "was still mentally very alert". In Mr Wells' view, Richard and Susie were happy and had a warm and loving relationship.

61. The Reverend Canon Gulliford first got to know Richard and Susie in 1998, when he was the curate at St Paul's, Knightsbridge, the church that they attended on their return from Bermuda. He knew them well, and was especially close to Richard, whom he visited in hospital a number of times during the last months of his life. His description of Richard tallied with that of other witnesses, in particular in saying that Richard was "mercurial" and in saying that while he had "extraordinary powers of analysis" he also had "a particular capacity to change his mind about decisions that he had made", which "may have been his own way of thinking out loud". Canon Gulliford gave a telling illustration of this, when Richard offered to pay £200,000 towards restoring the organ in St Dunstan-in-the-West (at which Canon Gulliford was Guild Vicar from 2002 to 2012), and then appeared to withdraw the offer, and then called the next day to reinstate it. Canon Gulliford said that, even in 2011-2012, Richard seemed to him to be in full command of his faculties, and: "He was not the type of person who would have done anything that he did not want to do, then or at any time prior to his illness … He always spoke in the most affectionate terms of Susie's care for him … I was very struck by how beautifully cared for he was by Susie … Knowing her well, and observing the huge sacrifices she made for Richard in his last months, it is very important to underline what she did to the detriment of her own health and well-being to be alongside Richard at home and in hospital, throughout the gruelling months of his care… One could see it taking its toll on her physically and emotionally but she never complained and was utterly devoted in her attention to Richard".

62. The evidence of the Reverend Gyle was unchallenged. He has been the vicar of St Paul's, Knightsbridge since 2001, and knew Richard as a co-trustee of St Paul's Knightsbridge Foundation, which Richard took the lead in establishing and of which he was chairman until the time of his death, in addition to knowing Richard and Susie well both pastorally and socially. He saw Richard frequently, and "as frequently in 2009 as I had in previous years". He stated that, in 2009, Richard was "as sharp as a tack, as he had always been"; that, in relation to an issue that arose at St Paul's during 2009 and 2010, Richard was "clear and forceful in his views and quite independent in his thinking"; and that: "I find any suggestion that he might have buckled under pressure to alter his testamentary intentions very hard to believe". The Reverend Gyle saw Richard up until the time of his death, and conducted his funeral. During this time he continued to see Richard and Susie together, and "I never saw anything that would give me any reason to think that there was a power imbalance in the relationship, that Susie was exercising any control over Richard,

or indeed anything other than complete devotion".

63. Mr Cooke was unable to give evidence because he is terminally ill. Lucy accepted that the evidence contained in his witness statement was honest in its entirety, and, indeed, Mr Macpherson sought to rely on aspects of that evidence in support of Lucy's case.

64. I did not find the points made by Mr Macpherson in the latter regard persuasive. For example, he attached significance to the fact that Mr Cooke had formed the impression that Susie was suspicious about the life interest trust that Mr Cooke had advised Richard to create as part of his new Will, and to Mr Cooke's belief that one reason why in August 2009 Richard "no longer wanted" Mr Cooke as an executor of his new Will was that Mr Cooke's relationship with Susie had deteriorated "given her suspicions about the inclusion of the life interest trust". Because this evidence, if right, is to the effect that Susie did not want the new Will to make provision for the life interest trust suggested by Mr Cooke, I find difficulty in understanding how Lucy's reliance on it assists her case that the life interest trust was only included in the 2009 Will as a result of Susie's undue influence. Further, this evidence is not supported by the documents.

65. By way of further example, Mr Macpherson attached importance to Mr Cooke's statement that he believed Susie to be "a strong willed woman who makes her opinions on matters known". However, Mr Cooke also states: "Whilst [Richard] was keen to take [Susie's] views into account, as would be expected, given the length of their marriage, he would always ensure that he did what he thought was the right thing". On a fair reading, I consider that Mr Cooke's evidence supports no part of Lucy's case.

66. Mr Macpherson also submitted that much of Lucy's case on Knowledge and Approval and Undue Influence concerned meetings and correspondence which Mr Cooke does not address in detail and in respect of which his evidence was key, such that, in the absence of the opportunity to cross-examine Mr Cooke, "[Lucy's] case must rely more than usually on conclusions drawn from inference and deduction" and "the Court should not shrink from drawing such conclusions simply because of lack of oral or documentary evidence". I accept that, as appears below, it is appropriate to draw certain conclusions based on inference and deduction in the present case. However, I do not consider that there is a lack of both oral and documentary evidence in many, if any, instances which matter. Further, overall, this exercise does not support Lucy's case.

67. Ms Harris was a very clear and honest witness, and I found her evidence most helpful. Mr Macpherson accepted that she was honest, but submitted that she was protective of the reputations of herself, Mr Cooke and Withers, was often unable to assist the Court, and required to have her evidence corrected in light of the Withers documents. I do not consider that these criticisms are well founded. Although she was willing to make concessions where appropriate, and in spite of the many points that were put to her in cross-examination, her evidence remained essentially unshaken. The essence of that

evidence was that Ms Harris had no concerns about Richard's testamentary capacity; she was clear from her contact with Richard that he was making decisions independently and in light of the emails and letters sent to him by Withers; she had no reason to believe, and did not now believe, that Susie exercised any undue influence on Richard as regards the preparation of the 2009 Will and "From the meetings I attended with him I cannot imagine that he would be railroaded into making any decision against his will"; Richard was intelligent, more than usually conversant with his affairs and the preparation of the 2009 Will, and fully understood its content; and that the 2009 Will reflected his wishes and was signed by him on 16 September 2009 in the presence of herself and Mr Cooke. As discussed below, this evidence accords with the documents.

Lucy's witnesses

68. Lucy gave oral evidence, and called as witnesses Mary, Anna Torrington (Lucy's daughter), and Mary's daughters Georgina Morton, Caroline Morton, and Charlotte Woodhouse, and Helen Salter, whose mother was a cousin of Richard's. Statements were served of other witnesses who would have given evidence on Lucy's behalf if the time allocated for the trial of this claim had not been eaten up in other ways, namely Lucy's son Gabriel, Richard's first wife Jennifer, Mary's husband Andrew, and two former boyfriends of Lucy, Anthony Grubb and David Halliwell.

69. In his written closing submissions, Mr Macpherson submitted that the evidence of these close family witnesses "demonstrated considerable distrust and dislike of [Susie]", and he provided the following summary of important aspects of their evidence:

    (1) Lucy believes that Susie has lied in large parts of her evidence. Lucy further believes that Susie deliberately made Richard's life harder rather than easier, refused to take on board advice that Richard should see a neurologist, threatened to leave Richard, underfed him, isolated him generally and especially when he was ill, coerced him, controlled him and made him fearful, and prevented him from telling his daughters that he loved them. Lucy's case as a whole is that Susie overbore Richard's wishes. In cross-examination, Lucy confirmed her belief that Susie might have plausibly intended to murder Richard. Lucy also believes that Susie is hostile to her, and particularly to any financial assistance for her.

    (2) Mary believes that Susie ordered Richard to make the 2009 Will despite his wishes to the contrary, that she threatened to leave Richard, isolated him in his illness, forced him to remove photographs of her from his home, banned him from seeing her (so that they had to meet in secret), and bullied him. In cross-examination, Mary (also) confirmed her belief that Susie might have plausibly intended to murder Richard.

    (3) Anna's evidence is that Susie threatened Richard, that Susie was verbally abusive to

her family, and that she remains shocked by her family not being invited to Richard's musical memorial.

(4) Georgina accuses Susie of actively encouraging friction within the family, of threatening her, of being verbally abusive, and of neglecting Richard's care. She also expresses concern that she will continue to be excluded from the family if Susie remains a trustee.

(5) Charlotte accuses Susie of threatening to leave Richard, of not being interested in her or her family, and of hating her family.

70. I return to certain aspects of this evidence, for example what is said to support the extraordinary allegation of intention to murder, when I consider the documents below.

71. Helen Salter was, in essence, called to give the evidence foreshadowed by a letter that she wrote on 24 March 2014 "To whom it may concern". The letter begins by recording that in July 1997 Helen Salter's mother had organised a big extended family party, to which both Mary, a third cousin of hers, and Richard were invited. Having not seen much of the Thornton family for some years, following that party, Helen Salter's family made sure that they kept in touch. In 1999 and 2009, there were two parties organised by Mary, the second of which was to celebrate her 50th birthday, but Richard did not attend either of them. Helen Salter describes him as being "unable" to attend, her placing of inverted commas around this word suggesting that this was not the true reason for his non-attendance. In 2008, when Helen Salter's mother celebrated her 90th birthday, there was another party, at which, according to Helen Salter, "Susie and Richard arrived very late, and left rather early, although I'm sure Richard would have wanted to stay longer and enjoy meeting others that he had not had a chance to see for some time". The letter also includes the following:

> "In between these family gatherings, I, or my mother and I, had visited the Thorntons at their home in Pelham Place. "Behind closed doors" I nearly always found Susie to be short and sharp with Richard, who was a lovely mild mannered person, always a charming host and a real gentleman. She would reprimand him for something he had said, and correct him in front of us, which I found disconcerting, and did not warm me to her at all. She appeared to be somewhat controlling and bullying. …
>
> After he became ill, Mary and her sister Lucy, from what I understand, were denied free access to see their father on his own, were not permitted to telephone him, and had to send letters by recorded delivery."

72. At one stage this evidence gave the appearance of being reliable independent evidence which supported aspects of Lucy's case. However, Mr Dew submitted that it was neither independent nor reliable, that Helen Salter knows little of the family, and still less of the

relevant events, and that even a limited analysis of the contemporary material shows that she did not have reliable knowledge even of the events she was describing. It is sufficient in this regard to refer to the fact that on 11 May 2009, Richard wrote to Callie as follows:

> "I am very sorry indeed to miss Mary's 50th birthday celebrations, but I think on the whole it's best that I am not there. I gather that the 'experts' that she has been consulting think that a lot of her problems are down to me, and at nearly 78 I find that a bit hard to take having lived every minute of the last 50 years and having (still) a pretty good memory. Having started out best friends Susie is not apparently acceptable – and that is also hardly acceptable to me – nor should it be.
>
> So, as I say, on the whole it's good that we cannot be there (tho' we have received no invitation!) – but it is also very sad, especially as one approaches the twilight years."

73. Confronted by this account, written at the time in Richard's own words, Helen Salter candidly admitted that she did not know the full facts. I do not doubt that she stated her perceptions honestly, but I agree with Mr Dew that they are unreliable. Her evidence provides an illustration of difficulties which, in my view, taint more generally the evidence of Lucy's witnesses. In sum, they attribute Richard's behaviour and actions to what they perceive or claim to perceive as Susie's adverse influence, when in truth they are due to the fraught relations between them and Richard or to other family tensions.

74. Mr Dew submitted, in brief, that the evidence of both Lucy and Mary could not be accepted and instead shows the extent to which both of them have become fixated on showing Susie to have been a bully and tyrant, and, with regard to the grandchildren, that the events of 2011 and 2012 have caused the Torrington and Woodhouse families to see events prior to that time through that prism. Among other specific points, he submitted:

(1) That the case that Lucy truly believes is that which was the subject of her application for permission to amend her statement of case to plead fraud, and which is dealt with in one of my interlocutory judgments. That case, in a sentence, is that the 2009 Will is not a genuine document, but is instead a forgery or fabrication which has been offered up as part of a concealment of a document or documents which sets out or set out Richard's true intentions and which has or have been concealed from her and from the Court because it or they relate to substantial offshore assets which are tainted by some form of illegality or wrongdoing, such as tax evasion or money-laundering. In the language of Mr Macpherson's written closing submissions, one matter which Lucy deduces from her beliefs that the 2009 Will does not represent Richard's true testamentary wishes and that Susie has lied about the extent of Susie's involvement in the preparation of the 2009 Will, and from her concerns about the Withers' documents, is that: "The 2009 Will is forged. [Lucy] believes that Richard signed the execution page, but that this belongs to

another document, perhaps another Will [although it is accepted that the Court cannot be asked to make this finding in light of the dismissal of Lucy's application to amend]". Mr Dew submits, and I agree, that the knowledge that this is the, or a, case that Lucy would wish to advance if permitted to do so, makes it very difficult to accept Lucy's evidence before me, which rests on the basis that the 2009 Will is genuine, albeit susceptible to attack. Concerns that Richard did not know and approve the contents of the 2009 Will, or was unduly influenced to make it by Susie, are specious if he did not make it all.

(2) In paragraph 102 of her first witness statement, Lucy gives an account of a telephone call in which in early 2011, and in spite of the fact that he was unwell and did not want to go, Richard told her that he had to go to Australia with Susie, commenting: "Susie had overridden his will, and beaten him into submission, just like when my father offered to pay off my debts". A letter from Richard to Callie dated 31 January 2011 reflects that a trip to Australia, for Susie to have a knee replacement operation, was planned at that time, although in the event, as the medical records reflect, this was aborted due to Richard's ill health. In paragraphs 20 to 22 of her second witness statement, Lucy describes how, in November 2009 and in a conversation at Pelham Place, Richard told her that he was very distressed at having to make a trip to Australia with Susie over Christmas of that year and "it was as clear as day that he was being forced to travel to Australia against his will by Susie". Mr Dew submitted that Lucy engaged in both lies and hyperbole in shifting this alleged event to 2009. I am unclear whether there was, or may have been, a trip to Australia in 2009 as well. However, there is no mention of such an incident in 2009 in Lucy's first witness statement, and the contemporary documents provide no support for Lucy's account of what she claims happened in 2009. For these reasons, I consider Mr Dew's points are right.

75. I would add to these points that Lucy's allegation that Susie overrode Richard's will, and beat him into submission, when he "offered to pay off [her] debts" is also not borne out by the contemporary documents. On 29 June 2009, Richard discussed with Mr Cooke how he might pay off Lucy's debts of £142,500. However, according to an attendance note that was made by her solicitor, Simon de Galliani, of a conversation that he had with Lucy on 3 August 2009, and as she confirmed in her evidence before me, Lucy was "reluctant to lose [her] Virgin One facility" because she was concerned that she "W[ou]ld never get it again". In other words, Lucy did not want any money that was paid by Richard to be used to discharge her Virgin One indebtedness (in the sum of about £130,000). On 5 August 2009, Lucy sent an email to Richard, referring to indebtedness to Virgin One of £130,000, to Lloyds of £9,500, and to Barclaycard Visa of £2,500, setting out her account of the history of Richard's offer, and saying that "I phoned Susie on Saturday and receive a tirade of abuse and complaint from her followed by threats of withdrawing Gabriel from Stowe from you". As long ago as 9 October 1998, Richard had written to Lucy describing her

Virgin One facility as "financial suicide" and asking her to "Please, please, sit back and think about this", and I have no doubt at all, on the basis of the contemporary documents, that almost the last thing that he would have been prepared to contemplate in mid-2009 was paying Lucy approximately £140,000 while still leaving her free to maintain Virgin One borrowing of around £130,000. Although that would have made sense to Lucy, for the reason that she gave to her solicitor, it would not have been acceptable to Richard.

76. Susie may well have been hostile to Richard advancing Lucy a further £140,000 in mid-2009. Further, Lucy may be sincere in her belief that the fact that Richard ultimately did not do this was attributable to Susie overriding his will. However, Lucy is wrong about this point. This is, in my judgment, a clear illustration of a wider phenomenon that was apparent throughout much of her evidence, namely that Lucy lacks insight and simply refuses to accept matters that do not accord with how she wishes things to be.

77. Mr Dew argued that Mary's evidence was unreliable for, among others, the following reasons:

    (1) The contemporary documents show that by 2007 Richard's relationship with Mary was difficult because of, among other things, what she said about Susie and indeed Mary's mother in law (Susie Woodhouse). Mary's belief that this was because Susie bullied and controlled Richard is not credible.

    (2) Mary's acceptance (then and now) of everything that Richard told her in 2011-2012, including that Susie was threatening to murder him, is illustrative of an inability to view events or facts with perspective or objectivity.

Appraisal of the witnesses

78. As Mr Macpherson accepted with regard to all of them except Susie, the Claimants' witnesses were all patently honest. In my judgment, they were also reliable. Their evidence enabled me to build up a clear picture of Richard's abilities and personality, and of the relationship between Richard and Susie, and, in particular, the extent to which he was likely to have yielded to attempts by her to exercise control over him in respect of his testamentary intentions, even if she had a controlling nature, which, on their evidence, she did not. This evidence is, in my opinion, borne out and corroborated by the contents of the voluminous contemporary documents in this case.

79. I have no hesitation at all in accepting that evidence where it differs from the evidence or perceptions of Lucy and the witnesses who were called in support of her case. In contrast to the Claimants' witnesses, most of whom had no axe to grind, their evidence lacked balance and perspective, and appeared to be tainted by emotional and perhaps psychological overlay, and, at least in some instances, to be little short of delusional. It

was also, in my opinion, and tellingly, hard to reconcile with the documents.

80. As Mary bravely admitted, she has had mental health problems, and she plainly found giving oral evidence a considerable ordeal. I consider that both she and Lucy are damaged individuals. The reasons for this are far beyond the scope of this judgment to attempt to fathom, but I suspect that, at least in part, they are rooted in the breakdown of Richard's marriage to their mother and in their relationships with Richard, who may not have understood them as well as he might have done – for example, a statement provided by one of them (who I refrain from identifying here) to a solicitor in 2011 includes the sentences "My father complained that I was living in an unacceptable way. Unfortunately I was so desperate to get my father to accept me that I started to behave in a rather extreme way. One could call it obsessional. It became very difficult for my husband, who left me …". Although I think that their stance in this litigation, like their stances over many years in relation to a number of family matters, has been most unfortunate, I am not without a degree of sympathy for the strength of their convictions, which I believe to be, at least in the main, sincere. I am not surprised that they perceived Susie as overbearing at times, because she was a strong character, whereas they were each in their different ways less robust. I also believe that their concerns for Richard were genuine. However, none of this means that their evidence is reliable, and I regret to say that I consider that it is not. I deal below with specific instances where, in light of the contents of the contemporary documents, I find their evidence unreliable.

81. I consider that, broadly speaking, the same considerations apply to the grandchildren who gave evidence before me. It would be understandable if their views were coloured by the attitudes and emotions of their parents, and I consider that this is what has happened in this case. In particular, so far as concerns events in 2011 and 2012, I consider that their relative immaturity meant that they were not able to view with proper perspective either the behaviour of Susie, in light of the extraordinary stress that she was under at that time, or the behaviour of Richard, in light of his illness, which included a diagnosis of dementia. I say no more about their evidence in this judgment not because I discount the sincerity of their views, but in an attempt to avoid worsening the prospects of reconciliation between them, Susie and Henry once this case is over.

82. I accept that there is a possibility that the Claimants' witnesses saw only one aspect of Susie's relationship with Richard, and that, behind closed doors, there was another side to that relationship, as Lucy and her witnesses contend. However, the Claimants' witnesses saw Richard and Susie in many contexts and over many years, including in business and legal contexts, during numerous holidays, and while Richard was seriously ill in hospital. It is not credible that none of them would have seen any sign of the domineering and unkind attitude that Lucy and her witnesses claim to have seen or believe that they saw Susie manifest towards Richard if that had indeed been the case.

83. Similarly, in spite of Mr Macpherson's repeated reference to the possibility that Richard

maintained a "social façade" that he was in good mental health when that was not, in fact, so, I do not believe that the Claimants' witnesses would have failed to notice mental fragility if, indeed, it had existed to any material extent as early as 2009.

84. There is, in any event, an element of tension, if not outright contradiction, between Lucy's case before me that Richard's mental health was such as to render him susceptible to Susie's undue influence in September 2009, and (a) the fact that Lucy was not concerned about Richard paying for all of Gabriel's fees at Stowe in November 2009 and (b) the fact that Lucy and Mary told their solicitors on 16 August 2011 that Richard "… has full mental capacity … He is a business man and very astute".

Henry's non-appearance as a witness

85. Henry was not called to give evidence. However, a clear narrative concerning his business career and his relationship with Richard, and to a lesser extent his relationship with Lucy and other family members, is provided by the documents and by the Claimants' witnesses. In addition, the trial papers contain a number of documents which bear on the discharge of Henry's duties as executor and trustee, and which also, in my view, help me to form a view as to why he did not give oral evidence before me.

86. On 11 October 2016, Nicki Thornton sent an email to Henry, marked "To whom this may concern". This email was written in response to an email from Henry, also dated 11 October 2016, and it appears from the contents of Henry's email and some manuscript endorsements on Nicki's email, that the events described in Nicki's email took place in 1992 and 1993. Nicki's email reads as follows:

> "We invited family and friends to stay with us in a rented house in Thurlstone in Devon. Richard and Susie were among our guests. Lucy and her mother turned up unannounced and uninvited and would not leave the property. They created an embarrassing scene. The police had to be called. It was a very unpleasant event which took place in front of young children and people from outside the family. It was unfair of them to pitch up as we were enjoying a lovely quiet and very private time and, above all, Susie was present, Richard's new wife.
>
> Similarly, the same happened when the two of them – Lucy and her mother – turned up uninvited at an after-christening supper party at Richard and Susie's home. Again, we had quite a few guests present and they behaved inappropriately outside. They stood out in the street and shouted obscenities at my parents when they were walking home."

87. On 5 November 2004, Mary wrote to Henry and Nicki, following an occasion when Mary had made some remarks which had caused upset in a way which, it seems, Mary did not envisage. Her letter includes the following:

"Henry, I have tried so many times, and so many times failed, to be on holiday with, and see Daddy and Susie, and I am so saddened that you think it has been otherwise. My last effort to see them, (Glyndebourne this summer) a special outing to include Caroline and Georgina was a disaster. When we spent weekends at Thorney Crescent, Daddy had to pretend to be walking in Hyde Park in order to visit us. He would catch the bus to the flat, be stressed to the nines and then dash off again as soon as he arrived, to make it tie in the length of a walk!! Sometimes we dropped him off around the corner of his house so as not to be seen. Otherwise they were always busy. In the end the only way we could see him was to go to his church and have a snatched pub drink. You can imagine how well that plan went down!!! This Summer, when he came to visit Charlotte, Susie threatened to be gone on his return. These threats have been going on since they got back from Bermuda and before. Whoever told you, and Peter, that I am heartlessly abandoning my parents, was not, as you well know, Nicki. …

I do so miss my friendship with Daddy, more than anything, but he is in a very difficult situation. When he tries to see us or we try to see him it only seems to make his and our situation worse. It doesn't help when he speaks ill of me to you and others. A lot of what he says is far from the truth and I hope I managed to put a few things straight with you Henry, before you slam the phone down ...

Please believe me I have no fight, I did not mean to insult or be rude. I acknowledge that I have insulted you both and I am sorry and I ask your forgiveness."

88. Henry replied to this letter on 28 November 2004, as follows:

"... Our phone call the other Saturday was hardly fun on either side and I'm sure many words were spoken in haste on both sides. You can consider that an apology.

The central problem was eloquently expressed in your first letter. I quote "together with Mummy, Lucy and Daddy I am now estranged from you both, your lovely girls, and Nicki's family as well".

To deal with the later first, the principal problem Nicki and her family have with our family is that they have never seen anything like it in their lives and, naturally, find it difficult to comprehend let alone deal with. That, however, does not do them nearly enough credit. Nicki has seen it all over a period of twenty years and, unbelievably, is still with me. I have all the time in the world for her parents and we count Janet and Ian among our closest friends ...

It is, unfortunately, a crystal clear fact that you do not currently have a working relationship with any of your immediate family. I have "achieved" the same – there have been multiple periods over the years when I was "not speaking" with one or other of you, Lucy, Mummy or indeed Daddy although I don't believe I ever achieved a full house. …

The way to rebuild a relationship with me is through Nicki, and the way to

> rebuild a relationship with your father is through Susie. You have a clear run at Mummy and I would not worry too much about David in Lucy's case.
>
> Life is not about pre-conditions but I would find it far, far easier to "re-engage" with you if I really felt you were making a progress with the other members of our immediate family.
>
> To rephrase your last sentence you have not insulted us, you have simply isolated yourself."

89. In my opinion, these documents reflect how hard the fractured relationships in this family were on all concerned. In particular, if the narrative contained in Nicki's email is correct, it would seem that Lucy's behaviour may have tested not only Henry but also other members of the family severely at times. However, they do not, in my judgment, provide any grounds for believing that Henry will not properly discharge his duties as executor and trustee, in particular as a result of bias against either Lucy or Mary.

90. On 10 October 2013, Henry sent an email to Stowe, informing the school that the executors of Richard's estate had decided to accept responsibility for all reasonable "extras" invoices in respect of Gabriel's remaining time at Stowe. At that time there was a sum of £1,112.52 which was overdue for payment in relation to "extras" for the spring and summer terms. Henry's email explained that the assets of Richard's estate had been frozen since his death, and would remain so until probate was granted. Accordingly, Henry stated that he had personally made payment of that sum to the school's bank account, and asked that in order to ensure prompt payment of the three remaining "extras" invoices, the school should post them directly to him.

91. On 29 November 2013, however, Henry informed the school that because the grant of probate for Richard's estate had been stalled due to the entry of a caveat, "I now have no certainty that I can recoup any expenditure from my father's estate and, therefore, am no longer willing to fund Leo Gleeson's extras". The email continued:

> "Could I suggest that you make Mrs Torrington aware of this and ask her to arrange settlement of Leo's extras. You might suggest that she approaches the individual who has placed a caveat on the estate."

92. I do not regard this as an unfair or unreasonable attitude for Henry to adopt, in circumstances where a caveat had been placed on Richard's estate, the effect of which might mean, as in the event transpired, that the grant of probate would be long delayed.

93. On 24 January 2014, Henry sent an email to Mary's trustee, Tim Adams, concerning Richard's Will and estate, and saying that he would be grateful if Tim would discuss the contents with Mary. The purpose of the email is apparent from the final paragraph, which states:

"For all these cogent reasons, I trust you will assure Mary that she need not fear that the Will (and the trusts created by it) could or would be administered in a manner unfair to her or her children. I hope you can recommend to Mary that her best interests, and those of her children and the family as a whole, would be to lift the Caveat before 29th January 2014 so as to allow Probate to be obtained."

94. The points made by Henry in support of this position included the following:

"1. The Will itself is not in any way controversial in terms of its drafting and I am grateful that you have explained this to Mary. I did not have sight of the Will prior to his death but, like Mary, was aware of my father's intention that his children were not to be significant beneficiaries. It was, therefore, unsurprising to me that the part of his estate not left to Susie is to be held in trust for his grandchildren (with the proviso that Susie retains a life interest). In practical terms this means that the grandchildren are unlikely to receive any capital until Susie either passes away or waives her rights to her interest in the Life Interest Fund.

2. The principal provisions of the Will in relation to his grandchildren is that they are given an interest in the estate which is to be 'in equal shares absolutely'. While the Will does give the Executors discretionary powers, these have to be exercised in the context of Clause 12.1 of the Will. The intent and the instruction could not be spelt out more clearly. While it is not possible for the Executors to share the detail of any letter of wishes, since they are expressly bound by my father's instruction that it be confidential, I can confirm that there is nothing of note in the letter of wishes which conflicts with clause 12.1 mentioned above.

3. I would ask you to point out to Mary that the Executor's powers have to be exercised in the best interests of the beneficiaries and in accordance with the Trust imposed by the Will. You can re-assure Mary that all the Executors recognise their responsibilities. Two of the four Executors are highly respected Solicitors and both very good friends of my father for several decades prior to his death. As such they are uniquely well positioned to understand my father's wishes and to administer the Estate. While Mary may fear that her relationship with Susie could be an issue, the reality is that Susie has the same responsibilities as the other Executors. Mary and Susie will have to take on trust my intention to administer the estate in accordance with the wishes of my father as set out in his Will.

4. I might add that when the time comes to distribute either income or capital to the grandchildren it would not be unreasonable for the grandchildren's parents to expect to be consulted in case there are factors that they believe should be taken into account. …

5. It is now over one year since my father died and eleven months since I sent Mary a copy of his will. The Executors became aware of the Caveat last October while preparing to apply for Probate. In my opinion the Executors have been more than generous in the additional time that they have allowed Mary to remove the

> Caveat (including, of course, the most recent two week extension) given that she has been in possession of the Will for almost one year. The Executors, and their professional advisors, remain of the opinion that my father's medical records, for the period leading up to his death, have absolutely no relevance to a Will that was made in September 2009 when he was unquestionably in full possession of his faculties."

95. As appears from a comparison with my brief synopsis of the 2009 Will, this summary was incorrect in a number of ways. Mr Macpherson's submissions on this topic are set out in detail below. In my view, however, the thrust of Henry's exposition was not unfair in saying that Richard's intention was that "his children were not to be significant beneficiaries", and the part of his estate that was not left to Susie was to be held on trust for Susie during her lifetime and then for Richard's grandchildren. In any event, I see no reason to doubt that Henry believed it to be correct. Certainly, it would have made no sense for Henry to have deliberately misstated the contents or effect of the 2009 Will, given that, as the letter records, he had already sent a copy of it to Mary.

96. On 27 January 2014, Tim Adams of Saffery Champness replied to Henry's email, stating:

> "As I hoped you wished, your email was well received and helped confirm what was likely to happen. Mary said that she was very grateful for your comments and additional reassurances about administering your father's wishes and for further clarifying the position of the grandchildren. At some future date, Mary would like to consult with you directly and I am sure will take you up on this offer."

97. This statement of Mary's position differs from her stance in these proceedings, in which she has played no active part but said in evidence that she fully supported Lucy.

98. On 12 November 2015, CRS wrote an open letter to Lucy's solicitors stating that the Claimants were: "willing, indeed anxious, to consider your client's precarious financial position and in light of it and having due regard to the Testator's intentions are currently minded to exercise such discretions as are available to them fairly and promptly on the assumption that your client drops her opposition to the issue of the grant of probate forthwith. At present the Executors and Trustees, in the face of your client's claim, are unable to carry out their respective functions because of this inability to obtain probate of the Will. The estate is effectively frozen to the detriment of all the beneficiaries including your client." The letter indicated how the Claimants might initially exercise that discretion by making her a secured interest free loan of £500,000, and pointed out that Lucy would be free to pursue such other claims as she might have. The letter concluded: "Therefore this letter is an open offer, capable of acceptance up to 4pm on 22 November 2015, whereby in the event of your client consenting to the dismissal of her defence and counterclaim, and to a grant of probate in common form of the 2009 Will, the Claimants will not seek an order for costs, other than an order that their costs be paid from the estate.

If accepted, they would also be prepared to reimburse your client's share of the mediation costs if these were paid by her."

99. On the face of it, this letter provides clear and express reassurance that each of the Claimants, including Henry, will act fairly and appropriately as executors and trustees.

100. Mr Macpherson submitted that I should draw adverse inferences from Henry's failure to give oral evidence, applying the principles summarised by Brooke LJ in *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324:

> "(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

101. Mr Macpherson further submitted that:

(1) Lucy had adduced evidence that (a) Susie was in a controlling and abusive relationship with Richard in 2009, (b) Richard was vulnerable to undue influence, and would have had difficulty knowing and approving the effects of his will in 2009, (c) Susie bears deep and longstanding animosity toward Lucy, Mary, and their families, and (d) Henry bears animosity toward Lucy, and does not intend to properly exercise his functions as a trustee.

(2) Henry has first-hand knowledge going to all of these vital issues.

(3) As a Claimant, Henry would normally be expected to give evidence on these issues, particularly since his own conduct and motives are impugned, and since he is the only potential witness on the Claimants' side other than Susie who can give evidence about Richard and Susie's private relationship.

(4) Henry has attended large parts of the trial, suggesting that he could have given

evidence had he wanted to.

(5) Notwithstanding these matters, Henry has chosen not to give evidence, and no explanation has been given as to why he is not giving evidence.

(6) In these circumstances, the Court should draw the adverse inferences that Henry knows, but is not willing to tell the Court, that Lucy's case on each of these issues is correct.

102. In response to these arguments, Mr Dew submitted:

(1) Before adverse inferences can be drawn (a) there must be a prima facie case based on other evidence for the alleged inference, and (b) there must be a basis to allege that Henry should have given evidence to rebut those inferences.

(2) The decision not to give evidence must be seen in light of whether Henry had anything to respond to. The pleaded grounds for removing Henry were (a) that "[Susie], and to a lesser extent [Henry], have shown hostility towards [Lucy and Mary] and their children and therefore cannot be expect to exercise their discretion under the 2001 Will or the 2009 Will with an even hand" and (b) "On 18 February 2013 [Henry] wrote to [Lucy] wrongly stating that [Richard] had left nothing to any of his children in his will".

(3) Neither of those allegations required Henry to give evidence, since they are rebutted by other evidence, especially the documentary evidence.

(4) Moreover, it is entirely understandable if Henry did not wish to participate in a general family "free for all" where allegations of irrelevant wrong doing and the events of long ago parties are revisited in order to see if he can be shown to be hostile.

(5) It is not in dispute that there have been hostile relations between Lucy and Henry and between Mary and Henry, nor that these worsened during the 2011/12 period. However, what is relevant is whether Henry can properly exercise his functions as a trustee.

(6) The evidence shows that (a) far from wrongly setting out the nature of the Will, Henry has accurately and fully described the trustees' functions to Mary and that she was satisfied by those responses, (b) Henry has paid from his own pocket Gabriel's "extras" bill and has stated that the further bill will be paid once probate has been granted, (c) all of the Claimants were responsible for the open letter, referred to above, which offered to assist Lucy's finances whilst not visiting all the consequences of this action on her, and that is not evidence of non-trustee like behaviour, and (d) while Henry can be a forceful character, he can and will be

guided by his co-trustees, and, as with Susie, he will be "checked" by the presence of Mr Isaacs and Mr Sutch.

103. I accept that Henry could be expected to be able to give evidence on each of the issues identified by Mr Macpherson. However, I consider that Lucy's case on all those issues is weak, and that it is more than sufficiently answered by other evidence which is in any event before the Court. In addition, I consider that it is entirely understandable that Henry would not have wanted to add to the extensive, and in my view highly regrettable, ventilation in public of what, apart from this litigation, would otherwise be private matters and of no business, concern or interest to anyone outside this already wounded group of family members. That is particularly so if, as seems inevitable from the manner in which Lucy's case has otherwise been conducted, giving evidence would involve Henry being questioned at length about events going back years before Richard's death and years after his death and exploring in detail hurtful matters the relevance of which is, at best, peripheral to the issues that I have to decide. Mr Macpherson is right in submitting that Henry attended much of the trial, and plainly could have given evidence if he had wanted to do so. His attendance enabled me to observe his reaction to some of the evidence that was adduced. I noticed that he left Court on occasions, and I would not be surprised if this was because he found it upsetting to listen to the many details of past unhappiness and his late father's personal and medical affairs which were raked over in the course of the oral evidence of others.

104. I draw no adverse inference from the fact that Henry was not called as a witness.

What the documents show

105. There are a lot of documents in this case, comprising, in sum, the Will files and other documents of Richard's solicitors, Richard's correspondence (which he appears to have kept for many years, including in the form of copies of both typed and manuscript letters that he sent to others), Richard's medical records, and miscellaneous documents (such as extracts from the file of a firm of solicitors which Lucy and Mary consulted in 2011 with regard to the concerns that they had about Richard's wellbeing, and the transcripts of various telephone calls and meetings which are discussed below).

106. In broad terms, the Claimants relied upon the Will files as supporting the conclusion that there is nothing in any of Lucy's grounds of complaint and upon the correspondence as showing that the contents of the 2009 Will and Letter of Wishes were entirely in keeping with Richard's views (including his attitude towards the financial position of Susie, Mary, Lucy and Henry) as expressed over many years in circumstances where it cannot realistically be suggested that he was not expressing himself in free and genuine terms; whereas Lucy relied on the transcripts as supporting her case that Susie treated Richard in

an unkind and domineering manner and on the medical records as evidence that, by 2009, Richard was vulnerable to such treatment.

107. I make extensive reference to the documents, for three principal reasons. First, they contain a valuable source of contemporary evidence – not least with regard to the role played by Mr Cooke, who was too ill to give oral evidence. Second, Lucy's case involves making a number of very serious allegations against the Claimants, and I consider that not only she but also the individuals against whom the allegations have been made are entitled to have those allegations considered in depth. Third, in the hope and expectation that a detailed exploration of matters, including and in particular what the paper trail reveals about Richard's sentiments, hopes and beliefs over many years, will assist the wider members of this unhappy family either to lay to rest their troubles and grievances or at least to approach them in future from a more informed perspective.

The CRS file

108. The private client department of Stephenson Harwood LLP (the firm in which Mr Isaacs and Mr Sutch were partners) moved to CRS, and accordingly Richard instructed CRS in place of Stephenson Harwood in relation to his personal affairs. The trial papers include CRS's file relating to Richard, from which it appears that on 29 October 2007 CRS first discussed with Mr Isaacs the prospect of Richard becoming a client of CRS, and that the first meeting between Richard and CRS took place on 16 November 2007.

109. The relationship between CRS and Richard broke down in the following circumstances.

110. On 29 November 2007, there was "a long conversation" between CRS and Richard. CRS's attendance note records that, among other things, Richard was "exercised" by the prospect that "if [IHT] of 40% was to be paid on the grandchildren's share with a further 6% every ten years, this would not leave them very much" and that CRS had explained that there was a "possibility of avoiding the up-front charge … by giving Susie a life interest in the Fund". On 30 November 2007, Richard wrote to CRS, enclosing various documents, and saying with regard to IHT: "[Mr Isaacs] has pointed out that by "appointing" Susie as a beneficiary the tax can be reclaimed. If it is not too much bother may I have a fuller explanation of that, which on the face of it sounds most promising". CRS did not reply to this letter until almost 11 months later, on 17 October 2008. Among other things, CRS explained how creating a life interest trust for Susie would save IHT, and stated: "There is nothing new about the above type of planning and it is actually contemplated in both your previous Letter of Wishes and the new version … enclosed". Richard was unimpressed by this delay. A CRS attendance note dated 12 March 2009 records him as saying that, given the delay, he had "decided to pursue another path" and that he was "particularly disappointed with the way things have turned out because [CRS]

are now asking for a "considerable sum" of money while [he was] still in the throes of making other arrangements and the new firm is considerably more expensive than [CRS]". In the result, Richard negotiated the complete withdrawal of CRS's charges, for which he expressed thanks on behalf of himself and Susie by letter to CRS dated 31 July 2009.

111. There is no hint in these documents that Richard was, or gave any impression of being, in poor or declining mental health, or that he was acting under the influence of Susie so far concerns his testamentary dispositions or, indeed, in any other respect. On the contrary, they show or suggest that, in the context of seeking advice from new solicitors with regard to the contents of his then current Will and Letter of Wishes, he was giving coherent and independent thought to the contents of those documents, was concerned to conserve assets in the best interests of those he intended to benefit from his estate, and was receptive to Susie receiving a life interest as part of that wider objective; and that he was more than capable of protecting his own financial interests, firmly but without ever descending into discourtesy or acrimony, when CRS sought payment of legal fees.

The Withers files

112. The solicitors retained by Richard in place of CRS were Withers. They were first instructed on 1 December 2008 at a meeting with Mr Cooke and Ms Harris at which both Richard and Susie were present.

113. Section 2 of the detailed attendance note of that meeting relates to Richard's assets. The BPF is dealt with in paragraph 2.7, which states: "Susie will become the principal beneficiary on Richard's death, although it is Richard's intention that after Susie the funds should go to his grandchildren rather than his children".

114. Section 4 is entitled "New Will". Paragraph 4.1 states:

> "Richard's principal aim in his estate planning is to ensure that Susie can continue to live with the standard of living that she is used to. Once Susie is appropriately provided for, Richard would also like to ensure that Lucy has sufficient assets since she is currently the least financially secure of his children. Assets should then primarily be held for the benefit of his grandchildren. Richard may wish to allow Lucy to benefit from the Bermudan pension fund."

115. "Executors" are dealt with in paragraph 4.3. Paragraph 4.3(a) discusses the "insider trading" implications of Henry being a director of EIT, and states that if Henry were to be appointed as an executor it would be important for at least three executors to be appointed "so that Henry could be excluded from any discussions relating to the shareholding". Paragraph 4.3(c) records that Mr Cooke would be happy to act as an executor in place of Henry in the event that Richard decided not to appoint Henry.

116. Paragraph 4.4 is entitled "Residue". Paragraph 4.4 (a) records the advice of Withers

which, in the event, has formed part of the genesis of this dispute, as follows:

> "It is anticipated that one half of the residue should continue to pass to Susie absolutely. It would, however, be more tax efficient for the latter half of the residue to be held on life interest trusts for Susie, rather than on a discretionary trust. This would provide Susie with the income from the trust fund, as well as the right to occupy any properties held in the trust. Susie's life interest could however be 'defeasible', meaning that the trustees would have a wide power to transfer assets to other beneficiaries, for example Richard's children or grandchildren, during Susie's lifetime".

117. The reason for this advice is spelled out in paragraph 4.4(b) of the note, namely that the proposed life interest trust would be exempt from IHT, and any appointments out of it, if made absolutely, would be potentially exempt transfers ("PETs"). As Mr Dew submitted, this was planning that the prior Wills had anticipated but had not expressly implemented; and the thrust of Withers' advice was to make this planning explicit.

118. Paragraph 4.4(e) states: "An updated letter of wishes stating Richard's intentions with respect to distributions from the trust, and requesting that Susie be involved in the decision making process, should be drafted to accompany the will". The reference to a request for Susie to be involved in the decision making process is in line with both the 2001 Letter of Wishes and the BPF Letter of Wishes, both of which envisage executors and trustees liaising with Susie as to whether trust assets are required to meet her needs.

119. Richard was sent a copy of this attendance note, and he made a number of manuscript amendments to it. These included the following:

(1) In paragraph 1.3, Richard added the words "against advice" after the word "recently" in the following sentence:

> "Lucy is the least financially secure of Richard's children, having recently taken out a further £100,000 loan on her property."

(2) In paragraph 3.3, Richard wrote the words "no capital" next to the following sentence:

> "The letter of wishes accompanying the will states that the primary intention for the trust assets, subject to Susie's needs, is to provide for Richard's grandchildren and remoter issue, and in particular Lucy's son and Lucy, if she requires it."

(3) In paragraph 4.1, Richard deleted the word "assets" and substituted the word "income" in the following sentence:

> "Once Susie is appropriately provided for, Richard would also like to ensure that Lucy has sufficient assets since she is currently the least financially

secure of his children."

(4) In the same paragraph, Richard deleted the sentence which reads "Richard may wish to allow Lucy to benefit from the Bermudan pension fund.", and wrote the following words against this sentence, "no, letter of wishes says so".

(5) Richard placed a tick against sub-paragraph 4.4 (e).

120. Besides suggesting that Richard read documents relating to his personal affairs carefully and gave coherent thought to their contents, these manuscript amendments bear all the hallmarks of reflecting Richard's independent views. In particular, not only do they accord with the 2001 Letter of Wishes and the BPF Letter of Wishes, but also they have to be seen in the context of the views and concerns that Richard expressed to others, including Lucy, in correspondence, and also in some instances that he recorded in notes made for his own use, before and at the time that this attendance note was produced. I do not consider that it can credibly be suggested that those views and concerns were the product of Susie's influence on him. Accordingly, the fact that these amendments are, as I consider them to be, consistent with those views and concerns provides strong evidence that the amendments reflected his independent thoughts.

121. There was a further meeting between the same persons on 12 January 2009. Section 1 of the detailed attendance note of that meeting is entitled "Pension Fund", and reflects discussion about Lucy. Paragraphs 1.3, 1.4 and 1.7 state as follows:

> "1.3 RT confirmed that his intention with regard to the pension fund was that it should primarily go to ST and thereafter to his grandchildren, but with the trustees having the power to distribute to his children if so needed, especially Lucy, since it currently appeared that she was likely to have most need of it.
>
> 1.4 ST commented that she had concerns over Lucy being favoured in any letter of wishes as Lucy and her mother were litigious and were likely to bring a claim if Lucy did not receive preferential treatment from such a letter.
>
> 1.7 …The trustees of the pension fund should think primarily in dynastic terms but they should liaise with ST and his executors to ensure that ST has been adequately provided for under his will in order to maintain her previous standard of living. The letter of wishes should also state that although RT anticipates that Mary and Henry have less need of distributions from the fund, they should not be eliminated from consideration. Lucy may need particular assistance but the primary focus should be on the grandchildren's generation and beyond."

122. Section 2 is entitled "RT's will". Paragraph 2.1 records that, in line with the advice of Withers recorded in the attendance note dated 1 December 2008, the nature of the proposed defeasible life interest in favour of Susie and the tax effect were explained.

123. There is nothing in these contemporary documents which suggests that Susie was the instigator of, or indeed had any input into, the notion that such a life interest should be created in her favour in respect of the half of the residue of Richard's estate that was not going to pass to her absolutely. On the contrary, on the face of the documents, it seems plain that this idea emanated from Withers. Moreover, although this represented some change, it was entirely in keeping with advice which Richard had received over many years. Finally, not only were clear reasons given why this route was advisable, but also at this stage those reasons were not so much concerned with benefitting Susie, but, rather, with avoiding IHT and thus, ultimately, benefitting other beneficiaries.

124. Following this meeting, on 29 January 2009 Mr Cooke sent a draft Will to Richard, under which Mr Isaacs, Mr Sutch and Mr Cooke were appointed as executors. Paragraph 6 of his letter, headed "Trusts for Susie", stated: "In contrast to your present will, pending any exercise of the trustees' discretion (as discussed below), if Susie survives you, the income of the Trust Fund is to be paid to her during her lifetime. The trustees will have power to release capital to her or to apply it for her benefit".

125. On 12 February 2009, Richard spoke to Ms Harris on the telephone concerning the draft Will. Mr Dew submits, and I agree, that, as appears from Ms Harris' manuscript attendance note, Richard expressed clear (and, on the face of it, rational) instructions regarding the removal of the power to add beneficiaries; and these instructions reflected a detailed comprehension of the trusts in the Will.

126. On 3 April 2009, Mr Cooke wrote to Richard and Susie, having seen them at a social function on 1 April 2009. His letter records that "You both declared that you need to spend some time concentrating on a detailed response to the draft Wills etc" and that Richard had made the point that "there may have to be a little rethinking with the fall in the markets". The explanation for the reference to "Wills" in the plural is that Withers were also advising Susie on her Will at this time. Richard's remark about rethinking in light of the fall in the markets suggests both independence and acuity of reasoning.

127. On 11 May 2009, Mr Cooke sent a chasing letter asking whether Richard would at least execute a codicil changing executors of the 2001 Will, because Mr Cooke felt that this "is one aspect that could leave Susie in a particularly difficult situation". Richard executed this codicil on 26 May 2009. It is apparent from the signatures of the witnesses, who included Ms Harris, that it was executed at Withers' offices, although there is no relevant attendance note. Susie seems to have played no part in these events.

128. On 17 June 2009, there was a meeting between Richard, Mr Cooke and Ms Harris. The purpose of the meeting was to discuss Richard's Will and, in particular, Susie's objections to his inclusion of Henry as an executor. Paragraph 2 of the attendance note of that meeting records that Susie was upset, was threatening to instruct new lawyers and new doctors, and was concerned that Richard may be beginning to suffer from Alzheimer's, but that Richard "had gone that morning and the doctor had confirmed that this was not the case". Paragraph 3 records that Richard did not want Henry removed as an executor, because, in his view, and in keeping with what he considered his own father and grandfather would have thought, Henry would become the head of the family on Richard's death and should therefore have a role in the continuing management of Richard's wealth. Paragraphs 8 to 11 record that Mr Cooke suggested a compromise of removing Henry as an executor (such that he would not be involved in the distribution of assets that Susie would receive absolutely) but leaving him as a trustee (such that he would be involved in the continuing trust, in respect of which it was not anticipated by Richard's letter of wishes that Susie would receive any sizeable amount of trust assets); that Richard agreed that this would be a good compromise if Susie accepted it; and that it was agreed that this would be put to Susie by Mr Cooke.

129. Lucy's position was also discussed at the meeting on 17 June 2009. Paragraph 13 of the attendance note records that Richard had told Lucy that he would not help her again financially but that he was concerned that Gabriel was about to start at Stowe and that he would have a very different home than that of his peers and so he was looking to provide some assistance. Richard sought guidance from Mr Cooke, who suggested a loan by way of an advance on Lucy's inheritance or from the pension fund. Paragraph 14 records: "The latter suggestion might be preferable as it could be done 'quietly', although RT stated that he would not like to go behind ST's back".

130. Mr Cooke met Susie at Pelham Place on 22 June 2009 to discuss the concerns which Richard had told Mr Cooke that she had, and to put Mr Cooke's compromise proposal to her. Paragraphs 1.3 and 1.4 of Mr Cooke's attendance note of that meeting state:

> "1.3 ST said her principal concern is that in the event of RT predeceasing her, Henry would be in a position to start telling her what she can and cannot do with her money, her life etc which she would resent. ST gets on satisfactorily with Henry on a non-business level and gets on particularly well with Henry's wife but ST had been distinctly unimpressed on occasions at the way Henry had treated both his father and his sisters; ST said Henry had been rude to his father in business meetings in front of others.
>
> 1.4 SGC then took ST through the financial position she would be in were RT to predecease her; Pelham Place, the Australian property [and cash in bank accounts] would all pass to ST by survivorship … In addition, RT leaves half his residue to ST absolutely and if Henry were executor, apart

> from being involved in the selection of assets to appropriate to her half share, Henry would have no other involvement over this half share which ST would be entitled to as of right … SGC said that ST should think of [the BPF] as her first port of call for emergency funds over and above what she would inherit outright … It is only in the last resort that ST would need to look to the half share of RT's residue retained in trust for financial help although she would be a beneficiary of it … ST acknowledged that it was right that Henry should be involved as Trustee of that fund … In fact, ST, upon reflection, felt that she had no problem with Henry as either a Trustee of the Continuing Will Trust or an executor of RT's Will given SGC's summary as above …"

131. I consider that events of 17 and 22 June 2009 should be considered together. I believe that, when speaking to Mr Cooke, Richard exaggerated the extent of Susie's reactions. This would be in keeping with the way in which Richard sometimes conducted himself, which was to test the reactions of people by overstating matters to them. At all events, Richard's claim that he had seen his doctor on the morning of 17 June 2009 concerning Alzheimer's is not borne out by the extensive medical records which are in evidence in this case. That part of what Richard is recorded as saying is, therefore, not entirely correct. In fact, Richard had visited his GP on 15 June 2009. In advance of that meeting, he prepared a long list of matters that, it would appear, he intended to discuss with his GP, one of which was "altz". However, the GP's notes contain no record of Richard asking the GP about Alzheimer's disease. Moreover, Susie's evidence, which I accept, was that she had never told Richard that she was concerned that he was suffering from Alzheimer's. She speculated that Richard may have had this concern because one of his aunts had suffered from that disease. On that basis, it is impossible to place complete reliance on what Richard is reported as saying about Susie's stance.

132. Be all that as it may, the tenor of Richard's discussion with Mr Cooke on 17 June 2009 was not that he would give in to pressure from Susie, but rather that, while he wanted to get along with Susie, he was also unwilling to allow Henry to be displaced from fulfilling what he regarded as Henry's proper role as the head of the family once Richard was dead. Moreover, the upshot, after Mr Cooke had spoken to Susie on 22 June 2009, was that Susie withdrew her objections to Henry altogether. In my view, none of this is consistent with Susie exerting undue influence on Richard, or, indeed, doing anything more than seeking to protect her own interests in a manner which was, in my judgment, entirely understandable and in no way open to legitimate complaint.

133. With regard to this last point, in her evidence to me Susie was clear that, at the time of the meeting on 22 June 2009, she knew that she stood to inherit half of the residue of Richard's estate, and that Henry would have no control over that or over what she did with those assets after they had passed to her. On that basis, it is hard to explain the first sentence of paragraph 1.3 of Mr Cooke's note. I have no doubt that Susie's evidence in this regard was honest. However, I do not believe that it was correct. More than 7 years

after the event, and having lived through the current dispute in which the provisions of Richard's Wills have been explored in considerable detail, I believe that Susie has probably confused the level of understanding which she now has with that which she had at the time of that meeting. I consider it more likely than not that the careful contemporary note made by Mr Cooke (an extremely experienced solicitor) is correct.

134. I consider that this interpretation of these events is supported by the contemporary correspondence. On 25 June 2009, Mr Cooke wrote to Susie, stating that he had "a better idea now of what has been troubling you" and that, on that point, "I hope I have been able to allay some of your concerns such that I can now press ahead with Richard's Will". On 8 July 2009, Susie replied by email, stating "It was most helpful to go over the various points which have been troubling me and it certainly helped clarify the most troubling matter". In my judgment, the matter which Susie regarded as "most troubling" before her meeting with Mr Cooke on 22 June 2009 is that identified as her "principal concern" in paragraph 1.3 of his contemporary note of that meeting.

135. If that is right, as I consider that it is, what happened in June 2009, in sum, is that Susie was concerned that, if Henry was made an executor, that would enable him to stand in the way of her enjoying the benefit of part of Richard's estate which Richard intended to leave to her outright; but, once Mr Cooke explained to Susie that this would not be the case, then her objection to Henry being made an executor evaporated. This is what paragraphs 1.3 and 1.4 of the note record. Those paragraphs also record that Susie had no objection to Henry being involved in making decisions about the part of the estate which was left in trust, and, indeed, that she thought that it was right that Henry should be involved in this way. This makes perfect sense, because, in accordance with Susie's evidence before me, which I accept, she always recognised that those assets should not be used for her benefit alone. The reference to Susie's attitude towards Henry in the second sentence of paragraph 1.3 of the note also accords with her evidence before me, and with her taking Richard's side and being protective of him, as I believe she was: whether rightly or wrongly, she felt that Henry had not behaved appropriately towards Richard on occasions, and this had caused her to take against Henry to some extent.

136. Finally, it is right to mention that I consider that Mr Cooke overstated the extent to which Susie could expect to look to the BPF for financial help (because my reading of Richard's Letters of Wishes is that Richard envisaged that in the event that she needed recourse to trust assets her first port of call should be on UK assets), such that Susie's agreement to Henry's roles as executor and trustee was possibly given on a basis which was partly incorrect – but this neither affects the fact that she withdrew such objections as she had, nor causes me to doubt the overall reliability of the contents of the note.

137. The extent of Lucy's continuing financial problems was discussed between Richard and Mr Cooke on 29 June 2009, when Richard said that he wished to pursue Mr Cooke's

suggestion of a distribution from the BPF to enable Lucy's debts of £142,500 to be paid off. During the same conversation, Mr Cooke reported on the outcome of his meeting with Susie, and that she was now happy for Henry to be both an executor and a trustee.

138. After receipt of revisions to the Letter of Wishes by fax from Richard on 20 July 2009, a draft Will and Letter of Wishes were sent to him by Mr Cooke on 22 July 2009.

139. Richard made a number of manuscript endorsements on this letter from Mr Cooke:

(1) Paragraph 3 is entitled "Nil Rate band discretionary trust", and states:

> "You leave your available nil rate band to Susie and your children and remoter issue on discretionary trusts. In your letter of wishes, you state that you wish Susie to have access to these funds if she requires it, but that, as you anticipate that she will have sufficient other funds, you would like these funds to be used primarily for your grandchildren and their children. You might like to include a reference to Lucy here?"

(2) Against this text, Richard wrote:

> "Concerned not enough income – our current experience – access to <u>all</u> income for Susie."

(3) Paragraph 4 is entitled "Residuary estate", and includes the following text:

> "I think the only thing which I am still not clear about is whether, if your interest in Pelham Place should for some unforeseen reason be as tenant in common, it should or should not be regarded as part of your residue for other purposes ie. half going to Susie free of trust and the other half remaining in trust."

(4) Against this, Richard wrote in manuscript:

> "House 100% to Susie."

(5) The text of paragraph 4 continues as follows:

> "I think it is important particularly from Susie's point of view to make it clear that although Susie is a beneficiary of the life interest share of your residue, this is effectively for emergency purposes only."

(6) Against this text, Richard wrote:

> "No! Don't agree."

(7) The text of paragraph 4 of the letter concludes as follows:

> "I say this as I think you know, one of Susie's concerns is that she might be in a position of having to go cap in hand to Henry for financial assistance. I said that in the event of your predeceasing Susie, quite apart from the assets Susie would have in her own name (substantial) if she needed additional help her first port of call would very likely be the pension fund of which she would by then be the principal beneficiary."

(8) Against the word "substantial", Richard wrote two question marks.

(9) Finally, at the end of the text of the letter, Richard wrote the following in relation to paragraph 4:

> "Current conditions in UK make this read like yesterday's news. Giant inflation – worse still to come. Susie will need every penny of income which averages 2% before tax. I spend capital – she will have to spend capital and as she is naturally frugal, so that should be safe. Some greedy bankers get more than my net worth as annual salary – likely those sums become the norm.
>
> Please explain whether clause 10 (powers of executors to over-ride) – negates clause 11. If so cannot sign the Will."

140. Susie's evidence, which I accept, was that around this time Richard did indeed have concerns about low levels of unearned income of the kind suggested by these notes.

141. In my view, the same points apply to these endorsements as I have made above with regard to the manuscript amendments that Richard made to the Withers' attendance note dated 1 December 2008. In particular, the content and language of the endorsements made against paragraph 4 of Mr Cooke's letter ring true as an expression of Richard's independent views: all the evidence before me is to the effect that he had commercial acumen and an acute interest in financial matters in a way and to an extent that Susie did not. I consider that these endorsements are not only revealing as to Richard's sentiments and concerns but also make commercial sense. For those reasons, they run counter to any suggestion not only that he was acting under Susie's undue influence but also that his mental faculties were materially impaired. Richard may have been unduly pessimistic about inflation in the immediate future following 2009 – although market conditions in 2017 suggest that he may yet be proved right before long - but his worries about reduced investment income in accordance with his experience were pertinent, and provide a rational basis for the concerns he expressed about Susie.

142. On the draft Letter of Wishes that was enclosed with the letter from Mr Cooke, Richard made the following manuscript amendments (among others):

(1) Paragraph 2.1 and the first sentence of paragraph 2.2 of the letter read as follows:

> "2.1 My priority is to ensure that Susie is able to maintain our current standard

of living.

2.2 However, I anticipate that Susie will have sufficient assets of her own and from the residue of my estate to enable her to do so and therefore assets from this fund should be used for the other beneficiaries of the trust."

(2) Against this second sentence, Richard wrote the word "delete" and, further, the words "which requires all the income!"

(3) Paragraph 4 of the letter is headed "Residuary estate", and includes the following text:

> "The remaining half of my estate is left on life interest trusts for Susie. Since I believe that Susie will have sufficient assets to maintain her current standard of living, I would wish you to invest this half of my residuary estate with a principal aim of achieving capital growth so that the income produced by it is modest."

(4) The second sentence of this text has been struck through, and Richard has written against it the words "Don't agree". Richard has also written against this text the following words:

> "I want full access for S to all my current assets – but want it to be subject to trustees."

(5) The same paragraph of the letter makes reference to the differing financial positions of Mary and Henry on the one hand as being "I believe, well provided for" and Lucy, who "may need to be helped financially bearing in mind that she is now divorced and has the responsibility of bringing up on her own two children on modest means". The text continues:

> "I therefore would want my Executors and Trustees to bear in mind particularly her and her family's needs which I consider should be given some priority over the interests of my other grandchildren. Clearly circumstances may change and as Trustees you must exercise discretions at the relevant time and in the light of all appropriate considerations. I would, however, wish you to consider that Lucy should be supported so that she has a reasonable level of income."

(6) The final words of this last sentence have been deleted by Richard, who has written beneath them the following words:

> "Lucy should only be bailed out if in DIRE straits."

143. The like points apply to these endorsements as I have made above with regard to the

manuscript amendments that Richard made to the Withers' attendance note dated 1 December 2008 and his manuscript endorsements on the letter from Mr Cooke. If and to the extent that these remarks reflected any change of emphasis or priorities in comparison to the contents of earlier draft documents, that is readily explicable for a number of entirely unexceptional reasons. First, most people change their minds about such matters to some extent from time to time, and Richard was certainly prone to changing his mind in this way - sometimes, on the evidence before me, more than once in a very short time. Second, as the contemporary documents show, Richard's attitude towards Lucy not only fluctuated but also, in broad terms, hardened over time when, as he saw it, she continued to spend money unwisely and without regard to his advice. Third, as time went on, and, as I infer, after the financial crisis of 2008, Richard found that it was increasingly difficult to meet his and Susie's needs out of unearned income. These factors provide a much more likely explanation than undue influence as to why Richard's concern regarding Susie may have risen and his sympathy for Lucy lessened.

144. On 23 July 2009 there was a meeting between Richard and Mr Cooke at which Lucy's position was discussed further, and it appears from Mr Cooke's attendance note that Richard wanted to take a first charge over Lucy's property in place of her existing charge "to ensure that Lucy cannot charge it elsewhere readily". With regard to Richard's Will, it appears from the note that (a) he wanted the BPF to be tapped by beneficiaries "only in emergencies because of its preferred tax status", (b) he was prevaricating over Susie's position of having to seek support from the UK trust that would be created over his residuary estate, and (c) he was concerned that the arrangement proposed by Mr Cooke "is more complex than required". I consider that all this fully accords with Richard exercising informed and independent judgment concerning his financial affairs in general and the terms of his Will in particular.

145. On 31 July 2009, Richard and Susie spoke to Ms Harris, principally about the loan to Lucy, and there was a discussion about the mechanics of making a loan and obtaining a first charge. After this, there was a discussion about Richard and Susie's Wills, and Ms Harris' note records that "Neither has a concept of money which was inherited from the Thornton side of the family which ST should be excluded from".

146. On 20 August 2009, Mr Cooke sent Richard a "signature version of your Will", believing that all outstanding points had been finalised. At the same time, he sent a bill for a large sum, which was substantially more than Withers had previously quoted.

147. This resulted in Richard attending Withers on 24 August 2009. It is apparent from Ms Harris' attendance note that the meeting began by Richard stating (a) that the Will did not meet his wishes as Susie "would not have sufficient income to live on after his death", (b) that he was concerned at the level of fees charged by Withers (which, it appears from a

later paragraph, amounted to about £14,000 in respect of his Will and £2,000 in respect of Susie's Will, in comparison to a quote of around £1,000 for each), and (c) that he would like to revoke the codicil appointing Mr Cooke as an executor. In my view, it impossible to separate these three matters. For example, when expressing concern about the "overriding power of appointment which could be exercised by the trustees in order to divert income away from Susie", Richard expressed the concern that this would give "particularly SGC" the power to divert income or capital away. This also accords with Ms Harris' evidence, which I accept, which was to the effect that her abiding memory of the meeting is that Richard had a "concern" or "distrust" about fees, and that this infected his attitude towards both Mr Cooke and Mr Cooke's advice.

148. It is understandable that, in the context of the present litigation, attention has been focussed on those parts of Ms Harris' note which record how she explained the provisions of the draft Will, how Richard's concern persisted "that sufficient provision for Susie would not be made", how Richard appears to have misunderstood aspects of the draft Will (particularly in the reference to Ms Harris explaining that Susie would receive Pelham Place being the matter "which appeared to concern RT the most"), and how, in light of his repeated concern about protecting Susie, Ms Harris' explanation that Susie's interest under the draft Will was "to some extent" greater than under the 2001 Will is not easy to square with Richard's statement that "even so, he would prefer his estate to be distributed in accordance with his current will by the trustees and executors named in his current will".

149. In my view, however, it is important not to lose sight of the fact that the meeting – which must have been a difficult one for Ms Harris to conduct alone, as she was required to do in the absence of Mr Cooke - ended with Richard saying that he would like to cease his instruction of Withers (and the codicil appointing Mr Cooke as an executor was revoked on the same day). I consider it more likely than not that this is what Richard had in mind, at least provisionally, from the outset, and that this was probably his real objective in asking for the meeting. Richard's expressions of misgiving about the contents of the draft Will must be seen in that light. He had lost confidence in Withers due to the sudden increase in their fees, and he was working towards the end, in his own mind as much as in what he said to Ms Harris, of rationalising whether, and if so why, it would be appropriate to terminate their retainer.

150. In any event, I consider that the note reflects that Richard had a good understanding of the effect of the draft Will. For example, he was right to say that the fact that the Will contained an express power to defeat Susie's interest could lead to the trustees deciding to pay money away to charity rather than to her. I also agree with Mr Dew that (a) it shows Richard exhibiting characteristic firmness regarding the charges proposed by Withers, and this goes against the suggestion that Richard was vulnerable to undue influence, and (b) to the extent that – contrary to my belief that, in fact, Richard was not confused at all - there was confusion on Richard's part, it appears to have been rooted in a determination to

ensure Susie's security. As a matter of logic, it is possible that this aspiration was precipitated by Susie's undue influence, but there is nothing in the contemporary documents to support this, and it is readily explicable in the absence of undue influence. At all events, as the upshot of the meeting was to dispense with Withers' services and revert to the 2001 Will, even if Susie had exercised undue influence on Richard, at that time it would not have produced any tangible result.

151. Mr Cooke had been in the country on the 24 August 2009 and both he and Richard then went away. On 25 August 2009, however, Mr Cooke wrote a letter to await Richard's return, in which he said the draft Will "follows your instructions based on the advice I have previously given and our discussions about that advice". The letter continued "I am doubly concerned because there is no doubt in my mind that your present Will is not what you want". The language of this letter reflects that the primary driver behind the contents of the draft Will was Mr Cooke's advice; and that this, in turn, was based upon and was subject to discussions between Mr Cooke and Richard, in which Richard had been afforded, and had taken, the opportunity to tell Mr Cooke what was wanted by him. Further, there is nothing to suggest that the impetus for reviving Withers' relationship with Richard came from anyone other than Mr Cooke. However, given that the meeting of 24 August 2009 had ended with Richard deciding to terminate Withers' relationship and stick with the 2001 Will, it would be logical to expect such impetus to come from Susie if she had truly been exerting undue influence on Richard to get him to change that Will in her favour. Accordingly, the letter runs counter to Lucy's case.

152. By 16 September 2009, the two men had returned, and a meeting with Richard had been placed in Mr Cooke's diary. It is particularly unfortunate, given the importance that those events have assumed in this litigation, that there is no attendance note which relate to the events of that day. However, Mr Cooke sent Richard an email on that day at 15:13, and Withers also kept data regarding the electronic versions of the draft Will.

153. In the email, Mr Cooke set out to clarify the discussion which had taken place at the meeting on the morning of that day, and, specifically "why your present Will is unsatisfactory" and "why I consider the Will I prepared for you improves the position radically but also how it might be improved further from Susie's point of view". He then went on to discuss fees, and suggested a compromise involving a radical reduction.

154. The reason why Mr Cooke considered that his draft Will improved the position "radically" in comparison to Richard's existing Will is that under the existing will "the half of your residue in trust will suffer IHT on your death at 40% even if Susie survives you" whereas under Mr Cooke's draft Will "it will be free of IHT assuming Susie survives you". This was, perhaps, an exaggeration of the extent of this difference, because, as discussed above, it was possible to avoid these adverse IHT consequences under the existing Will. Regardless of whether that is right, however, in my judgment, and based on the

documents, there can be no doubt at all (a) that Richard was keen on avoiding IHT and (b) that Susie neither instigated nor had any input into the changes in the draft Will that was produced by Mr Cooke that were aimed at avoiding IHT. Accordingly, the contemporary documents provide no support for the suggestion that this element of difference between the Wills was procured by Susie's undue influence.

155. Mr Cooke's email then turned from what he advised were the IHT consequences of the discretionary aspect of the Will remaining as it was to addressing the consideration that the effect of the power to pay capital was that the executors and trustees could override Susie's interests. His email then states: "I suggested that Susie's security would be improved still further if she were appointed to be one of your executors because, as Trustees have to act unanimously, Susie would effectively have a power of veto over distributions to members of your family other than herself during her lifetime which would mean that Susie's life interest could not be overridden without her agreement."

156. There is no reason, and none has credibly been suggested by Lucy, why Mr Cooke should have mis-stated the true position in this email, which, on the face of it, makes clear that this suggestion emanated from him. Further, it makes sense that Mr Cooke should have suggested this change in response to concerns expressed by Richard: that is in line not only with what Richard had written on the documents sent to him on 22 July 2009 but also with what Richard said at the meeting with Ms Harris on 24 August 2009. I do not believe that Mr Cooke would have reacted in this way if he had perceived that Susie, rather than Richard, was the one who was concerned about Susie's "security".

157. That still leaves the possibility that Susie was the real driver behind this change, and that she prevailed on Richard to express concerns, further or alternatively upon Mr Cooke to respond to concerns, in such a way that a proposal was made to change the draft 2009 Will to her advantage without Mr Cooke realising what was truly going on. I consider that suggestion is fanciful, and I reject it. First, it is entirely contrary to the contents of Mr Cooke's note of his meeting with Susie only two months earlier on 22 June 2009. This note not only suggests that Susie's understanding of the roles of executors and trustees was such that she was unlikely to have thought of this change as a way of furthering her own interests, but also, and perhaps more importantly, records that the meeting ended with Susie saying that she had no problem with the structure of the draft 2009 Will that was then proposed. Second, it suggests a degree of artifice which, having seen Susie give evidence over many hours in the course of a detailed and prolonged cross-examination, I would be completely unwilling to attribute to her. Third, it would reflect a degree of pliability on Richard's part which is inconsistent with the picture provided by the Claimants' witnesses. Fourth, it would involve Mr Cooke failing to realise the true position in a way that I consider unlikely to have occurred.

158. In these circumstances, the fact of this change also lends no support to the allegation of undue influence. In sum, I consider that Mr Cooke had good reasons for wishing to bring

matters to a head: the debate about the new Will had been going on for some considerable time; he was of the view that it was in Richard's best interests to make a new Will; and Richard was not the easiest of clients, and had recently terminated his relationship with Withers and, no doubt, had only been brought back on board with some effort. I infer that Mr Cooke was, understandably, motivated to suggest a final change to the draft Will that would enable Richard's lingering doubts to be resolved. If Mr Cooke had thought that there was anything, even potentially, untoward or contrary to Richard's true wishes about this change, he would not have suggested it: however, he did not think that – quite the contrary – and, in my judgment, he was right not to do so.

159. The relevant part of the email (before it turns to a discussion of fees) ends as follows: "To give effect to this would mean simply reprinting the engrossment of the Will I have sent you but with Susie's name added as executrix. We could get this revised Will to you for signature forthwith".

160. Withers' records show that, after the meeting on the morning of 16 September 2009, the draft Will was amended to insert Susie as an executor. Ms Harris' evidence, which I accept, was that the Withers documents show that (a) she and Mr Cooke spoke for 21 minutes on the morning of 16 September 2009 and prior to the meeting with Richard which was scheduled for 11am, (b) Ms Harris printed out the draft Will at 10.38am, and then saved it and closed it (on screen) at 11.54am, (c) Mr Cooke's email was created by his secretary as a Word document at about 12.15pm, which is presumably after the morning meeting with Richard was over, (d) at 2.15pm Ms Harris undertook further work on Richard's affairs including amending the draft Will, (e) the draft Will was printed out again at 2.24pm, and (f) there was a further meeting with Richard which started at about 3.30pm and which may have continued until 4.42pm (a time given on Ms Harris' timesheets, that fits in with her checking the document in again at 5.04pm).

161. The Claimants' case is that the Will was executed by Richard on 16 September 2009 at the offices of Withers. Lucy did not admit this.

162. It appears likely that the email was dictated onto a word document and then sent by a secretary, and, further, that Richard did not receive the email (if at all) until after he had returned from Withers' offices having executed the amended Will. I accept Ms Harris' evidence that the Withers' version of the email suggests that it was sent, and I do not consider that the fact that Susie has not produced a version that was received by Richard is determinative that he did not receive the same. However, whether or not he received the electronic version is not crucial, because he clearly received hard copies.

163. On 29 September 2009, Ms Harris sent Richard a copy of Mr Cooke's email of 16 September 2009, and Richard replied 20 minutes later: "I have solved the mystery! Stephen gave me a copy before we left your office, and I have just found it, neatly folded, but unanswered. In the drawer "for important papers." Grovel grovel, I am full of

apologies. What he suggests is perfectly agreeable to me." Based on the contents of this exchange of emails, it is more likely than not, and I find as facts, that (a) Richard had not received the email of 16 September 2009 by the time he returned to Withers' offices to execute the amended Will, (b) however, Richard was handed a copy of that email before he left Withers' offices for the second time on that date, (c) Richard temporarily mislaid that copy, and hence asked Ms Harris to send him the email again, which she did on 29 September 2009, (d) Richard's reference to "What he suggests" is to Mr Cooke's fee proposal (and indeed this accords with the fact that a revised invoice was sent on 1 October 2009 and was paid by Richard on 15 October 2009), and (e) Richard read and understood, and did not disagree with, all the contents of the email.

164. I base this last finding of fact on a number of matters. First, it appears from all the evidence before me, and not least the contents of the many documents that I refer to below, that Richard was careful and anxious about his personal and financial affairs and, generally, took care to read important documents. Second, it is clear from this exchange that Richard knew about the email and wanted to have sight of a copy of it, from which I infer that he was interested in its contents. Third, it is clear that he read it – hence his agreement to what Mr Cooke suggests. Fourth, if he had not understood its contents and had not agreed with them, and again in keeping with all the evidence before me, I have little doubt that he would have raised those matters with Withers.

165. Because Ms Harris cannot remember, and because no oral evidence was available from either Mr Cooke or Richard, I am unable to say whether the email was handed to Richard before, during, or at the conclusion of the meeting on the afternoon of 16 September 2009. However, Ms Harris was clear in her evidence, and I accept, that, in accordance with Withers' normal practice, the only change that had been made to the draft Will (concerning the executors) would have been pointed out to Richard and she would have said "Everything else has remained the same, please ask questions if you're not sure". Her stance was that there would have been no need to take Richard through all of the remainder of the draft Will, because it had already been explained to him. Moreover, "If a client comes in and says I want to sign my Will, usually you would enable them to do so". In my judgment, based on the contemporary documents alone, that stance was justified. I further consider, and find, that (a) if Richard had not been sure about the meaning and effect of the Will that he had returned to Withers' to sign, he would not have hesitated to say so on 16 September 2009, and (b) the fact that he did not question the contents of the Will after he was sent a copy provides an additional and independent basis for concluding that he understood and approved its contents.

166. On 19 October 2009, Ms Harris sent Richard "copies of the Will and the letter of wishes which you signed at our offices on 16 September". In light of this email, it is more likely than not, and I so find, that Richard signed the Letter of Wishes, bearing handwritten amendments he had made, at the same time as he executed the 2009 Will.

167. In my judgment, nothing in these documents supports Lucy's case that Richard did not appreciate what he had signed or that he was influenced into signing anything by Susie.

168. In particular, I accept Mr Dew's submissions to the following effect:

(1) Richard had clearly expressed prior concerns about the express power to override Susie's interests that was contained in the draft Will. That concern may not have been wholly logical – because the 2001 Will was to worse effect – but clients are not always logical and testators are not required to be. Moreover, Richard had a real point in that the power was so clearly and expressly set out in the Will.

(2) The solution of making Susie an executor and trustee is not one said by anyone to have come from her. She never suggested it at any time prior to 16 September 2009. Moreover, all the evidence is that Mr Cooke made the suggestion as a means to address the above concerns.

(3) It is very clear that Richard was engaged in a difficult juggling act regarding Lucy's financial demands and his desire to provide for his other beneficiaries. That is revealed by the BPF letter of wishes. It is similarly revealed by the handwritten amendments he made to the Letter of Wishes (summarised above), whereby he strengthened the reference to advancing capital to Susie and expressly removed the reference to supporting Lucy with a reasonable level of income, as appears from his own notes (discussed above) and the final version.

(4) Those amendments – and that difficult juggling act – show with great clarity how well Richard understood what it was that he was doing.

(5) It is, therefore, fanciful to suggest that he did not understand, or that in some way it can be inferred that the changes all came from Susie. They plainly did not.

Documents which pre-date 16 September 2009 concerning financial matters

169. A Stephenson Harwood internal note, dated 20 September 1994, from Mark Baily to Caroline Wright is mainly concerned with prospective revisions to Mary's Will. However, it also contains a narrative concerning the assets of the settlement established by Richard in 1971, based, in essence, on what Mr Isaacs has told Mr Baily. On the subject of the settlement, the Note records that Richard is a very valuable client of Mr Isaacs and of Stephenson Harwood, who is "genuinely successful in the investment world". The Note further states as follows:

> "Richard created a settlement of GT shares in 1971, which was exported in 1978 to Safferys in Guernsey. In 1984, the Trustees sold out for about £3M. The three main beneficiaries are Henry, Mary and Lucy. The Note records that Henry 'is a very successful Fund Manager, until recently, based in Hong Kong'. When he was in Hong Kong, he persuaded the Trustees to advance his one third share of

> the settlement out to him. Presumably, this was in order to 'wash out' the Trust gains, being the capital gains made not only on the sale in 1984 but also considerable further Trust gains which arose because Richard Thornton continued to manage the assets very successfully. Henry then re-settled on his children – at any rate part of the funds."

170. With regard to Mary, the Note records that she "left everything to Richard to organise and that her fund was now worth £3M. It only gets a very low income but that apparently is what happens when you go for capital appreciation stocks".

171. With regard to Lucy, the Note records that:

> "Lucy 'took fright' at the end of 1987 when the stock market collapsed and I assume went more or less into cash. In particular, she no longer wants her father to manage her fund and he does not do so. It is managed elsewhere and apparently she has quarrelled with his advisors. Apparently she has had considerable borrowings from her part of the Trust to include, in particular, to open a coffee shop in Clapham which lost £1M."

172. Lucy considers that Richard was in some ways unfair to her, both in failing to recognise that she had experienced greater personal adversity than her siblings and in his criticism of her financial dealings, which, she contends, would have worked out if she had received greater support and encouragement. Although she enjoyed huge advantages in comparison to most people, I agree that Lucy's life has not been without its difficulties, and, although I have no doubt that he loved his children equally, I believe that Richard may not have understood her as well as he might. Although he had worked hard for his success, and had to overcome some problems of his own – Mary said in evidence that he had gone to Stowe because he was not considered clever enough to go to Eton, and that he had felt guilty that he had not served in the armed forces when others in his family had done so – Richard had been very successful in business, and, perhaps, found failings with money difficult to accept. In my judgment, however, what matters for present purposes is not the rights and wrongs of Richard's views but instead that, even from this date, it is possible to see some of the threads of themes which run right through the following documents and which accord with the structure of the 2009 Will, which include conserving assets by not giving Lucy access to further capital sums.

173. On 3 January 1995, Richard wrote to Clive Nicholson of Saffery Champness concerning Lucy's financial affairs and the outcome of a conversation between Richard and Lucy's accountant. The letter states:

> "The situation is considerably worse than I think you realise. Not only does she have a mortgage on Thatch Cottage, but she has also apparently borrowed £100,000 from her mother, and I fear there may be personal bank overdrafts as well.

I have asked her to decide, as a matter of priority, to sell as much surplus property as she can as soon as possible. In particular, Webb's Road must go. As part and parcel of this I think it would be wise if the Trustees distributed, also as soon as possible, the loan account to her, although the distribution must be linked in my view to the disposal of Webb's Road in order to impress upon her the urgency of taking action. She also understands that she must pay the Revenue the sums that are due to them."

174. Also on 3 January 1995, Richard wrote to Lucy, in the following terms:

"I enclose a letter I have written Clive which I hope will make sense to you. I am alarmed at the rate at which you have been spending money and the news of a loan from your mother of £100,000 is really bad news. If you go on at that rate, you will be through the investments in a very few months and then what on earth are you going to live on??

You really must take a firm hold on yourself and come to grips with reality. You must sell such property as you do not need. After all, you owe mum £100,000 and the Revenue another £70,000. Both these debts could be repaid if you sell Webb's Road. I think the investments could safely yield you about £32,000 if very carefully handled and Hurlingham about £20,000 – so you would have £1,000 a week on which you should pay v. little tax while you live in France. But for all this to happen will require your co-operation, and there really isn't too much time left if you are not to avoid a major financial disaster. So do please listen to me and your advisors and act now."

175. On 21 May 1995, Richard wrote to Lucy and others in the following terms:

"I hope you will find the time to read this letter carefully, because the issues raised in it are very important to me and quite difficult to write about given all the unhappiness in the past. It fills me with profound sadness to know that I have a family who cannot get on together and I would hate to depart this world knowing that things are as they are.

Let me say at the outset how distressed I am that all these divisions exist in the family. I came from a happy and united family, and it would have been unthinkable for Chich and me not to have any relationship with our sister Anne, let alone for any of us not to speak to one of our parents. I really don't know precisely how and why these divisions have come about between you and your mother and sister/brother, but the time has come when some form of reconciliation must be made. … Can it be that my own children have no forgiveness or charity in their hearts. If they know or understand me they will know that this is totally alien to my thinking. Also, this whole matter is causing (and in some cases has caused) lasting harm to your own children, my grandchildren, and will continue with future generations unless something is done. When I look at Susie's and Nickie's happy and united families it is brought

home to me the more.

> While Susie and I were in England recently we had lunch with your mother, at her request. She is really very distressed at the state of affairs and no reasonable person would wish to leave anybody in such an unhappy state. It would be most cruel to do so, and I cannot, as your father and head of the family countenance it any longer. Your mother regrets enormously the rows and difficulties of the past, is anxious to make amends, and very much wants to resume a normal motherly relationship with all her children and to be able to see them and their families from time to time. …
>
> Moreover, Anna, who is the sweetest little girl aged only 4 years, is left in a particularly isolated position, none of which is her own making. Even if it is just for her sake something must be done. Imagine if one of your children were placed in her position! Poor Lucy who, I can assure you, has considerable generosity of spirit, is treated as an outcast and NOT as a sister. What a sorry state of affairs.
>
> The problem will not go away of its own. Apart from being very hurtful to your mother, and to me, the effects on future generations will be considerable. Reconciliation is the only possible course of action and I am looking to you all to do something about it…
>
> To conclude, I am asking you all to examine your consciences and seek a way to repair the unhappiness of the past. This is my dearest wish."

176. This letter largely speaks for itself. It reflects the deep divisions in the family, and the distress that they were causing Richard. It also shows that, in spite of his worries, and perhaps exasperation, concerning Lucy's financial affairs, Richard was not blind to Lucy's positive qualities – hence his reference to her "considerable generosity of spirit" and his regret that "she is treated as an outcast". In my view, Richard's concerns about her (and her children) are commensurate with the 2009 Will and Letter of Wishes.

177. On 17 October 1995, Richard wrote to Richard Wallis of Kingston Smith & Co., referring to previous discussions about a distribution being made in favour of Lucy. The letter states:

> "I asked, but did not make it a condition, that some form of UK settlement should be incorporated into the distribution process, so as to prevent Lucy from spending all the proceeds of any property sales she may make."

178. In a manuscript addendum, Richard wrote:

> "I have just heard from Lucy. The new plan is to sell Hurlingham, Thatch Cottage and Lyon and buy a house in Oxted, so that she will be near friends where she grew up and so that Anna can attend her old school. A house is available at £280,000 and she reckons the three mentioned above would raise

£600,000."

179. On 19 October 1995, Richard wrote to Lucy as follows:

> "Your mother rang me yesterday evening and extracted a promise that we would, for the next year, or anyway until you can sell Hurlingham, pay you £6,000 per month from the remainder of the fund which, at 29th September, had a value of only £641,000, excluding Meribel, as I reminded myself this morning.
>
> £6,000 a month is £72,000 a year, which is 11.2% of the fund.
>
> That is far too high and would consume the whole fund in a little over ten years unless remarkable capital gains are made in the meantime. Also, once you have returned to the UK we can only remit genuine income, which at the rate of 11% would be hard to find and risky as well.
>
> Your problems worry me and keep me awake at nights. If only you had listened to advice in the first place the Webbs Road disaster could have been avoided. Also the performance of the Trust Fund has been quite extraordinary. The Thornton shares multiplied about 10 times between 1985 and 1991 otherwise you would have been in these difficulties a lot earlier. Such gains are very unlikely in the future.
>
> …
>
> First and foremost, I have to be unkind in order to be kind. There has been such reckless expenditure over the past twelve years – Webbs Road – cars – Thatch Cottage – telephone bills – unpaid tax – Meribel – that it really would not be in your long term interest to bail you out again. You have been extraordinarily generously treated by the Trustees of the Settlement (on my advice) and one has to call a halt somewhere. As you well know, you three children received half the proceeds of my sale of GT Management, and the value of that was further increased by an investment in Thornton & Co. If we go on spending more than we have like this none of us will have anything left. Of course, if you were left absolutely on your uppers – bankrupt so to speak – help would be forthcoming, but it could not be on the scale you have had in the past. My father used to speak about 'cutting your coat to match your cloth' – and I am afraid this is as true today as it was in his lifetime.
>
> Secondly – why should you get special treatment over and above Mary and Henry? Mary has had her fair share of bad luck and Henry has worked extremely hard to get where he has.
>
> Finally, just at this moment I would find it extremely difficult to lay my hands quickly on £290,000, just like that. My affairs are quite carefully managed, and I have lots of other people to consider.
>
> …

You will by April have had nearly two-thirds of your settlement handed over to you, and I cannot think that anybody can deliver a return higher than 5% on the remainder of the Fund while preserving its value. That is £32,000 a year which will be subject to tax – approximately £370 a week net if tax remains at 40% - a somewhat doubtful proposition given the likelihood of a Labour Government soon.

…

I am sure there will be plenty of houses on offer after next July, possibly cheaper and nicer than the one that has currently caught your eye. I know this is very disappointing and I do sympathise, but we have come to the end of the road in terms of further help from the settlement. Anna's and your longer term interests make it imperative to preserve what remains of the fund. What on earth would you do if it all disappeared?

…

I want to conclude by giving you lots of credit for what you have achieved by going to live in France. The turn around in your fortunes I think will be seen to have dated from that move, which cannot have been easy for you. So you deserve to be congratulated on that.

To continue the process you must put out of your head extravagant schemes like this new house and proceed in an orderly manner to make better use of your resources, which are still considerable…"

180. Later in the bundle there is what appears to be a draft letter from Lucy to the Trustees of the RC Thornton 1971 Settlement, which states:

"I write in relation to my father's Settlement, dated 14 September 1971, and in relation to the resolution of the Trustees made on 25 February 1985.

I should be grateful if the Trustees would exercise their discretion and make a total capital distribution to me of £1,570,246.13, which is to comprise of (1) capitalisation of the loan account balance due by me of £1,230,246.13 as at 30 November 1995 and (2) a physical payment to me of £340,000.00.

In consideration of the Trustees making this distribution to me, I hereby confirm that I shall make no further request for capital from the Settlement and that I shall only be entitled to receive future distributions of income thereafter."

181. On 4 December 1995, Lucy wrote to Richard enclosing "my typed report stating my position at present and showing things as I see them. I hope you are in agreement as you indicated on the phone on Friday and that you will persuade the Trustees to concur with this plan".

182. On 5 December 1995, Richard sent a fax stating:

> "Basically I am in favour of this larger distribution. It does not much improve the situation: but failure to distribute would lead considerably to a further deterioration in Lucy's position. In a sense therefore, it is inevitable. She must not take any further mortgage".

183. On 26 January 1996, Richard wrote to Richard Wallis, stating, among other things, as follows:

> "Lucy will have told you that a very substantial distribution was made to her so that she could complete the purchase of the house in Oxted. In fact, there is now very little money left in the settlement and she now owns outright Hurlingham, Webb's Road, Oxted, Lyons and Thatch Cottage subject, of course, to the various mortgages that she has arranged on these properties."

184. A statement of the assets of Lucy's settlement fund as at 31 January 1996 records assets having a total value of £453,756.53 as at that date, comprising investments to the value of £262,931.49, liquid funds of £57,743.44, and Flat B6 Meribel having a value of £133,081.60.

185. On 7 October 1996, Richard wrote a letter to Mary, from which it appears that Mary's trust fund was at that time worth about £2.1million.

186. On 14 March 1998, Richard wrote to Lucy, stating:

> "I have arranged for you to receive a cheque for £30,000 to arrive shortly. I hope this will help your bank balance accordingly. As we are coming back from April 5th this is the last opportunity to send you money without hideous taxation consequences."

187. On 9 October 1998, Richard wrote a letter to Lucy entitled "Your Affairs", which includes the following:

> "I know that you must be disappointed that I have not at once written out a cheque to get you off the hook from an embarrassing problem with your bank.
>
> I have not done this without a lot of thought. Clearly the easiest course for me would have been to write a cheque, and I could have done this even though I am not nearly as well off as you and your mother seem to think. That would not have been in your long term interests. This letter explains why. Please read it carefully and accept that it comes with love and careful thought and your long term interests and those of Anna and Gabriel uppermost in my mind.
>
> The first point I wish to make is that you must begin to understand the difference between capital and income. Capital is the seed corn, and you must never spend it as income. …
>
> If you understand this first point it is much easier to grasp the second. First your

expenditure must be curtailed to your income level. Second, you must use your assets to maximise your income. You have consistently failed in both these objectives. Firstly your expenditure has always exceeded your income, and secondly you have always earned less than you could from your assets. Finally you have failed in another respect, which is that your assets since you took control of them have not been wisely invested. …

Failure to make this distinction has lead you from one mistake to another, and the effect has compounded till you find yourself in your present bind. You simply must get to grips with the facts of life and stop behaving in such a spoilt and childish manner.

Assuming that you understand my point about not spending the seed corn – even if you do not at the moment accept it – let's look at the other imperative, namely, to maximise the return on your assets.

At the moment you have, shall we say, Pounds 400,000 tied up in Webbs Road. Forget that it cost you more. That's gone and nothing is going to bring it back. Safe Government Bonds would give you a return in excess of Pounds 20,000, and a more adventurous investment policy could do better. You are getting £12,000 a year. See what I mean?

Then there is your ski resort flat held by your trust, worth in excess of £100,000. It returns nothing, according to Richard Wallis ...

Now about Virgin 1. Properly analysed this is simply a way of turning capital into spending money (which you will have understood from what I have written is sin number 1) with the added disadvantage that you're paying Virgin 10% per annum compound of the sum involved for the privilege of spending what is really your own money ... If you keep the loan for 7 years, interest will cost you between Pounds 70,000 and Pounds 100,000 and you cannot even set that against your tax bill these days. ... Please, please, sit back and think about this. It's financial suicide, and you know it is ...".

188. On 12 October 1998, Richard Wallis wrote to Richard stating (among other things) as follows:

> "I agree that Meribel and Webbs Road should be sold but should be properly invested. I am horrified by the idea of £100,000 loan from Virgin. How on earth would she be able to meet the interest charge let alone repay the capital?"

189. On 13 October 2003, Richard wrote to Lucy as follows:

> "From the limited information you gave me I think you are in a perilous position. If there is no or little equity in the house after you've paid off bank loans etc., how do you propose to live? ...
>
> I don't wish to be unkind, but you really have demonstrated that I should never have let you have access to your trust fund in the way I did. Just consider. Each

of you got a fund worth £1 million and I gave £1 million to the Foundation. I have no handle on how the various individual trust funds are doing now, as they have all been broken, but the Foundation was in part intended to be a guide to you all. Granted that it pays no tax, it is now valued at £3.6 million and that is after it has given away in excess of £3 million to charitable causes. The giving far exceeds tax and the income you might have spent over those years. So if you had left it to me, as Mary did for most of the period, you could have been reasonably well off instead of in the parlous state you partially described to me yesterday. Still, you can't have everything in life, and the sad thing is that she is a very sad person, I think, and you are still your own spendthrift but happy, loving self.

Something has to be done. And, so far as I am able, I will do what I can to help, if only for the sake of the children. But you must give me a full statement of your affairs, otherwise my hands are tied and I can do nothing ...".

190. On 16 April 2007, Richard wrote to Lucy as follows:

"It was lovely to see you yesterday… I enclose a form for Gabriel which I think you should complete and send in. They seem to be prepared to accept payment in arrears.

I am sorry if Susie wasn't quite on form, but it's best if I tell you why. Her complaint is that we only really see you when you need something, and sure enough Gabriel's school bill was due for payment. Nevertheless I think that is a little unfair but I know she is also concerned at the disparity between what we pay for you and what we pay for Henry and family, and Mary. She has a point because in the last few years I have re-done a house (which was not used but the sale of it cost me about £50,000!) and provided you with three cars and several largish cheques on top. Although I have some capital (and I suppose enough of it given the high inflation with which we live – much higher than the official figures) I am now retired and constantly dipping into it, and to run it down for your benefit is to be unfair to Henry and Mary when I have gone. As Susie points out the three of you all started with the same; and the others have managed their affairs so that they have not needed any help.

Susie was particularly upset by the latest BMW, which is why she didn't want to see it. … I consulted with Henry and put an upper limit of £15,000 but both Susie and I rather hoped that the upper limit was not reached at once. You could have got a jolly good Toyota or other second-hand car for much less. I have to confess I was a bit upset myself that all the £15,000 disappeared in one fell swoop as if it were a mere nothing…"

191. On 30 June 2009, Lucy wrote to Richard as follows:

"…Thank you for giving Gabriel all the opportunities you do and for helping me out. I really appreciate it. … P.S. Let me know if on reflection you do want me to

repay for the uniform in stages. Very happy to."

192. On 13 September 2009, Richard wrote to Lucy as follows:

> "I have been so impressed at the way you have brought up Anna & Gabriel and am so proud of all three of you because I know life has not been easy for you. It is great to think that G now has the chance to enjoy what I enjoyed all those years ago at Stowe.
>
> I fear I get a bit of criticism for paying you and your family more than the others. I have tried so hard with Mary, but not with success, and H and N's children have everything that comes with happy and successful parents. H has done very well in life but I often wonder how he and N would have coped if they had had the financial difficulties in the early days that Mum and I had. Her tiny salary as a secretary was really important until she had to stop work for Mary's arrival we relied on it.
>
> But I have had a lot of luck in my life – and had to work very hard to make the best of things – perhaps too hard for I should have been a more attentive father – rather as H is; and it does not seem to have spoilt his business career!
>
> Anyway more than enough about me. This is to say I love you and really appreciate your love in return."

193. The contents of these documents, and the themes that run through them, are, in my view, entirely in accordance with (a) the 2009 Will and Letter of Wishes and (b) the conclusions that I have reached in respect of the contents of the documents from the files of Richard's solicitors and his own manuscript responses to those documents.

194. It follows that, in my judgment, these documents provide no support for Lucy's case concerning Knowledge and Approval or Undue Influence.

The medical records

195. The trial papers contain no fewer than five full lever arch files of Richard's medical records. Some of the key matters that these documents reveal are as follows.

196. On 29 June 2000, Richard's GP, Dr John Cowen, sent a letter to Dr Paul Oldershaw, a Consultant Cardiologist at the Cromwell Hospital, referring Richard for further investigation following an exercise ECG which had been reported as "being equivocal". The letter described Richard as a 69 year old "somewhat anxious" retired man.

197. Dr Oldershaw reported back to Dr Cowen, by letter dated 10 July 2000, stating that in Dr Oldershaw's view, the exercise ECG was positive for ischaemia, recording that Richard had a family history of coronary artery disease, and suggesting that, subject to further tests, "we may or may not go on to coronary angiography". In the result, it appears from

later medical records that these further tests revealed a small amount of inferior myocardial damage, for which Richard was prescribed various medications, but which did not require treatment by operation.

198. By letter dated 7 May 2002, Dr Cowen referred Richard to Dr Edward Huskisson in relation to Richard's painful legs. That letter described Richard as "a reasonably healthy man for his age", but stated that he had a few chronic problems, naming some: a mild degree of angina; a deep vein thrombosis in his left leg which occurred in 1987, following which he appears to have had a pulmonary embolism; moderate osteo-arthritis in both knees, the left one being worse than the right; and pains around his left hip which were associated with a feeling of loss of balance, and more recently pains in both legs, often after any serious exercise. By letter dated 9 May 2002, Dr Huskisson reported that there were quite severe changes of osteo-arthritis in Richard's knees, and suggested that Richard's lumbar spine was the likely source of his recent symptoms.

199. On 22 April 2005, Dr Cowen wrote to Dr Oldershaw again, referring Richard to him, essentially because he was experiencing what he called a "balance problem" on walking, particularly when going up or down stairs. Richard was also complaining of intermittent swelling of his legs, worse on the left than on the right.

200. A GP note dated 20 September 2007 states: "Worried about daughter, whose husband has walked out after she shouted at him. She gets into frenzies against everyone – has alienated her mother and brother."

201. A GP note dated 4 April 2008 states: "Memory deteriorating, especially figures … Complains all day long and Susie fed up with him."

202. On 11 April 2008, Dr Michael Gormley wrote to Dr Oldershaw, asking for guidance as to how best to proceed with Richard's future treatment, in circumstances where Richard had returned from a stay in Australia, complaining of being tired and weak, but had felt "hugely better" and had been "springing up the stairs again" within four days of being taken off statins, which, as Dr Gormley concluded, clearly "did not suit him".

203. A GP note dated 15 June 2009 states: "Short term memory drives Susie nuts."

204. A GP note dated 8 September 2009 states: "Confidence down. Fear of being left. Fear of flying to Cuba."

205. These documents, and the extent to which Richard attended for medical treatment of one form or another, reflect four matters in particular. First, he enjoyed mixed health – on the one hand, he suffered from quite a wide variety of illnesses, some of which were relatively serious and debilitating, on the other hand, he was reasonably healthy for his age, and at least some of his symptoms appear to have been the product of medication which did not agree with him. Second, he was anxious about his health. Third, and allied to the first two

matters, he was seen by doctors on a fairly frequent basis. Fourth, no diagnosis of mental illness was made prior to the signing of the 2009 Will, and nor does any mental illness appear to have been suspected by any of the medical practitioners who saw him, although the GP notes suggest that he was showing signs of loss of memory which were causing problems in his relationship with Susie. Richard was 77 or 78 years old in 2008-2009, and, while some people fare better than others, some loss of short term memory at that age would not, in my view, be unusual.

206. On 6 April 2010, Richard sustained injuries in a fall, and was taken to the Accident & Emergency Department of Chelsea & Westminster Hospital. The hospital's Discharge Summary, completed on 7 April 2010, states as follows:

> "Fall down stairs at home (8) and knocked head on bannisters, found by wife on floor with blood from head injury. Frequent falls – 6-7 in last two years. No warning of fall but felt himself go. Had just bent down to pick up glass of water and stood up and he tells me he has suffered with postural symptoms – there was no significant postural drop in A&E.
>
> No headache, chest pain, SOB or weakness preceding fall. Wife saw him immediately after fall, slightly dazed initially but talking and no LOC. No vomiting, no seizure, no amnesia."

207. On 12 July 2010, Richard and Susie went to see Dr John Coltart at the Cardiothoracic Unit of St. Thomas' Hospital. Susie prepared some type-written notes in advance of that appointment. These list Richard's medication, and then the following symptoms:

> "Has irregular heartbeat – consults Dr. Paul Oldershaw
>
> General decline – friends noticing and commenting on general fragility and rapid ageing (led to this visit)
>
> Complains frequently 'not feeling well'
>
> More frequently experiencing feelings of dizziness (suffers vertigo)
>
> Exceeding poor balance – several falls
>
> Excessive swelling of ankles – DVT in 1987 – some days unable to get shoes on
>
> Weak knees / legs but usually focussed on balance problem
>
> Weight loss over last year (13 to under 12 stone) and muscle wasting away
>
> Always tired, eyes drooping (says he is unable to see properly at times)
>
> Severe anxiety / overwhelmed by things which affects his thinking and mind

? Is it normal 'ageing' – seems much more rapid than contemporaries

? Lacking something (blood tests)

? Effect of combination of pills

? diuretics achieving anything

? Memory / anxiety"

208. Dr Coltart reported to Dr Gormley by letter dated 16 July 2010. The letter includes the following:

> "By nature, he is a rather anxious and panicky individual, he has had no headaches, his vision has deteriorated such that he has minimised his driving recently and his wife tries to do all the driving. He used to be in the investment business but still enjoys reading the Financial Times. … His friends have noticed that his smiling has decreased and that he does not laugh or enjoy social conversation any more and he is a member of three London clubs but now rarely visits them.
>
> …
>
> The MRI brain scan showed that there were age-related changes within the brain, there were some chronic ischemic changes seen in the paraventricular white matter, there was no evidence of a recent infarct or intracranial haemorrhage or a space-occupying lesion, the major intracranial arteries and dural venous sinuses were patent. The cervical medullary junction skull base, orbits and sinuses were within normal limits.
>
> …
>
> In the light of this I believe that his basic problem is the oedema from the incompetent veins in the leg and I have suggested that he has a modern-day support stocking going above his knee. … Other than that, I have spoken to both him and his wife and reassured them on the results of these investigations."

209. On 18 February 2011, Dr Mark Kinirons, a Consultant Physician and Geriatrician at the Cromwell Hospital, wrote to Dr Gormley in the following terms. Richard had been admitted to hospital on 7 February 2011, and discharged on 18 February 2011. It appears that he had become unwell over the weekend, and had lain on the ground overnight. The acute diagnosis was that Richard suffered from delirium due to a chest infection; other diagnosis included that he suffered from hypertension with small vessel disease revealed by a brain MRI, elevated cholesterol, permanent atrial fibrillation, severe generalised osteo-arthritis, and "mild age related memory reduction with no features of anything more sinister."

210. Based on speaking to Susie at Richard's bedside on the evening of 8 February 2011, the letter from Dr Kinirons records:

> "His personality has not changed. His memory has declined and this appears according to my interpretation of the wife's story more to do with normal ageing [than] anything else. He continues to run his affairs successfully and the wife has noticed [nothing] of any concern in this regard. They are clearly devoted to each other."

211. Dr Kinirons' report also states that "He had what I now think may have been some rigor or type activity or some function of twitching in the context of him becoming unwell" and that "I formed the impression that he is suffering from an acute confusional state due to above".

212. A letter from Lynden Hill Clinic to Dr Gormley, dated 7 March 2011, records that Richard had been admitted to the clinic on 15 April 2011 "for rehabilitation following a sudden onset of immobility, drowsiness and increased confusion", had been transferred to the Royal Berkshire Hospital on 17 April 2011 "after difficulties swallowing, shocking and coughing" and that "his wife then arranged his admission to the Cromwell Hospital".

213. On 4 April 2011, Dr Angus Kennedy, a Consultant Neurologist at Chelsea & Westminster Hospital, wrote to Dr Kinirons, with copies to Richard and Dr Gormley, making a tentative diagnosis of cortical Lewy body disease. The letter records that Richard's increasing tendency to fall over, as well as some forgetfulness, "all sounds quite organic with episodic memory difficulties". With regard to the fall which culminated in Richard not being able to get up and, in consequence, being on the floor overnight, the letter states:

> "He then presumably had a toxic encephalopathy as when he came into hospital he was hallucinating and extremely confused."

214. The letter further records that "following his discharge to Lynden Hill, he continued to improve in terms of his mobility and independence which was retained on his return home". The letter continues:

> "However, the situation seems to have deteriorated with further immobility, worsening hallucinations giving rise to very vivid visual phenomenology such that there were people in the room and as a consequence he tried to get from the basement and his microenvironment to another room to sleep.
>
> Since his admission on Tuesday the situation has continued to deteriorate with drowsiness, confusion, hallucinations and intermittent jerking in his limbs some of which sound myoclonic. I could not elicit a history of anything that suggested a partial seizure disorder although it was difficult to tell from the history. ...
>
> On examination there was considerable rigidity, possibly even some stiffness. He had his eyes closed and required assistance to open them. His horizontal eye

movements were abnormal. He was reluctant to move his eyes in a vertical plane. His speech was indistinct but he was able to answer some simple questions. He was able to move his four limbs. The plantars were probably extensor. There were some myoclonic jerks but no wasting or fasciculations.

The history suggests that he does presumably have some degenerative cerebral process. This would be odd for Alzheimer's disease but cortical Lewy body disease or perhaps progressive supranuclear palsy would be a possible option. One would also have to consider a prion disorder."

215. On 30 April 2011, Dr Ben Turner, another Consultant Neurologist, wrote to Dr Gormley, stating that Richard had had a history of recent cognitive decline and that he "appears to have an acute and chronic dementing process. There are visual hallucinations and extrapyramidial symptoms. I would favour the diagnosis of Lewy body dementia. I think the treatment here is going to be supportive".

216. On 2 December 2011, Dr Angus Kennedy, another Consultant Neurologist, wrote to Dr Gormley concerning Richard's diagnosis of "Cortical Lewy Body Disease, Stiffness and rigidity in legs with immobility, Cognitive impairment Mood disturbance, Postural hypotension, Aspiration pneumonia", stating:

> "His mood is satisfactory, his cognitive symptoms are at bay. His son is keen for him to continue as a Trustee to a number of work related organisations. I have indicated that it is probably better for him to stand down from these duties. The Neuropsychometric profile that we have performed certainly shows that there are some cognitive difficulties and whilst these are under control they would really preclude any formal work related activity. That is not to say that we do not want him to be active and involved in things and the fact [is] that he certainly does have the capacity to make decisions for himself at the current time but there are times when he is confused and I think it would be very difficult to hold such a role."

217. On 22 June 2012, Dr John Costello, a Consultant Physician, wrote to Dr Kennedy thanking Dr Kennedy for asking Dr Costello to see Richard again and stating:

> "He is certainly generally remarkably better than he was during his admission last year when you made the diagnosis of Lewy Body disease and he appeared to be generally deteriorating. Since that time he had a short time in nursing care but is now back home and being looked after by his wife. He had an admission to the Lister Hospital with an aspiration pneumonia in April this year and ended up in intensive care but once again seemed to bounce back and has made a good recovery. He does, however, now have a PEG in place."

218. Richard died on 21 January 2013 at Chelsea & Westminster Hospital. The Death Certificate, dated 22 January 2013, states the primary cause of death as bronchopneumonia and cortical Lewy body disease, and the secondary cause of death as

being atrial fibrillation, osteoarthritis and hypercholesterolaemia.

219. The picture that emerges from these documents is that Richard's health declined significantly in the period after the 2009 Will and Letter of Wishes were signed. This decline may well have started with or been accelerated by the fall that he had in April 2010, because this was followed within a short time by Susie noting in July 2010 concerns such as "Is it normal 'ageing' – seems much more rapid than contemporaries". This led (among other things) to a diagnosis of Lewy body disease in April 2011.

220. It is not impossible that Richard was suffering from dementia before that date. It appears from the medical records that, in common with many other sufferers, Richard had good and bad days, and that he gave varying impressions to different people. In February 2011, Susie's perception was that Richard continued to run his affairs successfully, and she had noticed nothing of concern in this regard, and, in December 2011, Henry was keen for him to continue as a Trustee to a number of work related organisations. However, by the latter date, although Dr Kennedy thought that Richard certainly had the capacity to make decisions for himself, he also thought that Richard's confused state at times "would really preclude any formal work related activity".

221. While recognising this possibility and the difficulties for the doctors of making a firm diagnosis, in my judgment it is more likely than not that if Richard had been suffering from dementia much earlier than April 2011, and at all events as far back as September 2009, this would have been picked up much sooner than it was. Further and in any event, I consider that the extent of Richard's deterioration after September 2009, as evidenced by these medical records, makes it entirely unsafe to rely upon his symptoms and behaviour in and after 2011 as a basis for assessing his resilience in 2009.

The Hospital Patient Notes

222. The Hospital Patient Notes include the following entries.

223. For 6 April 2011: "Spoke with Lucy (Mr Thornton's daughter) she is concerned that her father is not with dementia or Alzheimer's but had a mercury poisoning. Asked to speak with consultant, in order to ask him to request some appropriate tests."

224. As Lucy explained in evidence, this reflects a concern that she had, based on something that she had read, that consumption of fish could give rise to mercury poisoning and that, in light of the quantity of fish that Richard was eating at this time, he might be suffering from mercury poisoning. Lucy's concern may have been well intended. However, I consider that it was ill-founded. Further, her decision to raise it in this way is illustrative of the clutch of problems which arose during the unhappy period of Richard's terminal decline as a result of the tension between what Susie considered to be in his best interests and the fears expressed by Lucy and others about his welfare.

225. For 29 March 2012: "Patient was distressed on arrival this morning due to the Police visiting him on 28/3/12 night. Patient was listened to and then as per patient's wishes I helped him phone his wife, his wife was very angry about the visit. The Police visited as they were told by one of his daughters that the wife Susie was attempting to choke / poison him. Mr Thornton has informed everyone this is not true and has expressed wishes not to see his daughters. … Patient appeared exhausted today following the stress of last night's incidents."

226. This was a serious incident, in which the attempts of Lucy and others to involve themselves in Richard's care and wellbeing, whether well intended or not, caused both him and Susie serious and understandable upset. Lucy's evidence was to the effect that this incident arose due to a misunderstanding, in that she and other members of the family were concerned that Richard might be choked by the way in which he was being fed under Susie's auspices, and their concern had been misunderstood by the police as being one that related to an allegation that Susie had attempted to strangle Richard.

227. I do not need to resolve whether the intention behind these reports was good or bad. What matters for present purposes is that the fact that such an allegation could be made and the effect that making it had on Richard and Susie are illustrative of the extent to which the circumstances which prevailed during the period of Richard's accelerated decline were extraordinary. That decline resulted in Susie being subjected to an unprecedented degree of stress, and had a profound effect on her day to day dealings with Richard, as well as straining and affecting more widely the inter-personal relationships within the family. Accordingly, in my judgment, it would be unsafe, unfair and wrong to place reliance on what transpired, including and in particular on how Susie behaved towards other family members when confronted not only by Richard's decline but also by the strain that incidents like this placed on her and on Richard, during this exceptionally troubled and stressful period, either (a) when assessing the extent to which Richard was susceptible to undue influence by Susie in 2009 or (b) when assessing Susie's suitability as an executor and trustee going forward.

Other documents relating to the allegations made against Susie

228. The incident which is referred to in the Hospital Notes was the subject of investigation by Social Services. These documents show that the allegations made by Lucy, and further allegations made subsequently by Mary's daughter Georgina, were thoroughly investigated and were found to be without substance. They also confirm that, unsurprisingly, these allegations caused stress. Finally, they reflect that Susie was not receptive to the idea of a "family meeting" to try and resolve "the difficult family dynamics". I do not regard this as surprising in the circumstances. Further, even if I felt in a position (which I do not) to find that this afforded grounds for criticism of her, I do not consider that would have any bearing on the issues that I am called upon to decide.

229. The relevant correspondence includes the following.

230. On 31 July 2012, Helen Shakespeare, a Social Worker with the Royal Borough of Kensington & Chelsea, wrote to Richard and Susie with regard to a safeguarding alert that had been raised in March 2012. The letter records that "The allegations made by Lucy Torrington have been found to be unsubstantiated" and "Following subsequent allegations by Georgina Moreton, no further action has been taken due to the context being the same as the previous investigation". The letter explains that Social Services would also be writing to Lucy and Georgina "to inform them of the outcome". It concludes by stating: "Your GP Dr Coyne has contacted Social Services regarding the stress that this has caused."

231. On 2 August 2012, Helen Shakespeare wrote to Georgina Moreton concerning the same safeguarding alert. That letter states:

> "The allegations that were made have been investigated thoroughly with the support of District Nurses, Community Dietician and other professionals, as well as speaking directly to your grandfather. It has been found that the allegations were unsubstantiated, therefore no further action will be taken by Social Services at this present time.
>
> Social Services have written to your grandfather and step-grandmother recommending and encouraging that as a family, contact and an open, on-going dialogue is maintained between yourselves about Mr Thornton's health and well-being. A family meeting was suggested to Mrs Thornton to try and mediate the difficult family dynamics, as opposed to going through Social Services, however this was not taken up."

232. These documents support Susie's case in several ways. First, and most obviously, they show that these specific allegations against her were unfounded. Second, they suggest that the perceptions concerning Susie (and Richard) of Lucy and other family members were skewed and unreliable. Third, they reflect how such a skewed approach subjected Susie (and Richard) to pressure and upset, and fractured family relations still further.

Family relations

233. The contemporary records provide clear evidence of the ebb and flow of the profound and long-lasting difficulties of relations between different members of Richard's family over very many years. They shed light on the concerns and anxieties which affected him, and which are plainly manifest in the lengthy discussions which preceded the making of the 2009 Will and in the terms of the 2009 Will and Letter of Wishes.

234. In large part, the contents of these documents speak for themselves, and call for little commentary. Difficulties between a second wife and the children of a first marriage are a familiar phenomenon, and the correspondence shows that these existed in the present case,

and gave rise to tensions not only between Richard's children and Susie but also, because of his affection for Susie, between his children and him. However, the correspondence also shows a degree of adverse reaction and upsetting behaviour which are, perhaps, unusual, especially where adult children are concerned, and which were certainly unfortunate. It also shows that differences and difficulties in the family were not concerned with Susie alone, but extended to virtually every inter-personal relationship between blood relations, and affected or threatened to affect relations with those who were not related by blood and who were perplexed at all this family strife.

235. The correspondence also reflects a measure of disapproval from Susie about Richard's tenderness towards his children, and, in particular, the payment of money to Lucy. It is unnecessary for me to attempt to judge whether Susie's attitude was right or wrong, but I consider that it was understandable. These were not her children. Indeed, she had no children of her own, and had never been a parent. Susie's focus was on Richard. Further, she knew that he had given his children very substantial sums, and, indeed, vastly more money than most ordinary people could hope to see in their entire lives. The correspondence does not suggest any antipathy on Susie's part towards Henry. However, if and to the extent that Susie considered that Lucy and Mary were over indulged and selfish, and did not consider the distress that they caused Richard by their behaviour, and, in the case of Lucy, the way in which she used up money, it seems to me that this was not an unreasonable standpoint for Susie to adopt, even if it did not mirror the more sympathetic view of his children that Richard was inclined to take.

236. Similar considerations apply to the disagreements that arose when Richard became ill. I do not need to decide whether everything that Susie said and did during this period was beyond reproach, and in particular whether she struck the right balance between what she considered to be in Richard's best interests (and, indeed, in her own best interests as the family member who had primary day to day care of Richard) and the interests of Lucy and Mary and other family members in having contact with Richard before he died. In my view, however, both the contemporary documents and even more importantly Susie's oral evidence, which I accept, provide an explanation for the way in which she behaved and the decisions she took which are both entirely understandable and not sinister in any way. It may be that the consequences were perceived as being hard and unfair, not only by Lucy and Mary but also, for example, by Georgina and Anna. It may even be that the course taken by Susie was, at times, and with the benefit of hindsight, less tolerant and understanding than it might have been of the sentiments and concerns of other members of Richard's family, and, indeed, of his wish to have contact with them. Even if that were right, however, it would not mean that Susie would be open to legitimate criticism. Moreover, it may not be right. It is perfectly possible that all that Susie did was, in fact, objectively in Richard's best interests: certainly, her contemporary complaint that visitors upset Richard by, in effect, raking over the old coals of family unhappiness rings true, and seems entirely legitimate to me. At all events, Lucy and Mary and others did not make

matters any easier for Susie or for themselves by the way in which they chose to go about responding to her position.

237. In any event, I am wholly unpersuaded that the degree of disapproval that is reflected in these documents, or the disagreements that arose after Richard became ill, is or are such as to require Susie to be removed as an executor and trustee under the 2009 Will.

238. On a more positive note, the correspondence shows that the family members continued to care about each other, and to regret their differences and the upset they were causing one another, and that Richard continued to provide financial support to Lucy, in particular in respect of Gabriel, in spite of his sometimes critical attitude towards her.

239. On 18 September 1999, Richard wrote to Lucy as follows:

> "... I really don't know what has got into you the last few months. You have thoroughly upset my Susie, who used to be so fond of you, with the hurtful things you have said about her, and the way we feel you have twisted the truth from time to time to put her in a bad light. This has had the effect of preventing us from coming to see you. Perhaps you don't mind any more, but I do! We are very fond of your children and would have liked to have come to your reunion party earlier this month. As it is the things you wrote, and the hysterical way you went at me over the telephone after our last visit made it impossible.
>
> I can assure you this makes me infinitely sad, the more so since none of us is getting any younger and these should be the years when Grandparents and Grandchildren most enjoy each other and get the best from each other. It's no good pretending that Susie and I can have a normal relationship with Caroline and Georgie when they must know there is this hostility in the background. We just shall not be able to see them as much as we would like. As for Charlotte, she looks as if she is going to grow up without the benefit of any Grandparents, which I suspect she will regret just as much as you regretted that you couldn't see your Granny Gleeson towards the end of her life because of the problems between you and your mother ...
>
> Susie Thornton. If you want to see much of me during the rest of my life – and perhaps you don't – you must make it up with Susie. She is your step mother, but more importantly, she is my wife, something you actively encouraged back in 1989, and, loving her as I do, that is a prerequisite for you and me to get back to a proper father/daughter relationship. The way in which you have chosen to treat her of recent years has bitten very deep for she is a sensitive and warm hearted person who comes from a background where these sort of things are unthinkable. At no time has she ever wished you anything but joy and happiness, as witness the time when I brought you and Andy and Charlotte back for the night after some crisis, and I am sure that holds for the future. But you <u>must</u> apologise for your strange behaviour of recent months, and be prepared for a lecture in reply,

because you have upset us both a lot recently. I can assure you she is exactly the same loving person I married in 1989 and only wishes for everybody to be happy.

I am sorry if this is a tough letter for you to receive. Unfortunately it is very necessary for me to write it. Susie and I will look forward to hearing from you."

240. On 30 October 1999, Richard wrote to Mary as follows:

> "Mary, it just isn't any good being really horrible to people and then, just because a month or two has gone by thinking that all is forgotten. When Susie and I married you were a great help and good fun and I know Susie was delighted to have such a lovely bubbly stepdaughter. On your second trip to Bermuda we noticed a great change had come over you. You seemed to us to be a misery all of a sudden. Since then you have become more and more difficult and often rude to Susie (often totally ignoring her and writing nasty things about her in your letters to me which are not true), culminating in that awful telephone call you made after our trip to see you in Ireland from which, frankly, I am still trying to recover. You really have got to face up to things, and stop this kind of behaviour. You must apologise, and mean it, before you can expect us to resume happy relations without strain."

241. On 7 December 1999, Richard wrote a letter to Mary which includes the following:

> "Mary, in recent letters I have mentioned how much you have upset Susie – and therefore me – in recent years. What all this is about only you know. When Susie and I married you were a great ally and perfect step daughter. Susie hasn't changed. She is still the same warm loving person, and she has made me very happy. I know she is not a country person particularly nor does she like boats that much. … But as I say Susie makes me very happy and the last ten years have been as happy as any I can remember since I was a child. It hurts me very much when you make Susie unhappy – in being unkind and unwelcoming to her you are effectively being those things to me as well. If you continue I am afraid we shan't be seeing you very much, which will be very sad for me but only what you should expect. A lot of damage has been done, and you must not expect to be able to turn the clock back straight away. It's really up to you. Susie is a wonderful person and I love her very much, so the choice for the future is very much yours. …"

242. On 3 January 2005, Richard wrote to Lucy following what appears to have been some unhappiness over the Christmas holiday period. The letter records that Susie had been upset because presents were opened when she was not present, and subsequently crackers were pulled when she was out of the room, and that "she disapproved of my writing cheques and talking about school fees in front of her mother". The letter ends by stating:

"Most of all that is my fault – presents crackers and cheques! Very sorry."

243. On 24 November 2009, Richard signed an agreement for prepayment of school fees for Stowe, which records that he is enclosing a cheque for £125,338 in respect of the prepayment of school fees as specified in a quotation dated 13 October 2009. The agreement was countersigned by Lucy, as required by the school in circumstances where prepayment is made by someone other than the parent(s) of the child.

244. On Easter Day 2010, Richard wrote to Lucy as follows:

> "I have decided to pay the 'extras' myself as this is quite a tight deadline before you get a penalty charge for late payment – and its therefore better paid by return.
>
> I enclose a cheque for £600 for you to spend how you wish. Susie is not in favour of continued subsidies and it is unfair on Henry (with two still at school and two already paid for without a penny of help) but what was lost in the various disasters cannot be replaced and both Gabriel and Anna should not be disadvantaged by past errors."

245. On 7 October 2010, Richard wrote to Lucy as follows:

> "I enclose a cheque for £7,000 to cover the teeth and I hope you can manage any 'extras' there may be by yourself.
>
> Susie is aware of it and reluctantly agrees – a letter of appreciation might help.
>
> I continue to be worried by your finances, and hope you will manage when I have gone."

246. This was followed by a letter from Lucy to Richard and Susie, dated 21 October 2010, which begins by saying that it is written "with reference to the monies you most kindly loaned me for Gabriel's necessary expenditure" and expresses gratitude to Richard and Susie "for your understanding and cooperation". The letter discusses some of Gabriel's immediate needs, before turning to more general matters in the following terms:

> "I have brought up my children to understand family values and to respect you both, unreservedly. I have used my financial resources to give both my children a decent life, and I have drained myself of these resources in the process so that my children could receive the best that I could provide for them. I have been a single parent and unfortunately Anna's father took advantage of my situation. The only family support I have had was from both of you and my mother. The rest are only ghosts who fleetingly send greetings and token meaningless acknowledgements of one's existence.
>
> It has taken me years to come to terms with the fact that people who denigrate other people, and who openly taunt or ignore the existence of others, or who lie

and even believe their own lies, are not worth knowing.

My sister has caused her own mental illness and breakdowns with all her manipulative lies. She is very plausible and cunning, and throughout her life her destructive behaviour and taunts have caused upsets and divisions within the entire family. As to the trunks of letters and your personal papers that Mary is holding, these will become her next weapon. I was appalled to hear the comments that she made and to see her relentless pattern of rude and antagonistic behaviour towards Susie.

As to my brother, he sits upon Capital Hill with BDT as a flagship to the Thornton name. In his private life there is no room for anyone else except his own family. So that's it.

I am very lucky to have a family and I appreciate all your support, help and understanding. Thank you again."

247. On 10 March 2011, Lucy wrote to Susie expressing concern about the stress that Richard's recuperation was placing upon her. The letter ends by stating: "I hope you realise that I am always there for you just as you have both been for me."

248. On 12 April 2011, Susie sent an email to Lucy concerning Richard's health, which states:

> "…I had a long talk with a consultant on Sunday evening and they are still somewhat puzzled as to the exact diagnosis, apart from the fact that there is cerebral degeneration. We can only watch how he progresses with the medication and what level of recovery he makes over time, both physically and mentally."

249. On 25 April 2011, Susie sent Lucy a longer email, which includes the following text:

> "Of course I am compassionate and understanding about your wish to see your father but are you being understanding about his wellbeing? You and M have seen him mostly when he is more aware and calm (thankfully for your sakes) but the reality is usually quite different. I have tried my best to explain 4 people visiting is TOO much for him – believe me – and leaves him tired and exhausted, and he finds it confusing with so many. He has even told me so. Visits need to be shorter, and only one or occasionally two people. Even though you and M think you are sitting there quietly and not talking much, he is aware and it is a huge strain for him. Other people all realise and see this why don't you and M. Of course he is happy to know you visit but only wants (and needs) a short time. It isn't the last time and I would always let you know if there it seemed that way. The nurse you saw the other day was an agency nurse for the day and not really familiar with his condition like the permanent nurses. Also I do not understand why you all remained when the physiotherapist was there. I am sure he got no benefit in those circumstances.
>
> Lucy, of course you must see him and I have no issue with any of you visiting.

> On the whole you have been co-operative and supportive, but because M (and sometimes you) just turn up whenever and do not arrange visits through me I have had to take the action I mentioned. I do mean it, in HIS best interest. The nurses have a daily list of any pre-arranged visits through me and otherwise they will not be admitted. Everyone agrees this is the best arrangement and are more than happy about it. So please, arrange your visits and make them shorter.
>
> There is something I do take issue with – during the visit on Thurs someone said something concerning the family which left him very troubled and anguished the following morning and later in the day. It is shameful to make him suffer anymore than he has by reminding him in some way of past family discord. Issues relating to you all, and your mother – in the past and now – should be dealt with amongst yourselves and not involve him. The past is irreversible and it is a bit late to start trying to play happy families now. Of course he is, I know, so pleased you met up with H and Alice and that you and M speak, but leave it at that. It is shameful when he is so vulnerable that he is reminded of the unhappiness in the past. I don't know what triggered this but found it deeply distressing that he was so troubled by it."

250. On 23 October 2011, Susie wrote a letter to Mrs Sue Thompson, the Customer Care Manager of Lift Able Limited concerning installation of a stair lift at Pelham Place. In sum, this records that Susie had arranged an installation date of 22 July 2011, that one lift was installed on that date but another was not because of faulty manufacture. A second installation date was arranged for five weeks later, but this was cancelled because pieces of track were missing and had to be remade. The lift was not fully installed until a further four weeks later. It seems that even then the problems were not over, such that for some time Richard "was unable to access the ground floor to leave the house and important medical appointments had to be cancelled". At other times, Richard was unable to make the return journey up from the ground floor because the lift did not work, and at other times further problems arose, such as the lift making a noise during the night, which did not stop even when the lift was switched off. All in all, Susie suggested that fair compensation would be represented by a deduction of 50 percent off the price for the second lift, as opposed to the 30 percent deduction which the manufacturers appear to have offered. I mention this letter only because it was suggested to Susie that her conduct relating to this stair lift provided an example of how she had been dilatory or neglectful when looking after Richard's interests. I do not consider that this letter supports that accusation, and I reject it in any event.

The transcripts

251. Lucy also relied on a number of transcripts of recordings of telephone conversations and visits to Richard's home, which had been made in 2011 and 2012, although I consider that it is sufficient to refer to only some of them. These recordings were made without the knowledge or consent of any individual other than the person(s) responsible for making

the recording. There is an obvious risk that someone who is covertly recorded in this way may be "set up" by the person making the recording. In addition, in the context of the present case, ventilating the contents of these documents in open court not only placed a considerable amount of otherwise private and sensitive family material in the public domain but also risked causing distress to Susie which was out of all proportion to any legitimate purpose that Lucy might hope to further, to say nothing of prolonging and exacerbating the existing rifts between different family members.

252. In a recording of a telephone conversation between Mary and Richard on 18 November 2011, the following exchanges took place:

> "Mary: You do love me but you're not allowed to tell me that you love me
>
> Richard: Yes
>
> Mary: Oh gosh Dad, that does make me sad
>
> Richard: It makes me very very sad
>
> Mary: Can you ask Gail to write a note or something saying that you do love me, that I can have, close to me if you can't tell me that you love me?
>
> Richard: I… I don't think I can trust Gail
>
> Mary: You can't trust Gail? Who can you trust?
>
> Richard: Nobody really
>
> Mary: Well you can trust me Dad
>
> Richard: Yes, but… anyway it's a sad day
>
> Mary: Oh it is a sad day and it was so sad that Hector and Georgina were wanting to come and see you on Sunday and they had to stay outside on the… in the porch, in the… outside your front door
>
> Richard: That was disgraceful, I had no idea they were there
>
> Mary: They were and they weren't allowed in, and, and it seems so sad because you were upstairs on your own and it looked as if Will and Susie were going to have their lunch downstairs, or do they bring their lunch up on a tray?
>
> Richard: I don't get any lunch, I don't get any food
>
> …

Mary: Well thank you. Is there anything else you want to explain?

Richard: No, I can't… its, it's a form of… nervous breakdown

Mary: Who's having a nervous breakdown?

Richard: Susie

…

Richard: Well I don't know what where to turn for help nobody I can trust

Mary: Nobody you can trust?

Richard: Well nobody, nobody who's is not going to inflame things. If you said anything about it it much worse

Mary: Hmm, well who comes to wash you in the mornings?

Richard: It's a poor position because if she were to execute any of the threats of abandoning me, I don't think I could cope. I'd die.

Mary: She's threatening to abandon you?

Richard: Well

…

Richard: I took the opportunity because she's out

Mary: Well thank you for telling me, do you know where she has gone?

Richard: What?

Mary: Do you know where she's gone?

Richard: No I don't. But if I get turned out now I'll have no money, no cheque book, no nothing, I can't, I'm in a very poor position… Very poor position

Mary: Who says you'll have no cheque book?

Richard: I don't know where they are!

Mary: You don't know here your cheque books are?

Richard: No

Mary: Well where's your bank statement?

Richard: I haven't got them anymore

Mary: You haven't got it anymore?!

Richard: Well, if, I was away for, you know hospital for about nine months

Mary: Hmm

Richard: And all that was taken over

…

Richard: For all I know she may be hiding behind the door and listening to all of this and there will be a tremendous blow up and I'll probably get murdered

Mary: You'll get murdered?!

Richard: Well I don't know… after this call

Mary: She doesn't lash out at you does she Dad?

Richard: What?

Mary: She doesn't hit you?

Richard: No, no, anyway, there we are Mary, I'm sorry. I just wanted to explain"

253. The most surprising aspect of Lucy and Mary's evidence in relation to this recording is their belief, confirmed by Mr Macpherson's summary of their evidence in his closing written submissions, that, based on what Richard said, there were genuine grounds to fear that he might be murdered by Susie. That remarkably serious allegation is not supported by a shred of credible evidence, and I regard it as little short of shocking that it was raised, let alone persisted in, as it was. Once the lack of credibility of that suggestion is appreciated, the difficulties about placing reliance on anything else that was said by Richard become obvious. It is very concerning that Lucy and those who were called to give evidence on her behalf appeared to be quite unable to accept this.

254. On 3 August 2012, a recording was made in relation to a visit made by Mary and Georgina to Richard and Susie's home. The transcript includes the following:

"Mary: Hi Susie I'm in London taking Charlotte onto the station not the station.

Susan: Well I'm sorry you can't come in

Mary: Well it's really important to me to see Dad

Susan: No I'm sorry if you don't all come at once he's not available at the

moment and you didn't ring so sorry

Mary: Well you always say no even when we ring

Susan: We don't

Mary: [unclear] it will make any difference

Susan: Well it does make a difference

Mary: It's really important to me that I see

Susan: Well I'm sorry you can come in but the others can't

…

Mary: Why can't we just say hello to our father?

Susan: Because you can't all go into our room I'm sorry we don't have visitors in there.

Mary: Well… why is he in the room?

Susan: Because he's on his feed and he's in between [carers?]

…

Susan: No I'm sorry it's… if you hadn't got the decency to call up and make an appointment

Mary: Susie, it doesn't make any difference

Susan: It does

Mary: [If?] we call you don't let us see him

Susan: I do so I don't stop you

Mary: You do Susie

Susan: You called once and he said to come this week

Georgina: [unclear] Grandfather [unclear]

Mary: Because you don't…

Susan: You don't speak to me like that. You're disgusting Georgina. Everybody from all our carers, the nurses, the professional people, our church, our friends all of them think they're bad enough that they think that what you've done is even more disgusting.

Mary: It's really important for me that I'm able to visit my father with my

sister and my daughter.

Susan: No sorry you can't.

Mary: It's really important

Susan: Well I'm sorry you can't.

Mary: [unclear]

Susan: No. You can't all go into our bedroom.

Georgina: Well perhaps we can talk to him from outside the door.

Susan: No… no… no you can ring up and make an appointment and if you refuse to do that you can't see him. I'm sorry. You've been told that. You've been asked… you're the only people who haven't got the good manners to observe that. Even Henry rings before he comes and arranges an appointment but no, it's not good enough for you.

Mary: Well…

Susan: Well I'm sorry.

Mary: It's really important for me to be able to see my father today.

Susan: Well you can come in but the others can't. So take your choice.

Mary: Well… it's really important for all of us to be together.

Susan: Well, sorry.

Mary: Susie, come on please.

…

Susan: No, I've already said where he is. Did you not hear what I said? Could I ask you. Do you have a pint of decency to do and [unclear] what I asked you to do?

Mary: Well it's really important [unclear]

Susan: No you answer me before you go up.

Mary: Susie, I don't try phoning you anymore.

Susan: Don't…

Mary: Because you keep putting the phone down on me.

Susan: I do not. Well, only when you're being silly.

…

Susan: To say hello and whatever. No you listen to me first. You've got no manners, no courtesy, no respect and until you show that you won't be welcome here. And if they just turn up like that then I don't want you to go up there and tell him they're outside because that is going to make him distressed and I will not have it. Ok?

…

Susan: Mary… showing no respect to your father's [illness?] and I don't want you coming here and telling him that you [unclear] about your illness because he doesn't need that worry. [unclear] have no idea what's wrong [unclear], you show no respect, you show no respect to me and that's the way you'll be treated [unclear]…

…

Mary: Well that's nice. Well Dad I wanted to visit you with Georgina and with Lucy

Richard: Yeah

Mary: Um

Richard: And where are they?

Mary: Well… they're outside your front door.

Susan: Oh you are a [unclear]

Mary: I don't lie, I'm sorry

Susan: No but you didn't have to bring that up. I asked you not to.

Mary: But it's really important for me to tell Dad that that's what we wanted to do.

Susan: Well if you want to do that you have to make arrangements but you refuse to do it so that's how it is. Darling why [unclear]

…

Susan: So you want to see your father? Have a nice visit and make him happy and talk about something nice!

Mary: But it's… it's…

Susan: Can I not expect that from you?

Mary: It's very important for me to just explain that when Dad calls us what

he says to us sometimes is really concerning

Susan: Well if you're so stupid you don't realise he's got a serious illness and he forgets a lot of things. He called you once and said he was left alone so what do you do? You stupid girl, go off to the social services and complain. I went to the dentist once and he misunderstood the whole thing. One visit to the dentist and he told you because he was feeling a bit confused that I'm never there and so you go off to the social workers, you distressed him, you distressed me…

…

Mary: Could I just ask you if I could just speak without being interrupted then I can say it quickly and that would be good for all of us I think. Um sometimes, Dad, when you have telephoned it's been of concern to us what you say and um we love you, we're your family, what we hear you say is…

Susan: You love him?

Mary: …is of grave concern.

Susan: How could you? No sorry I will not let you say such a thing…

Mary: And…

Susan: …when you do what you've done to him…

Richard: Hmmm

Susan: Seven times you've all been to the social services, darling, and police… police into the hospital

Mary: And then…

Susan: Can you tell me why you sent police to the hospital in the middle of the night?

Richard: [unclear]

…

Susan: Look, if you… no why don't you just start from the beginning. If you had any inkling of his illness you would understand that there are times when he gets confused and forgetful and he has a memory lapse, do you understand that? Did you know about that?

Mary: Well…

Susan: So therefore, you have to be a little bit more grown up and mature and not take everything he says in a confused lapsed… lapsed memory

moment and take it as gospel first of all and secondly, it's not as our breeding to go running to social services.

…

Susan: If you think your father said those things and meant them then you don't really know your father at all … you really don't

Mary: Well, thank you for putting me straight Susie because obviously you can imagine that that sort of phone call…

Susan: Well, I don't care – you don't know what all of you have put us through

Richard: Oh darling…

Susan: You know… being ill … [answers phone]… hello? sorry? Yes

Mary: Have you had many visitors Dad?

Richard: Have I had what?

Mary: Visitors? Have you had any visitors?

Richard: Well… I've got friends… yes

Mary: Who comes to visit you?

Richard: Yes actually I've had a lot

Mary: Oh good

Richard: When I think about it

Mary: I gather Murray wanted to pop in

Richard: Yes he rang it just wasn't convenient. I can't remember why… I had to put him off. It was very kind of him to ring.

Mary: Hmmm… he was a little bit concerned that you didn't let him come in but anyway

Susan: Well for your information I wasn't even here when Richard decided himself so he must have been tired… you know some days he sleeps and some days he doesn't want to do anything… you have to understand all of those things and that's why it's important that everything is kept to a routine more or less and also the timing and also arranged because some days are good and some days are not"

255. On 18 November 2012, a recording was made involving Mary, Lucy, Richard and Susie. The recording begins with Mary and Lucy discussing matters in a car, prior to a visit to

Richard and Susie's home. In the context of discussing the visit that is about to take place, Lucy says that she is going "to see the old witch". After Lucy has entered the house and gone to the bathroom, the transcript proceeds as follows:

"Lucy: Mary is in the car and she would love to see you if you would like to see her

Richard: Can't she come in?

Lucy: Well…

Susan: No, she can't

Lucy: Only if I ask you, I'm asking if you'd like to, come, if she could come?

Susan: No, do you think, you know just like a criminal…

Lucy: Excuse me I'm…

Susan: No. Excuse me

Lucy: Hang on I'll just…

Susan: Excuse me Lucy, I'm sorry…

[unclear]

Susan: Excuse me Lucy, you know what, Richard and I have been married for a very long time, no listen to me would you, and by showing me some, well, stop talking about me

Lucy: I'm not

Susan: By showing me such lack of respect you dishonour your father and I have said to Mary if she wants to come to see her father…

Lucy: Daddy I will come and see you another time okay, I'm not going to leave Mary… exactly, I'm not going to leave her sitting in the car so I'm…

Susan: Well you could have said you had her in the car and maybe she could have come, but now she can't because you've been sneaky and deceitful

Lucy: Why are you being so ridiculous Susan? Come on, really? Daddy says he wants to see her…

…

Susan: No no Richard, I am not going to

Richard: I only want to see my eldest daughter, please.

Susan: No, no darling I'm sorry they're just, disobedient little children

Lucy: He's in… He's in charge of who he wants to see

Susan: Don't you tell me what…

Lucy: Well you know that…

Susan: happens in my home… okay, right, if you can't, you are deceitful because you didn't say that

Lucy: But if I don't want to talk to you about it I won't

Susan: Well I'm talking to you, you show me respect or you don't come to this house

Lucy: Stop shouting…

Susan: Well don't talk about me

Lucy: For goodness sake Susie

Susan: Go out please, leave… you can't, you're deceitful and underhanded

Richard: I'd like to see Mary

Susan: I'm sorry but she purposefully did this and Lucy deceitfully did it, she did not ask if she could bring Mary and Mary has not got the decency to ring and I am telling you

Lucy: Excuse me…

Susan: This is how it is

Lucy: I'm sorry Susie…

Susan: Excuse me, this is how…

Lucy: I'm not talking to you about it I'm talking to Dad

Susan: Well you're not talking to him because this is my house too…

Richard: Oh shut up Susie

Susan: Darling, don't you dare speak to me like that because your disobedient children

Lucy: Susie…

Susan: Everybody knows how rude you are

Lucy: I haven't been rude have I Valdemar?

Susan: Don't speak to people like that

Lucy: Well it's obvious I haven't, all I have done is

Susan: You're so…

Lucy: And I'll come another time and I can't stay in this sort of atmosphere

Susan: Well I can't take it…

Richard: [mumbling]

Lucy: Well why don't you leave and go into a different room and let…

Susan: Because you are deceitful and I am not allowing it.

Richard: Could you go and get Mary?

Lucy: Well Dad if you give me your phone I will ring her

Richard: I haven't got a phone

Lucy: Well why don't you have your phone?

Richard: I don't have a phone

Unknown female: You do so doesn't he Valdemar

Valdemar: Yes, you dropped it

Richard: No but I don't know…

Susan: Darling, we are not, they are being deceitful and underhand and we have talked about it before

Richard: I don't have a mobile phone..

Susan: We've talked about it before and we're not having it. She's got… she's like a criminal, who thinks she is above the law

Lucy: For goodness sake Susie, I'm just saying if I can't, if she's not going to be allowed to come in, then I'll come another time

…

Valdemar: I'm taking care of Richard, personal care

Susan: And this is not in his interest

Richard: I'm going to go out…

Lucy: [unclear] Dad come out with us, and we can have a walk and you can see her by the car… that's the only option left

Susan: You're a selfish little piece of creature aren't you. Richard, we've talked about this before darling and we are not having her dictating it, she cannot ring up or Lucy hasn't got the courtesy when she rang up before to say Mary was with her then sorry you're not, playing this game

Lucy: No, Susie

Susan: And you were…

Lucy: Susie

Susan: Showing your father no respect

Lucy: Shh

Susan: Don't you shh me!!

Lucy: Don't you hit me!

Susan: Well don't you shh me!!

Lucy: don't you hit me! Dad, come on we're going upstairs

Richard: No we're not

Susan: You're making…

Richard: For once I am in charge

Susan: No you're not darling

Richard: I would like Mary to come in… I really want her to come in, she's been very ill

Susan: She's not very ill, and there are people a lot worse than that, they never think about you, and your care.

Lucy: Excuse me, Georgie, actually, Mary told me, has already told you that we want to see Dad together

Susan: Yes, and I said if the mother rings up and asks

Lucy: But Susie, Mary doesn't want you shouting at her and abusing her and I

can understand why

Susan: But I'm not shouting abuse…

Lucy: So I'm asking Dad directly does he want to see his daughter and he said yes

Richard: I'd like to see them

Lucy: Exactly Dad, it's not a game to you, it's just we want to see our Dad and that's the end of it, no more, no less

Susan: No, I'm sorry you see him when you ring up and that's it.

Richard: I want to see… it's very embarrassing

Lucy: because I am really worried about you

Susan: Darling, could you please tell your daughter to leave, she's showing us disrespect

Lucy: I'm not showing you disrespect, I'm really concerned

Susan: You dishonour your father by…

Lucy: I'm not going to shout because you're shouting at everybody and I'm not going to get drawn into it

Richard: Well… I'll come out

…

Susan: No, you are not going to do it Lucy so you're wasting your time because he's going up for his feed in a minute and you are a deceitful, like, like two disobedient children…

Richard: Oh shut up Susie

Susan: Darling don't you speak to me, this is what happens

Lucy: Don't…

Richard: Shut up

Lucy: Don't insult his children at all time like that Susie

Susan: Well you deserve it

Lucy: Yes…

Susan: Everybody knows what you're like

Lucy: It has nothing to do with you

Susan: Oh sorry it is

Lucy: No, you don't have the right to keep abusing us like this

Richard: I do, because you don't behave properly

Lucy: You don't have the right to keep abusing us like this

Richard: Oh will you stop Susie

Susan: Darling, don't tell me to stop. They have done nothing but cause you pain all their life. They've made messes with their lives, they know nothing about anything… They don't know anything about relationships and marriage… I don't care…

…

Richard: I'll go out and see Mary

Susan: You will not darling

Richard: I will, you can't stop me

Susan: I can

Richard: You can't stop me, I'm, I… depends whether I can get up, could you help me

Susan: You have to go up for your feed!

Richard: I want to be taken out to see my daughter

Susan: You're not going out at this time of night! That shows you how self-absorbed you are, you don't think about your father, you just think about yourselves

Richard: I can go out for a minute

Susan: You can't go outside darling. I'm just fed to the back teeth of your daughters they're like two disobedient children who need a good spanking, which they should have had all their lives…

…

Richard: I can't get up…

Susan: He's an ill man and Vlademar and I take care of him and you are not going to do it

Richard: I want to be helped up …"

256. There are a number of disturbing features about these exchanges. There is no doubt that Susie reacted forcefully, and I believe that she stated a number of home truths. I expect that, in those moments, she did consider that Mary and Lucy were being unreasonable, deceitful, inconsiderate and selfish in visiting in the way they did, were not thinking about Richard's welfare, were wrong to believe everything Richard said, had caused a lot of upset by complaining to social services and so forth, and, more generally, had done nothing but cause Richard pain, had made messes of their lives, and knew nothing about relationships and marriage. As I have said above, I do not consider that I should attempt to rule on the rights and wrongs of these views, but I regard them as understandable. On the other side of the coin, it seems to me extraordinary for adults to behave as these visitors did, and, in particular, that they showed a remarkable lack of understanding or empathy concerning Susie's circumstances at this time, and that to embroil Richard in their anxieties and contretemps was, frankly, little short of heartless.

Formal validity

The law

257. Section 9 of the Wills Act 1837 (as amended) provides, so far as relevant, that "No will shall be valid unless (a) it is in writing, and signed by the testator …; and (b) it appears that the testator intended by his signature to give effect to the will; and (c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and (d) each witness either (i) attests and signs the will; or (ii) acknowledges his signature in the presence of the testator (but not necessarily in the presence of any other witnesses) but no form of attestation shall be necessary."

258. A Will which contains a proper attestation clause and on its face appears to comply with the requirements of the statute will be presumed to be valid in the absence of "the strongest evidence" that it was not. Evidence by the witnesses to the Will to the effect that it was properly executed will dispel any suggestion that it was not. Even where the witnesses have no recollection at all of the Will being executed, it will be deemed validly executed in the absence of evidence showing that it was not. See: *Sherrington v Sherrington* [2005] EWCA Civ 326 [2005] WTLR 587, *Channon v Perkins* [2005] EWCA Civ 1808 [2006] WTLR 425 and *Kentfield v Wright* [2010] EWHC 1607. In *Channon,* Neuberger LJ said at[7]-[11]:

> "7. There is good reason for the requirement that one must have "the strongest evidence" to the effect that a Will has not been executed in accordance with section 9 when, as in this case, it appears from the face of the Will that it has been properly executed in all such respects and where there is no suggestion but that the contents of the Will represented the testator's intention. Where a Will, on its face, has been executed in

accordance with the section 9, and where there is no reason to doubt that it represented completely the wishes of the testator, there are two reasons, one practical and one of principle, why the court should be slow, on the basis of extraneous evidence, to hold that the Will was not properly executed.

8. The practical reason is that oral testimony as to the way in which a document was executed many years ago is not likely to be inherently particularly reliable on, one suspects, most occasions. As anyone who has been involved in contested factual disputes will know, people can, entirely honestly and doing their very best, completely misremember or wholly forget facts and events that took place not very long ago, and the longer ago something may have taken place the less accurate their recollection is likely to be. Wills often are executed many years before they come into their own.

9. Furthermore, when one is dealing with the recollection of witnesses to a Will, one is, as my Lord, Mummery LJ, pointed out in argument, often, indeed normally, concerned with the evidence of persons who have no interest in the document that has been executed, and therefore to whom the signing of the Will would not, save in usual circumstances, have been of particular significance.

10. The principled reason for being reluctant to hold that a Will, properly executed on its face, representing the apparent wishes of the testator, should be set aside on extraneous evidence, is that one is thereby declining to implement the wishes of the testator following his death. That would be unfortunate, especially in a case he has taken care to ensure, as far as he can, that his wishes are given effect in a way which complies with the law."

The parties' submissions

259. In his opening submissions, Mr Macpherson accepted that as a general rule strong evidence is required to demonstrate non-compliance with section 9 of Wills Act 1837, but he contended that there is a serious suggestion that the 2009 Will did not completely represent Richard's intentions, and that for this reason a more circumspect approach is justified in the present case. This contention was repeated in his closing submissions, in which he added that Lucy did not admit that Richard executed the 2009 Will, although she did not make any positive case concerning due execution.

260. Mr Dew submitted that, far from having "the strongest evidence" of invalidity, Lucy has no evidence at all that the 2009 Will was not properly executed. He relied not only on the Will itself, and in particular the attestation clause, but also on the evidence of Ms Harris.

She said in evidence: "I'm 100% sure that I witnessed the Will", that "I'm 100% sure that the Will that was bound was that Will", and that Richard did not take a copy with him when he left Withers' offices because "that's not our practice". I accept that evidence, which also, in my judgment, fully accords with and is supported by the contemporary documents, namely Mr Cooke's email of 16 September 2009, Ms Harris' time sheets of that day, and the fact that on 19 October 2009 she sent Richard "copies of the Will and the letter of wishes that you signed at our offices on 16 September".

Discussion and conclusion on the facts

261. I accept Mr Dew's submissions. The challenge to formal validity of the 2009 Will fails.

Knowledge and Approval

The law

262. The following points can be extracted from the judgment of Lord Neuberger MR, with whom Lloyd and Jackson LJJ agreed, in *Gill v Woodall* [2011] Ch 380:

(1) It is usually right to consider knowledge and approval first, and only then to turn to matters such as undue influence. This accords with the consideration that where circumstances that "ought generally to excite the suspicion of the court" exist, and whatever their nature may be, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud, undue influence, or whatever else they rely on to displace the case made for proving the will. ([13])

(2) Knowing and approving of the contents of an individual's will is traditional language for saying that the will represents the individual's testamentary intentions. ([14])

(3) At first sight, the proposition that a testator knew and approved of the contents of the will is very hard indeed to resist, as a matter of common sense and authority, in circumstances where the will has been properly executed, after being prepared by a solicitor and read over to the testator – such circumstances raise a very strong (or grave) presumption that it represents his intentions at the relevant time, namely the moment he executes the will. ([14]-[15])

(4) The proposition that the Court should be very cautious about accepting a contention that a will executed in such circumstances is open to challenge is reinforced by a strong policy and evidential considerations, namely:

> "Wills frequently give rise to feelings of disappointment or worse on the part of relatives and other would-be beneficiaries. Human nature being what it is, such people will often be able to find evidence, or to persuade themselves that evidence exists, which shows that the will did not, could not, or was unlikely to, represent the intention of the testatrix, or that the testatrix was in some way mentally affected so as to cast doubt on the will. If judges were too ready to accept such contentions, it would risk undermining what may 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.
>
> Further, such disputes will almost always arise when the desires, personality and state of mind of the central character, namely the testatrix herself, cannot be examined other than in a second hand way, and where much of the useful potential second hand evidence will often be partisan, and will be unavailable or far less reliable due to the passage of time. As Scarman J put it graphically in *In the Estate of Fuld, decd (No 3) [1968] P 675* , 714: "When all is dark, it is dangerous for a court to claim that it can see the light." That observation applies with almost equal force when all is murky and uncertain." ([16]-[17])

(5) The approach to the issue of knowledge and approval that will generally be correct is for the Court to consider all the relevant evidence available and then, drawing such inferences as it can from the totality of that material, come to a conclusion whether or not those propounding the Will have discharged the burden of establishing that the testator knew and approved the contents of the document which is put forward as a valid testamentary disposition. When carrying out this exercise, the fact that the testator read the document, and the fact that he executed it, must be given the full weight apposite in the circumstances. However, as a matter of law those facts are not conclusive, and nor do they raise any presumption. ([22])

(6) The intensely fact-sensitive nature of the exercise of assessing knowledge and approval (especially where, as in the present case, the court at first instance has heard evidence over a period of many days relating to the character and state of

mind and likely desires of the testator, and the circumstances in which the will was drafted and executed, and other relevant matters) is illustrated by the consideration that, before overturning a first instance finding of fact, the Court of Appeal has to be satisfied that the trial judge reached a conclusion that he could not reasonably have reached, or made findings which were not open to him on the evidence, or made some other fundamental error which vitiates his finding. ([18])

263. Further helpful guidance was provided in *Wharton v Bancroft* [2011] EWHC (Ch) 3250, 2011 WL 5903177 by Norris J at [27]-[28]:

(1) The overall burden lies on the claimant to produce evidence sufficient to prove the Will. Certain evidential presumptions may assist in the discharge of that burden. However, the circumstances may indicate that the propounder is required positively to prove what in other circumstances might be presumed or inferred from the proof of other facts.

(2) The assertion that the testator did not "know and approve" of the Will requires the Court, before admitting it to proof, to be satisfied that he understood what he was doing and its effect (that is to say that he was making a will containing certain dispositive provisions) so that the document represents his testamentary intentions.

(3) The burden lies on those seeking to prove the Will to show that the testator knew and approved of the Will in that sense.

(4) The Court can infer knowledge and approval from proof of capacity and proof of due execution.

(5) Circumstances such as those described in *Gill v Woodall* at [14] raise a very strong presumption that the Will represents the testator's intentions at the relevant time.

(6) However, proof of the reading over of a will does not *necessarily* establish

"knowledge and approval". Whether more is required in a particular case depends upon the circumstances in which the vigilance of the Court is aroused and the terms (including the complexity) of the Will itself.

(7) Those challenging the Will must produce evidence of circumstances which arouse the suspicion of the Court as to whether the usual strong inference arising from the manner of signature may properly be drawn.

(8) It is not for them positively to prove that the testator had some other specific testamentary intention: but only to lead such evidence as leaves the Court not satisfied on the balance of probabilities that the testator understood the nature and effect of and sanctioned the dispositions in the will he actually made. But this evidence itself must usually be of weight, because in general the Court is cautious about accepting a contention that a will executed in the circumstances described is open to challenge.

(9) Attention to the legal and evidential burden can be decisive where the evidence is in short supply. But in other circumstances identifying the legal and evidential burden is simply a tool to enable the probate judge to identify and weigh the relevant elements within the evidence, the ultimate task being to consider all the relevant evidence available and, drawing such inferences as the judge can from the totality of that material, to come to a conclusion as to whether or not those propounding the will have discharged the burden of establishing that the document represents the testamentary intentions of the testator.

(10) A challenge on the grounds of want of knowledge and approval is not precluded by an admission of testamentary capacity. There are plainly cases in which the Court will accept that the testator was *able* to understand what he was doing and its effect at the time when he signed the document but needs to be satisfied (by something other than inference from the fact of capacity and due execution of the will) that he did *in fact* know and approve the contents, i.e. understand what he was doing and its effect: see *Hoff v Atherton* [2004] EWCA Civ 1554 at [64].

264. In *Hoff v Atherton* [2004] EWCA Civ 1554, [2005] WTLR 99, using language which

appears to form the basis of some of Mr Macpherson's submissions, Chadwick LJ said at [62]-[64]:

> "62. … if testamentary capacity — the ability to understand what is being done and its effect — is established, then it is open to the court to infer that a testator who does know what is written in the document which he signs does, in fact, understand what he is doing. And, where there is nothing to excite suspicion, the court may infer (without more) that a testator who signs a document as his will does know its contents. It would be surprising if he did not.
>
> 63. Whether those are inferences which should be drawn depends, of course, on the facts of the particular case. The fact that a beneficiary has been concerned in the instructions for, and preparation of, the will excites suspicion that the testator may not know the contents of the document which he signs — or may not know the whole of those contents. The degree of suspicion — and the evidence needed to dispel that suspicion — were considered by this Court in Fuller v Strum [2001] EWCA Civ 1879, paragraphs [32]–[36], [73], [77], [2002] 1 WLR 1097, 1107 *C* – 109 *A* , 1122 *A–C* , 1122 *G* –1123 *C*.
>
> 64. Further, it may well be that where there is evidence of a failing mind — and, *a fortiori* , where evidence of a failing mind is coupled with the fact that the beneficiary has been concerned in the instructions for the will — the court will require more than proof that the testator knew the contents of the document which he signed. If the court is to be satisfied that the testator did know and approve the contents of his will — that is to say, that he did understand what he was doing and its effect — it may require evidence that the effect of the document was explained, that the testator did know the extent of his property and that he did comprehend and appreciate the claims on his bounty to which he ought to give effect. But that is not because the court has doubts as to the testator's capacity to make a will. It is because the court accepts that the testator was able to understand what he was doing and its effect at the time when he signed the document, but needs to be satisfied that he did, in fact, know and approve the contents — in the wider sense to which I have referred."

The parties' submissions

265. Mr Dew submitted, in a nutshell, that proper application of these considerations to the facts of the present case leads inexorably to the conclusion that Richard did "know and approve" the 2009 Will. In brief outline, his main submissions were as follows:

(1) There are no suspicious circumstances in this case, and the Court is not required to go beyond the fact, in accordance with Ms Harris' evidence, the Will was discussed with Richard and the key changes and provisions identified for him.

(2) The suspicious circumstances suggested by Lucy in Mr Macpherson's opening

submissions bear little relationship to the reality of 16 September 2009:

(i) There is no evidence that Richard was lacking in mental abilities. All the independent evidence, and the perception of the solicitors, was that he was not. The "golden rule" (i.e. that the making of a will by an old and infirm testator ought to be witnesses and approved by a medical practitioner who satisfies himself as to the capacity and understanding of the testator and makes a record of his examination and findings – see *Cattermole v Prisk* [2006] 1 FLR 693 at [12]) was not applied because it did not apply.

(ii) Neither the Will nor the appointment of Susie represented a substantial break in Richard's pattern of testamentary giving. The Will was essentially the same as earlier Wills, especially once it is appreciated that a life interest could and would have been granted to Susie under the 2001 Will. Although making Susie an executor and trustee was a new development, (a) it did not represent a radical break in Richard's testamentary wishes, and (b) it is a change that is fully explained by the evidence.

(iii) Withers' advice as to the appointment of executors and trustees clearly changed or else was not accepted by Richard. That is not suspicious.

(iv) The statement that Lucy and Mary are "cut out" from the Will is based on their stated perceptions of Susie, rather than on the real effect of her appointment, still less on how Richard would have perceived that appointment. It is wrong in both fact and law.

(v) The effect of appointing Susie as executor and trustee is wholly consistent with the desire stated by Richard that Susie should be sufficiently provided for. It is not contrary to the 2009 Letter of Wishes.

(vi) Lucy's complaint that Susie does not, in truth, have a veto and that *this* was not properly explained to Richard pulls in the opposite direction to other aspects of her case, but is ill-founded in any event: Richard had already engaged in a number of conversations about the positions of executors and trustees, and was fully aware of their powers.

(vii) Susie's involvement in the Will was limited and, on the evidence of Ms Harris, was not uncommon, surprising or unusual. In most cases where a beneficiary has been involved and a Will is successfully challenged, they not only receive substantial benefit from the Will, but their desires can be seen in the Will that results. The present case is not one of those cases.

(viii) There is likewise no evidence of pressure from Susie in the creation of

the Will.

(ix) The contemporaneous alterations to the Letter of Wishes do, in fact, make sense. The alteration regarding Lucy directly reflects her demands on Richard at the time. The fact that he made the changes shows strongly that he did understand the 2009 Will and Letter of Wishes.

(x) The "lack of any record" that the changes were explained to Richard is a particularly bad point, given the extensive records of the Will being explained to him and the evidence of Ms Harris that the important provisions of the Will would have been explained to him on the day.

(3) If the Court is required to go on to consider whether Richard had knowledge and approval, the test remains the simple one of whether the 2009 Will reflected his intentions. It plainly did so. In particular:

(i) There are good reasons to believe that Richard understood sufficiently well the nature of the office of executor and trustee. Among other things, he was a long-standing officer of listed companies and charities and had in fact obtained a law degree. He did not have an unsophisticated mind.

(ii) In so far as it is Lucy's case that Richard failed to consider the effect of the strained relations between Susie and others, it is based on the false premise that Susie would never make distributions to (for example) Lucy and Mary. Moreover, even if that premise were true, Richard had been aware for many years of the relationships between family members, and there is nothing to suggest that he would not properly have considered them here.

(iii) The suggestion that Richard failed to understand the tax effect (given the probability or risk that Susie would never allow any distributions to anyone) ignores the competing demands that existed in respect of the residue of Richard's UK estate and Richard's desire that the BPF should, if possible, be conserved as a dynastic asset, all of which he understood.

(4) The Withers documents and the evidence of Mr Cooke and Ms Harris show very clearly that the 2009 Will represented Richard's intentions.

(5) Richard received the 2009 Will and Letter of Wishes by both email and letter and that they remained in his possession until he became ill in 2011. He had ample opportunity to review them and had he not understood, or had they not reflected his wishes, he could have amended them, but he never sought to do so.

(6) The jurisdiction pursuant to which the Court may omit from probate particular words of a Will where they did not reflect the testator's intentions has become

largely redundant following the passing of section 21 of the Administration of Justice Act 1982, not least because that section permits the court to add words as well as to omit them. This jurisdiction could not properly be applied here. In *Fuller v Strum* [2002] 1 WLR 1097, Peter Gibson LJ said at 1108 "I do not doubt that it is possible for a court to find that part of a will did have the knowledge and approval of the deceased and another part did not. An example would be if a solicitor, who had been instructed to draft a will, obtains the deceased's approval of the draft but subsequently before execution adds a clause without drawing it to the attention of the testator and keeps the executed will. But the circumstances in which it will be proper to fund such a curate's egg of a will are likely to be rare". None of Lucy's evidence or cross examination has been directed at the possibility that Richard understood fully the remainder of the 2009 Will but not the appointment of Susie. Further, to exclude that part alone from probate would disturb the whole balance of the Will and so create a Will that does not reflect the testator's intentions at the relevant time, and this would not be right.

266. Lucy's case on knowledge and approval, as set out in Mr Macpherson's very detailed written closing submissions, contains the following principal elements:

(1) It is for the Claimants to prove that Richard knew and approved of the effect of the 2009 Will, and this includes proving that Richard appreciated: (a) the size of his estate, including the likely effect of tax, (b) the size of particular dispositions, including the likely effect of tax, and (c) the competing calls on his bounty.

(2) The circumstances in which Richard signed the 2009 Will were very far from normal:

(i) There is persuasive medical and witness evidence that Richard suffered from anxiety and weakening short-term memory. The 2009 Will is complex. The effect of adding Susie as an executor and trustee is not obvious. Richard was likely to need extra assistance and explanation to understand that effect.

(ii) The events of 16 September 2009 indicate that Richard may not have known of the effect of adding Susie as an executor and trustee: (a) the idea to do this did not come from him; (b) he did not have long to consider the effects of doing this; and (c) he did not amend the 2009 Letter of Wishes to reflect the purpose of adding Susie as an executor and trustee.

(iii) There is no evidence that Withers provided Richard with the assistance and explanation required to ensure that he understood the effects of adding Susie as an executor and trustee. The advice to Richard that making Susie an executor and trustee gave her an effective veto was simply wrong, as Mr Isaacs agrees.

(iv) Richard's behaviour after signing the 2009 Will indicates that he may not have had knowledge and approval of its effects. In particular, on 18 October 2009 he reconsidered a draft of the 2001 Letter of Wishes that he had amended and supplied to Withers before 29 January 2009.

(3) Richard's instructions and his 2009 Letter of Wishes indicate that he was keen to provide for his grandchildren and Lucy during Susie's expected lifetime. It is inherently improbable that he wanted to create a situation where: (a) Susie would be able to prevent appointments from the life interest fund to his grandchildren and Lucy during her lifetime; or (b) there was a real possibility that his grandchildren and Lucy would receive little or nothing from his estate until Susie's death.

(4) The court should conclude that Richard failed to know and approve of the effect of appointing Susie as an executor and trustee in the three following ways:

(i) There is no doubt that Susie exerted influence and pressure on Richard to appoint her as an executor and trustee even if the court is unable to conclude that this influence and pressure was undue. In the circumstances, it is probable that Richard did not have in mind that appointing Susie as an executor and trustee would create a situation that disadvantaged his grandchildren and Lucy. In other words, it is probable that Richard was focussing on the call upon his bounty from Susie to the exclusion of the competing calls upon his bounty from his grandchildren and Lucy.

(ii) Richard's instructions and Letter of Wishes indicate that the primary purpose of appointing a life interest in favour of Susie over the life interest fund was to save tax. It is inherently improbable that Richard intended by appointing Susie as an executor and trustee to create a situation where there

was a real possibility that the life interest fund would be subject to 40% tax on Susie's death. This would significantly reduce the size of his estate available to benefit the grandchildren and Lucy in circumstances where Richard had already expressed concern whether the life interest fund would be sufficient. It is probable that Richard did not have in mind that this was the effect of appointing Susie as an executor and trustee.

(iii) Mr Cooke says that he advised Richard that the addition of Susie as an executor and trustee gave her an effective veto on appointments of income or capital from the life interest fund to members of Richard's family other than Susie during her lifetime. It is probable in those circumstances that Richard did not understand that Susie would as an executor and trustee have fiduciary obligations toward all members of the class of beneficiaries.

(5) If the court concludes that Richard failed to know and approve of the 2009 Will, it should not admit it to probate.

(6) If the court concludes that Richard had knowledge and approval of the 2009 Will, but not that part appointing Susie as an executor and trustee, it should not admit that part to probate.

Discussion and conclusion on the facts

267. Mr Macpherson's submissions contain elements of overlap or repetition. They also contain elements of contradiction, or at least tension. For example, on the one hand it is argued that, by advising (see his email of 16 September 2009) that "as trustees have to act unanimously, Susie would effectively have a power of veto over distributions to members of your family other than herself during her lifetime" Mr Cooke overstated the extent to which Susie could properly resist appointments of income or capital from the life interest fund to members of Richard's family other than herself during her lifetime; but, on the other hand, it is argued that Richard probably did not appreciate that the effect of appointing Susie as an executor and trustee would create a situation that (a) disadvantaged his grandchildren and Lucy and/or (b) gave rise to a real possibility that the life interest fund would be subject to IHT of 40% on Susie's death.

268. I am not impressed by any of these submissions on the facts, for the following reasons.

269. There is some evidence that, in September 2009, Richard suffered from anxiety: see, for example, the GP notes for 8 September 2009. However, this was nothing especially new: he was described in the medical notes as "somewhat anxious" as far back as 2000, and, leaving Susie entirely to one side, his family gave him plenty of cause for worry over the years, and not least Lucy, as reflected in the medical notes for 2007. There is also some evidence that, in September 2009, Richard had weakening short-term memory: see, for example, the GP notes for 4 April 2008 and 15 June 2009.

270. However, there is no evidence, whether in the medical notes or in the way in which he presented himself to Ms Harris or in any other respect, to suggest that Richard needed any more assistance and explanation concerning the effect of adding Susie as an executor and trustee than he was given by Withers. On the contrary, as discussed in detail above, the contemporary documents demonstrate that Richard had a good understanding of the provisions of the draft Will and draft Letter of Wishes that Withers proposed that he should sign. I would mention, in particular, his comments on the draft Will and Letter of Wishes that he was sent on 22 July 2009, and my belief that it is a mistake to place much reliance on any confusion that Ms Harris' note suggests that he manifested at his meeting with her on 24 August 2009, in circumstances where, in my view, his real focus was on developing grounds for terminating Withers' retainer. Although the 2009 Will is fairly complex, most of its provisions had been debated with Richard at length over many months, and I am wholly unpersuaded that the implications of adding Susie as an executor and trustee were so complicated or difficult for someone of Richard's capabilities to grasp that they required further elucidation.

271. In reaching this conclusion, I have taken into account that, in accordance with my findings, (a) the idea of adding Susie as an executor and trustee did not come from Richard, but came instead from Mr Cooke, and (b) Richard implemented the suggestion later on the same day as it was made (i.e. 16 September 2009). It is not entirely correct to say that Richard did not have long to consider the suggestion, because – even if he was going away again soon after 16 September 2009 - there was no requirement on him to implement it rapidly, and all the evidence suggests that he typically did not rush into making decisions without thinking them through. In all the circumstances, I consider that the fact that Richard chose to return to Withers the same day shows not only that he did not consider that he required long to reflect on the suggestion, but also that he had a clear understanding of its implications, such that he was comfortable with deciding to execute the revised draft Will suggested by Mr Cooke.

272. It is true that Richard did not amend the 2009 Letter of Wishes to reflect the purpose of adding Susie as an executor and trustee, but I attach little weight to this, and certainly do not regard it as coming anywhere near a suspicious circumstance: Richard made, in manuscript, all the amendments to the Letter of Wishes that he considered appropriate, and I consider that he would have relied on Withers to advise him if any further amendment(s) was or were advisable to take account of Susie's appointment.

273. I do not consider that the criticism of Mr Cooke's advice is justified. According to his witness statement, he believes that he attended the meeting with Richard and Susie on the morning of 16 September 2009 without Ms Harris, and in any event his email of that date "summarises the discussions that were had at that meeting" and "I thought it was important to send the email to reiterate that Mrs Thornton could be added as an Executor and Trustee to enable her to have a say in relation to the exercise of the Trustees' discretionary powers". Viewed in this light, the language of the email is not perturbing: it is merely summarising what was, in fact, an accurate exposition given orally by Mr Cooke of the effect of appointing Susie as an executor and trustee. In any event, Lucy cannot have it both ways: she cannot say that, by neglecting to point out that Susie would be subject to fiduciary obligations, Mr Cooke overstated the extent to which appointing Susie as an executor and trustee would or might have adverse consequences for other potential beneficiaries and for IHT purposes; and at the same time say that the explanation that Mr Cooke provided to Richard did not enable him to understand that Susie's appointment would or might disadvantage Lucy and others. In fact, read literally and in isolation, Mr Cooke's email overstated the potential adverse effects on others of appointing Susie as an executor and trustee, such that, as a matter of logic, if Richard was proceeding on the basis of the email alone, the appropriate inference is that he wanted to enhance her "security" even if that was the consequence.

274. In my judgment, it is considerably more probable than not that Richard realised full well that the effect of Susie being appointed as an executor and trustee would or might lead to an enhanced prospect that his grandchildren and Lucy would receive less, and possibly nothing, from his estate until after Susie's death. This accords, in particular, with the comments that Richard wrote on Mr Cooke's letter dated 22 July 2009 and the draft Letter of Wishes that was enclosed with that letter. By 2009, as evidenced by those comments, Richard's concerns, in particular about low income from investments, were such that he believed that Susie would not have sufficient assets without recourse to the life interest trusts to enable her to maintain the standard of living that she and Richard had enjoyed. Accordingly, he was concerned that Susie might need "every penny of income" from all

the assets in his estate, and that her status as a beneficiary of the life interest share of the residue of his estate should not be regarded as "effectively for emergency purposes only". In accordance with the contemporary documents, the whole purpose of appointing Susie as an executor and trustee was (a) to respond to these concerns of Richard and (b) to improve her security in these respects. It is inescapable that, if the life interest trusts were to be deployed for Susie's benefit in this manner, that would adversely affect both the extent to which they could be deployed for the benefit of other people and the prospect of making long-term IHT savings by PETs, and I do not think for one moment that these consequences would have been lost on Richard. He was nothing if not financially astute, and the ramifications of balancing competing objectives of this sort had been debated with him at length over a long time.

275. Turning to Richard's behaviour after signing the 2009 Will, the most significant aspects, in my judgment, are, first, that he was plainly interested in seeing a copy of Mr Cooke's email dated 16 September 2009; second, that he was sent copies of the 2009 Will and Letter of Wishes on 19 October 2009; and, third, that he did not at any time revert to Withers with any questions or concerns in relation to the contents of these documents. He had ample opportunity to read and consider these documents, and there is no reason to doubt, and every reason to believe that he took that opportunity. In these circumstances, that fact that he raised no questions or concerns about their contents provides cogent evidence that the 2009 Will represented his testamentary intentions.

276. I believe that Mr Macpherson is misguided in seeking to suggest that Richard lacked knowledge and approval because "on 18 October 2009 [Richard] reconsidered a draft of the 2001 Letter of Wishes that he had amended and supplied to Withers before 29 January 2009". The relevant document is one copy of a version of the 2001 Letter of Wishes which contains manuscript amendments made by Richard. The relevant copy bears the following manuscript endorsement at the top of the first page: "N.B. October 18 '09. This was a corrected copy for a letter of wishes which is nearly right but still needs amending". In my view, the language of this endorsement (i.e. "This was a corrected copy") suggests that Richard was aware that this was a historic document, and the fact that the endorsement was made on 18 October 2009 does not suggest confusion on his part, but, rather, that he was marking the copy for record purposes.

277. I do not consider that Susie exerted pressure and influence on Richard to appoint her as an executor and trustee. On the contrary, as discussed above, I consider that this was a suggestion made by Mr Cooke in response to what he, rightly, understood to be Richard's

concerns, arrived at of Richard's own volition, that, in the economic climate prevailing in 2009, Susie would need what Mr Cooke termed the "improved security" of having "a say in relation to the exercise of the Trustees' discretionary powers".

278. Nor do I consider that it is right to say that Richard's primary purpose in appointing a life interest in favour of Susie was to save IHT. This was undoubtedly one purpose, but it was always envisaged that the life interest fund might be required (in addition to other assets bequeathed to her outright) to meet Susie's reasonable needs. In any event, Richard was entitled to change, and, in my view, did change, his views as to the priorities which should apply to this fund, in light of circumstances as he perceived them, reasonably and independently, in 2009. I have gone over this in detail above.

279. In sum, therefore, the 2009 Will was properly executed, after being prepared by Withers and discussed with Richard at the second meeting on 16 September 2009, and there is accordingly a strong presumption that it represents his intentions at the time he executed it. Properly considered, there were, in my judgment, no suspicious circumstances in the present case, but if I am wrong about that, on the facts of this case the degree of suspicion is low and is readily dispelled by the points made by Mr Dew and the factors that I have gone over when considering Mr Macpherson's submissions.

280. For all these reasons, and applying the guidance that is provided by the decided cases, including (if it were necessary to place reliance on it) the caution against accepting too readily arguments of the kind that have been put forward on Lucy's behalf in this case, I am satisfied that Richard knew and approved of the contents of the 2009 Will.

Undue influence

The law

281. The law as to undue influence in the case of a will was summarised by Lewison J in *Edwards v Edwards* [2007] WTLR 1387 at [47] in the following terms:

> "There is no serious dispute about the law. The approach that I should adopt may be summarised as follows:
>
> (i) In a case of a testamentary disposition of assets, unlike a lifetime

disposition, there is no presumption of undue influence;

(ii) Whether undue influence has procured the execution of a will is therefore a question of fact;

(iii) The burden of proving it lies on the person who asserts it. It is not enough to prove that the facts are consistent with the hypothesis of undue influence. What must be shown is that the facts are inconsistent with any other hypothesis. In the modern law this is, perhaps no more than a reminder of the high burden, even on the civil standard, that a claimant bears in proving undue influence as vitiating a testamentary disposition;

(iv) In this context undue influence means influence exercised either by coercion, in the sense that the testator's will must be overborne, or by fraud;

(v) Coercion is pressure that overpowers the volition without convincing the testator's judgment. It is to be distinguished from mere persuasion, appeals to ties of affection or pity for future destitution, all of which are legitimate. Pressure which causes a testator to succumb for the sake of a quiet life, if carried to an extent that overbears the testator's free judgment discretion or wishes, is enough to amount to coercion in this sense;

(vi) The physical and mental strength of the testator are relevant factors in determining how much pressure is necessary in order to overbear the will. The will of a weak and ill person may be more easily overborne than that of a hale and hearty one. As was said in one case simply to talk to a weak and feeble testator may so fatigue the brain that a sick person may be induced for quietness' sake to do anything. A “drip drip” approach may be highly effective in sapping the will;

(vii) There is a separate ground for avoiding a testamentary disposition on the ground of fraud. The shorthand used to refer to this species of fraud is “fraudulent calumny”. The basic idea is that if A poisons the testator's mind against B, who would otherwise be a natural beneficiary of the testator's bounty, by casting dishonest aspersions on his character, then the will is liable to be set aside;

(viii) The essence of fraudulent calumny is that the person alleged to have been poisoning the testator's mind must either know that the aspersions are false or not care whether they are true or false. In my judgment if a person believes that he is telling the truth about a potential beneficiary then even if what he tells the testator is objectively untrue, the will is not liable to be set aside on that ground alone;

(ix) The question is not whether the court considers that the testator's testamentary disposition is fair because, subject to statutory powers of intervention, a testator may dispose of his estate as he wishes. The question, in the end, is whether in making his dispositions, the testator has acted as a free agent."

282. In *Cowderoy v Cranfield* [2011] WTLR 1699, Morgan J set out this summary at [140] and then added at [141]:

"Lewison J did not refer to the authorities which supported his summary of the legal principles. I was specifically referred to *Craig v Lamoureux [1920] AC 349* and Hall v Hall (1868) LR 1 P & D 481 which plainly provide the source for some parts at least of that summary. In particular, the former of these two cases is the source of the statement that the circumstances must be "inconsistent with a contrary hypothesis", that is, an hypothesis other than the exercise of undue influence: see [1920] AC 349 at 357. In the present case, where I have considerable evidence as to the circumstances in which the disputed will was prepared and executed, I think that it is more appropriate for me simply to ask whether the party asserting undue influence has satisfied me to the requisite standard that the will was executed as a result of undue influence. The requisite standard is proof on the balance of probabilities but as the allegation of undue influence is a serious one, the evidence required must be sufficiently cogent to persuade the court that the explanation for what has occurred is that the testator's will has been overborne by coercion rather than there being some other explanation: see how the matter was put by Rimer J in *Carapeto v Good* [2002] EWHC 640 (Ch) at [124]-[125]. This last case also makes clear that a finding of undue influence can be made by a court drawing inferences from all the circumstances, even in the absence of direct evidence of undue influence: see at

[126]."

283. By the conclusion of the parties' closing submissions, it was common ground that the above statement of the law was both accurate and sufficient for purposes of this case.

The parties' submissions

284. Mr Macpherson submitted that Susie was in a position to exercise influence over Richard, and that she did so, and, moreover, in relation to the 2009 Will. Thus, the live questions are (a) whether the influence that was exercised was undue and (b) whether it was by means of the exercise of that influence that the 2009 Will came to be executed.

285. Mr Macpherson submitted that the key points which indicate that Susie's influence was undue are as follows:

(1) The Withers Will File shows that Richard would not proceed with the drafting of the 2009 Will without the consent by Susie to the appointment of Henry as executor and trustee. This indicates that Susie had a significant level of control over Richard.

(2) Mr Cooke's unchallenged evidence is that he believed that one reason that Richard removed him as executor and trustee was the deterioration of his relationship with Susie. This also suggests that it was Susie and not Richard who made the decision to remove Mr Cooke as executor and trustee.

(3) Mr Isaacs' unchallenged evidence is that Richard told him in August 2009 that Susie had suggested that she be appointed as executor and trustee in place of Henry. This suggests that the decision on 16 September 2009 to appoint Susie as executor and trustee was that of Susie, not Richard.

(4) Susie's evidence on the above points was untrue. This suggests that she believes the true position to be evidence that her influence was undue. It also means that her evidence on other important issues should be rejected where contradicted by Lucy or her witnesses.

(5) Lucy and her witnesses state that in 2009 Susie dominated Richard in private or with family to such an extent that she overbore his wishes. The key example is how Susie controlled and limited Richard's ability to see his daughters against his wishes. This is supported by contemporaneous documents as well as subsequent evidence. Susie's evidence to the contrary should not be accepted.

(6) There is persuasive evidence that Richard was suffering physical decline and a decline in confidence, and specifically that he suffered from anxiety and fear of being left. This made Richard more vulnerable to coercion than before 2009.

286. Finally, Mr Macpherson submits that, having concluded that Susie's influence was undue, the Court should also conclude that on the balance of probabilities this undue influence caused Richard to appoint her as executor and trustee. Mr Cooke does not recall the morning meeting of 16 September 2009. It is improbable that a man of his expertise and experience would have advised Richard to appoint Susie as executor and trustee because this did not achieve the aim that Richard said he desired. It is more likely that Susie proposed and pressed the idea, as suggested in Mr Isaacs' evidence.

287. Mr Dew submitted, in sum:

(1) In light of the evidence, especially of Mr Isaacs but also of Susie herself, Susie was not in a position to make Richard do something that he did not want to do.

(2) There is no evidence that the changes to the 2009 Will, whether of the life interest or of the addition of Susie as an executor and trustee, came from Susie. All the evidence is that the latter suggestion was made by Mr Cooke to meet the concerns expressed by Richard at the meeting on 24 August 2009.

(3) The hypothesis that Susie must have procured these changes by undue influence ignores the fact that the changes were rational in light of Richard's long-standing wishes and desires, and more so in light of the contemporaneous financial demands being made of him by Lucy. There were and are perfectly rational reasons that explain the changes made to the 2009 Will and which have nothing to do with persuasion by Susie, let alone coercion by her.

(4) Although Lucy's case had kept changing in a manner that was neither satisfactory nor fair to the Claimants, her current case theory seemed to be that Susie insisted upon being made an executor or trustee because Susie realised that she might come to need the residuary estate. Aside from the obvious lack of any supporting evidence, it is not at all clear that this theory would be sufficient to establish undue

influence – it alleges persuasion, but does not show coercion.

Discussion and conclusion on the facts

288. I have dealt with each of Mr Macpherson's key points by the detailed findings of fact that I have made above, and for the reasons given above I am unable to accept any of those points. For the like reasons, I accept Mr Dew's submissions.

289. Lucy has come nowhere near to satisfying me to the requisite standard either that Susie exercised undue influence on Richard or that it was by means of the exercise of any influence that Susie had over Richard that the 2009 Will came to be executed (and, specifically, that the two major changes in relation to the 2001 Will came to be made).

290. The case based on undue influence falls at each major hurdle and must be dismissed.

Removal of executors and trustees

The Claimants' case

291. Mr Dew accepted that the Court has jurisdiction to remove either or both of Susie and Henry as executors or as trustees (or both).

292. Mr Dew contended that further discussion of the jurisdiction was not fruitful. However, he extracted the following propositions on the use of that jurisdiction from *Lewin on Trusts* (19th Ed) 2015 (*"Lewin"*) at para 13-064ff, *Alkin v Raymond* [2010] WTLR 1117 and *Kershaw v Micklethwaite* [2011] WTLR 413:

(1) It will require an extreme case before the Court will remove an executor or trustee who has been expressly chosen by the testator, especially (but not only) where the grounds of that removal were ones which existed at the time the decision was made.

(2) In such cases, hostility from, or disagreement with, the beneficiaries will not amount to a ground for removal of the trustee.

(3) It will usually require some evidence of positive wrongdoing, usually in the form of an actual or anticipated breach of trust, to remove such an executor or trustee.

293. So far as concerns Susie, Mr Dew pointed out that her removal arises only if the 2009 Will is valid. However, if the 2009 Will is invalid then there is no reason why her co-trustees (but not executors) could not appoint her as an additional trustee provided that they were confident that she would not then commit a breach of trust. While not a matter for decision now, that further demonstrates the basic futility of Lucy's case.

294. In respect of the individual grounds that he understood to be put forward by Lucy at the time when he prepared his written closing submissions, Mr Dew submitted as follows.

295. As to hostility:

(1) It is not enough to show that relations between a trustee and their beneficiary are poor. It must also be shown that the trustee will, because of those relations, not be able to properly exercise their trustee functions. A trustee is not required to have a warm or loving relationship with the beneficiaries, still less to make regular visits or give birthday presents.

(2) The trustee functions are (principally) the consideration of requests made by a beneficiary for the exercise of the trustees' discretion and, in doing so the consideration of only relevant matters and the ignoring of irrelevant matters.

(3) It is accepted that relations have been poor between Susie and Lucy/Mary but not so poor that Susie has become unable to act objectively. The level of hostility has been plainly 'ramped up' by both Lucy and Mary in their determination to succeed in this case and in consequence of their actions in 2011 and 2012. Susie's evidence was that she would be able to consider requests made by them for financial assistance.

(4) It is also very clear that Susie will be both guided by, and if necessary restrained by, her co-trustees. If Susie were to refuse to take an action or proposed an action that was a breach of trust both Mr Isaacs and Mr Sutch would have to intervene and could (if it came to it) apply to court. Indeed, one of the cases relied upon by Lucy (*Klug v Klug* [1918] 2 Ch 67) provides an example of precisely that (and in that case the trustee was not removed).

(5) Although the precise reasons for the hostility being shown by Mary and Lucy could not have been apparent, Richard was aware of (and plainly anticipated) the difficult relations that existed long before 2009. There has been no material change since then save for this litigation itself. It cannot be right that a beneficiary can remove a trustee simply by throwing as many allegations as possible (and more) at them.

(6) Lucy has also failed to see what the product of the alleged hostility will be. If the

trustees do fail to act properly she will have her remedies then. However, at the present moment the trustees have been unable to properly (or at all) exercise their discretions. It does not properly lie in the mouth of Lucy to allege that they could have done when she has launched an action to prevent them and opposed even an interim grant of probate (including the payment of legacies to herself and her children).

(7) The best evidence for what the trustees will do is the open letter, referred to above.

(8) Susie also paid (from her own resources) Gabriel's extras at Stowe shortly after Richard's death.

296. As to conflicts of interest:

(1) This submission is mis-guided, if not plain wrong, given that (i) the 2009 Will contains an express clause permitting all relevant powers to be exercised notwithstanding a conflict of interest (clause 46) and (ii) it was precisely this relationship between Susie's position as a beneficiary and as a trustee that caused Stephen to recommend her appointment and for Richard to agree. It is settled law that 'original' trustees with conflicts of interest are not prevented from acting because they have been placed in that position by the settlor, see *Edge v Pensions Ombudsman* [2000] Ch 602 at 631.

(2) It is not unusual, indeed it is very common, for a spouse with a life interest in the residue of the estate to be appointed as a trustee and that is precisely *because* of their interest in the exercise of the trustees' powers.

(3) It is also not unusual for trustees to hold board seats on companies in which they have major interests. Indeed, it would be highly unusual for a trustee to not take up such a seat since otherwise they would lack proper insight and oversight into that company.

297. As to insider-dealing:

(1) This is not a concern that Lucy really holds, since if it had been it would have been identified from the outset. It seems to have arisen only because of it having been mentioned by Mr Cooke in 2009.

(2) It is also not an objective concern. Since (as above) it is not unusual for trustees to hold board seats it is something that must frequently arise. What it will prevent is not the regular management of the trust or even the proper oversight of its largest investment. Rather, it will prevent the trustees being able to make sales of shares in that investment during limited periods of time, namely when the announcement of semi-annual and annual financial results and dividends are about to be made. It will

not prevent sales at other times. It will not prevent what seems to be the long term objective of holding the shares to benefit from their long term returns.

(3) It is not a concern that is unique to the holding of investments by trustees. It must also arise for insurance companies, investment trusts, hedge funds and so on. No one has ever suggested that such organisations should not hold board seats on their investments.

298. So far as concerns Henry:

(1) Henry was Richard's long term choice as executor and trustee. When it was suggested that he should not be an executor and trustee Richard stuck to his guns and the decision was made to retain him. It would be quite extraordinary for the Court to override that long standing and well considered decision.

(2) No adverse inferences should be drawn from the fact that Henry did not give evidence.

(3) In these circumstances, the response to the claim against Henry is the same as for Susie, save that it is emphasised that in Henry's case he was plainly the long standing choice of the Testator.

299. So far as concerns the issues of disclosure, not even the bleakest picture of that disclosure would establish that any of the trustees have acted in a non-trustee like manner. Dropping the claim to remove the professional trustees is taken as an implicit acceptance of that, since if it were a genuine concern it would apply also to them.

300. So far as concerns neutrality, Lucy has at various points sought to suggest that the Claimants should have behaved neutrally in this litigation. The assertion is plainly wrong: executors are entitled to seek to prove the Will of which they are appointed and cannot be criticised for having done so (see *Boughton v Knight* (1873) LR 3 P&D 64 and *Wild v Plant* [1926] P 139).

Lucy's case

301. Mr Macpherson submitted that: (a) the Court has a statutory power to remove trustees under section 50 of the Administration of Justice Act 1985 ("AJA 1985"); (b) the Court has two statutory powers to remove trustees: first, section 50(4) of the AJA 1985 allows the Court to treat an application under section 50 of the AJA 1985 as an application under section 1 of the Judicial Trustees Act 1896 ("JTA 1896"), second under section 41 of the Trustee Act 1925 ("TA 1925"); (c) the Court has no statutory power simply to remove a trustee, but it has an inherent jurisdiction to do so; and (d) the principles governing how the powers are to be exercised are identical in each instance.

302. Next, he submitted that: (a) if the 2009 Will is upheld, because it defines the trustees of the trusts created thereunder as the executors from time to time, any order under section 50 of the AJA 1985 replacing or removing the executors will also replace or remove the trustees, and the court will not need to consider its other powers; but (b) if the 2001 Will is upheld, the position is potentially different, because that Will defines Mr Isaacs, Mr Sutch, Henry and Susie as "executors and trustees", and, in this regard: (i) Lucy's primary case is that the 2001 Will, properly construed, treats the executors and trustees as the same people, such that a change in the identity of the executors will therefore changes the identity of the trustees, but (ii) if that is wrong, Lucy asks the Court to exercise its powers relating to removal and replacement of trustees.

303. So far as the applicable principles are concerned: "The general principle guiding the court in the exercise of its inherent jurisdiction is the welfare of the beneficiaries and the competent administration of the trust in their favour" (see *Lewin* at para 13-64). The Court applies similar principles in the exercise of its power under section 50 of the AJA 1985 (see *Lewin* at para 15-018) and under section 1 of the JTA 1896 (see *Lewin* at para 19-002). The Court must consider the exercise of its power under section 41 TA 1925 to be "expedient" (see *Lewin* at para 15-005). The approach should be the same here.

304. Mr Macpherson referred me to *Letterstedt v Broers* (1884) 9 App Cas 371 at 386-387 (PC) and the decision of Newey J in *Brudenell-Bruce v Moore, Cotton & Ford* [2014] EWHC 2679 (Ch) and invited me to adopt the statement of law at [252]-[256] in the latter case. He submitted there are three important corollaries to the general principle:

(1) The removal jurisdiction is not designed to punish trustees or to allocate blame. The court might remove a trustee if those beneficially entitled were unable to work in harmony with the trustee "even if for no other reason than human infirmity". A breach of trust is neither a sufficient nor a necessary requirement.

(2) Removing a defaulting trustee may not be in the interests of the beneficiaries if there is little risk of further breaches and replacing him will cause duplication of costs. Removing an innocent (or largely innocent) trustee may be in the interests of the beneficiaries if the relationship has broken down so that the administration of the

trust is undermined, even if the lion's share of responsibility is borne by the beneficiary.

(3) Hostility and distrust between the beneficiaries and trustees is not sufficient in itself. There are many contexts in which a trustee or executor must make a decision that may adversely affect some persons claiming under a trust. It is to be expected that this will often create an element of friction. The question is whether this hostility and distrust is capable of undermining the efficient administration of the trust.

305. Mr Macpherson submitted that the following factors have been found relevant in previous cases and are relevant in this case:

(1) The nature of the duties of the executor or trustee under the estate or trust. If the duties are likely to be complex or long-term, this is a factor pointing toward removal. The fact that a duty will require "a dispassionate judgment" may point to removal: *Re Steel* [2010] EWHC 154 (Ch), Richard Snowden QC at [117].

(2) A change of circumstances between the date the trust was settled or the will was executed and the date of hearing. This was an important ground in *Letterstedt*, which was referred to on this point in *Kershaw v Micklethwaite* [2010] EWHC 506 (Ch) at [13]. The change of relationship between the trustee and beneficiary formed the basis of the removal of the trustee in *Brudenell-Bruce* at [258].

(3) The intentions of the settlor or testator. Newey J considered this as "capable of relevance" in *Kershaw* at [14], "if on no other basis than because the testator may be expected to have had a knowledge of the characters, attitudes and relationships involved which a court will lack". He agreed that testators often create the possibility of conflicts of interests where family members are executors: see [26]. The importance of the choice of the executor as a factor was enhanced where the testator gave considerable thought to who her executor should be: see [35].

(4) The conduct of the executor or trustee in response to reasonable enquiries by the beneficiaries (see *Letterstedt* at page 389), and the conduct of the executor or trustee

in litigation (see *Thomas and Agnes Carvel Foundation v Carvel* [2008] Ch 395 at [18] and [48-53] and *Kershaw* at [20]-[22]).

(5) The costs of a new executor or trustee getting to grips with the estate (see *Kershaw* at [33]-[34]). However, as Lucy is no longer seeking to remove Mr Isaacs and Mr Sutch, Mr Macpherson submitted this issue is of minimal concern.

306. The application to remove Susie and Henry as executors and trustees is made partly on the basis there is sufficient likelihood that they will breach their duties under the trust, or that there is sufficient suspicion that they will do so, such that their continuation as trustees is not in the interests of the beneficiaries or the efficient administration of the trust. Mr Macpherson therefore submitted that I needed to have regard to what those duties are. He referred me to Clause 10 of the 2009 Will and the summary of the duties of a donee of a fiduciary power in *Re Hay's Settlement Trusts* [1982] 1 WLR 202 at 209A-E. He submitted the duties of a discretionary trustee and of donees of fiduciary powers are (see *Pitt v Holt* [2013] AC 108 and *Edge v Pensions Ombudsman* [1998] Ch 512): (a) to consider from time to time whether to exercise the power, (b) to take into account all relevant considerations, including the wishes of the settlor, and the range of beneficiaries, (c) to disregard irrelevant, irrational, or improper considerations, and (d) to avoid conflicts of interest, and to manage them where they cannot be avoided.

307. He submitted that an example of impermissible behaviour by the donee of a fiduciary power is found in *Klug v Klug* [1918] 2 Ch 67. There the donee of the trust power declined to exercise it in favour of her daughter because she married without her approval (see page 71). Neville J found that the mother had not considered whether or not the appointment would be for the benefit of her daughter. The mother had not exercised her discretion at all. The court directed that the appointment be made.

308. Moving on to the facts, Mr Macpherson made general submissions that: (a) Richard's intention was that the life interest fund should continue for some time; and (b) the duties of the trustees of that fund are complex and will require dispassionate judgment.

309. With regard to Susie, Mr Macpherson made the following submissions (which are only relevant if the 2009 Will is upheld):

(1) Susie bears deep animosity toward Lucy, Mary and their families (the majority of beneficiaries under the 2009 Will), which long pre-dates Richard's illness. Reliance was placed on: (a) Lucy and Henry not being invited to Susie and Richard's wedding; (b) correspondence from Richard indicating that Mary and Susie had fallen out, as supported by Mary's oral evidence; (c) Susie's desire that Lucy should not be favoured in Richard's letter of wishes; (d) Susie's extreme hostility to a gift/

loan being made to Lucy in 2009; (e) Susie's hostility to Richard paying Gabriel's school fees; (f) Susie's general hostility to financial aid to Lucy; and (g) Lucy and Mary's oral evidence that at times they were banned from Pelham Place, and that Susie tried to prevent Richard from seeing them.

(2) The relationship between Susie, Lucy, Mary, and their families significantly deteriorated after Richard made the 2009 Will and after he lost capacity to amend his Will. This is said to be clear from the following evidence: (a) Susie is recorded (on the transcripts) repeatedly referring to Lucy, and Georgina, as "disgusting" for reporting their concerns to social services, notwithstanding Mary's attempts to explain their concerns; (b) Susie disparages Mary, Lucy and Georgina, when they try to tell Richard that they love him; (c) Susie is recorded downplaying Mary's multiple sclerosis to Richard in order to help justify her refusing to allow Mary in to visit; (d) Susie's claim in cross-examination that this was in order to avoid worrying Richard is incredible, and needs to be seen in the context that it was immediately followed by a claim that "they" (Lucy and Mary) "never think about you, and your care": in fact, it is clear that her downplaying of Mary's illness was being used to justify her preventing Mary from visiting.

(3) It is not open to the Court to conclude that Susie's words in the recordings do not reflect her current views and that she no longer bears any animosity toward any of the beneficiaries, on the basis that they were said when she was under significant pressure and Lucy/Mary/Georgina were being antagonistic. In particular: (a) the hostility expressed in the recordings is not confined to hostility based on Lucy, Mary, and Georgina's behaviour in 2011-12. Susie makes clear that her animosity derives at least in part from her belief that Mary and Lucy "made messes with their lives", "know nothing about anything", "don't know anything about relationships and marriage", and have "had things all their lives"; (b) Susie's hostility continued beyond 2011-12, when she did not invite Lucy, Mary, or their families to Richard's memorial concert. Susie's claim that she advertised the concert must be seen in the context that she did invite Lucy's ex-husband and ex-mother-in-law, and others whom she was happy to attend; (c) Susie continues not to be on speaking terms with Lucy, Mary, and their families, notwithstanding that three years have elapsed since Richard's death; and (d) none of Susie's co-trustees were willing to positively attest to her ability to dispassionately consider whether and how to exercise her functions as a trustee.

(4) Given the level of animosity from Susie, there is a real risk that Susie will take into account irrelevant factors (namely her personal dislike of Lucy, Mary, and their families) in deciding whether and how to exercise her fiduciary powers.

(5) There is also a real risk that Susie will ignore a relevant factor, namely Richard's wish that his trustees "bear in mind particularly [Lucy] and her family's needs which

I consider should be given some priority over the interests of my other grandchildren".

(6) Susie's inability to dispassionately and properly consider whether and how to exercise her functions as a trustee, and particularly her power to appoint income or capital under Clause 10 of the 2009 will, is crucial due to the fact that trustees must act unanimously. Mr Isaac's evidence was that any issue of animosity could be contained because Susie would need to take on board the views of her co-trustees. However, this is not correct. If Susie refuses to exercise her powers, the power will simply not be exercised unless an application is made to Court, regardless of the views of the other trustees. The likely need for such applications is clearly not in the interests of the efficient administration of the trust.

(7) Hostility and distrust from the beneficiaries to the trustee are also a material factor in determining a removal application insofar as it is may prejudice the efficient administration of the trust. The hostility in this case goes far beyond the friction anticipated by Newey J between a discretionary trustee and a disappointed beneficiary. The animosity is deep-seated, widespread and, as Susie recognised in cross-examination, likely to continue to the next generation. Two of Richard's three children, and five of Richard's nine grandchildren, have been willing to give evidence to support Lucy's case. Susie is not on speaking terms with any of them. Together, they comprise more than half of the beneficiaries under the 2009 Will. Their evidence demonstrated considerable distrust and dislike of Susie. In particular, Mr Macpherson relied on the aspects of the evidence of Lucy's witnesses which he summarised in his closing submissions and to which I have already made reference above.

(8) Mr Macpherson submitted that this is testament to the hostility and distrust which is felt toward Susie by most of the beneficiaries she is seeking to become a trustee for. This cannot be conducive to the efficient administration of the trust. In particular: (a) since most of the beneficiaries are not on speaking terms with Susie, her presence as a trustee makes it harder for them to be effectively consulted or engaged with by the trustees, and for them to approach the trustees for assistance (since at some point this will necessarily involve approaching Susie, who has veto power over distributions); (b) since many beneficiaries do not believe Susie to be trustworthy, her presence as a trustee makes it much more likely that the trustees' decisions will be viewed with suspicion and challenged; (c) this risk is compounded by Susie's demonstrable dishonesty and the conflicts of interest relied upon by Mr Macpherson; and (d) the trial process is likely to have made these problems worse rather than better: Mary and Lucy, who are two of the beneficiaries and mothers to five others, have been publicly accused of lying on Susie's instructions, and the cross-examination of Charlotte and Georgina is likely to have entrenched rather than

ameliorated their concerns.

(9) Susie was dishonest. She was willing to mislead the court where she feels that it is in her interests to do so. In particular, Mr Macpherson submitted that: (a) although Susie insisted in the witness box that restrictions on visits from Mary, Lucy, and their families, was due to the need to accommodate Richard's care regime, this claim was deliberately misleading: in particular, (i) Susie admitted in cross-examination that her refusing to allow Mary in to see Richard on 3 August 2012 was not justified on any medical ground, and (ii) the recordings demonstrate that Susie's desire to prevent regular visits from Lucy was at least partly due to Susie's hostility toward Lucy, and that attempts to make appointments by Georgie would be denied due to Susie's hostility; (b) although Susie denied that she was a wealthy woman or that she appreciated the size of her own absolute interest in the estate, this claim was implausible and was made for the sole purpose of avoiding assisting the Court by answering questions about whether the purpose behind her appointment (protecting her) was now otiose given her vast wealth; (c) Susie's willingness to mislead must be seen in the context of her conflict of interest, of her animosity toward many of the beneficiaries, and of their distrust toward her; (d) the probity of a trustee is an important factor as to whether it is in the beneficiaries' interests that she be a trustee; and (e) even if there is some innocent explanation for Susie's misleading statements, the *appearance* of dishonesty can only compound the beneficiaries' suspicions about her, and further undermine the efficient administration of the trust.

(10) The beneficiaries' suspicions about Susie, and her dishonesty, should be given greater weight in the circumstances because of the conflicts of interest from which she suffers. First, she is the life tenant of the fund, and therefore has a financial interest in vetoing all appointments of income and capital to beneficiaries other than herself. Second, as a director of EIT, she has an interest not to pursue it or its board in the event that it causes loss to the trust fund.

310. Moving on to Richard's choice of Susie as an executor and trustee, Mr Macpherson submitted that little, or no, weight should be attached to this for the following reasons:

(1) Richard's decision to appoint Susie was taken at the last minute, without detailed consideration, and with incomplete advice. This is not a case like *Kershaw*, in which the appointment was made after careful deliberation.

(2) The express purpose of Susie's appointment as trustee and executor was, in accordance with Mr Cooke's email of 16 September 2009 for her to "effectively have a power of veto over distributions to members of your family other than herself during her lifetime which would mean that Susie's life interest could not be overridden without her agreement". As to Susie's evidence that the purpose of her appointment was to protect her, Mr Macpherson submitted that: (a) on Susie's case,

Richard's purpose in appointing her was to ensure that she should be able to veto an appointment in the event that two independent professional trustees should reach the properly considered decision that her interest should be defeated in whole or part by an appointment under Clause 10, which is an inherently improper purpose, such that minimal weight should be given to Richard's decision to appoint her; and (b) as it happens, any concerns Richard may have had about financial collapse have not been borne out, and Susie is an extremely wealthy woman, such that any suggestion that she will require capital or income from the life interest fund is entirely fanciful, and Richard's purpose in appointing her has been rendered otiose and should not be accorded any weight.

(3) Since Richard made the 2009 Will, and since he lost the capacity to amend it, the circumstances pertaining to Susie's suitability as an executor and trustee have changed radically. In particular: (a) her relationship with the beneficiaries has deteriorated radically; (b) the purpose behind her appointment is no longer relevant; and (c) she has shown herself to be dishonest. In these circumstances, Richard's views about her suitability in 2009 have been overtaken by events and should not form a significant factor in the Court's decision.

311. Turning to the grounds for removal of Henry, Mr Macpherson submitted that (a) Henry has not given any evidence explaining whether and why he wishes to continue as an executor and trustee, or why he considers himself to be suitable; (b) none of the Claimants' witnesses were willing to positively attest to his suitability for the role; (c) the Court should draw the adverse inferences against him that are discussed above; and (d) regardless of whether these adverse inferences are drawn, the efficient administration of the trust is not best served by his continuation as a trustee.

312. Mr Macpherson further submitted with regard to Henry's relationship with Lucy that:

(1) Henry has a long history of animosity toward Lucy. Her unchallenged evidence is that he has barely spoken to her civilly since they grew up, and that in 2011 he returned her unopened birthday card to him. Lucy's evidence is that he has historically been verbally abusive to her, and this is also supported by the recordings, which show him agreeing with Susie's hostility and doing his utmost to prevent her from visiting Richard in hospital. Henry is likely to have had a hand in the decision not to invite Lucy, Mary, or their families to Richard's internment and memorial concert.

(2) In these circumstances, the same issues as those relating to Susie apply. As is clear from Lucy's witness statement, she has no confidence in Henry as a trustee.

313. Mr Macpherson further submitted:

(1) Henry's letter dated 18 February 2013, and his e-mail dated 24 January 2014, demonstrate his unsuitability for the role of trustee.

(2) The letter states that "[Richard] was clearly of the view that he had already made generous provision for his children. In summary, aside from the modest legacies and the portion left outright to Susie, the Estate is left for the benefit of his grand-children and future generations (subject to a life interest in favour of Susie)." This was intended to mislead Lucy into believing that she was not to benefit from the life interest fund, and in fact reflects Henry's intention not to treat her as an object of the power in Clause 10 of the 2009 Will.

(3) The e-mail is similarly concerning. As it was sent a year after Richard had died, the trustees would have been able to take legal advice on the effects of the 2009 Will. The following passages are material.

(4) First: "… [T]he part of his estate not left to Susie is to be held in trust for his grandchildren (with the proviso that Susie retains a life interest). In practical terms this means that the grandchildren are unlikely to receive any capital until Susie either passes away or waives her rights to her interest in the Life Interest Fund." This statement is misleading for two reasons. First, it is calculated to make the reader believe that only Susie and the grandchildren are to receive any benefit under the life interest fund. This is simply not true. Richard's children are members of the discretionary class, and Lucy is expressly mentioned and prioritised in the letter of wishes. Secondly, it is designed to make the reader believe that the grandchildren are not to receive any capital during Susie's lifetime unless she waives her interest in the fund. This is not true, because Clause 10 of the 2009 Will provides an explicit power to appoint capital during Susie's lifetime (and indeed would be largely otiose if Henry's position in the e-mail were correct), and the letter of wishes clearly anticipates that appointments should be made.

(5) Second: "The principal provisions of the Will in relation to his grandchildren is that they are given an interest in the estate which is to be "in equal shares absolutely". While the Will does give the Executors discretionary powers, these have to be exercised in the context of Clause 12.1 of the Will. The intent and the instruction could not be spelt out more clearly." This statement is misleading since it misconstrues Clause 12.1 as the "principal provision" when it is not. Clause 12.1 is a *default* provision taking effect 80 years after Richard's death. The principal dispositive provision in relation to the life interest fund is Clause 10, and there is no indication in the 2009 Will that it is to be exercised only in order to effect an equal *per capita* division amongst the grandchildren. On the contrary, Richard's children are also included as objects of the power in Clause 10 and the letter of wishes expressly anticipates priority being given to Lucy and her family.

(6) Third: "While it is not possible for the Executors to share the detail of any letter of wishes, since they are expressly bound by my father's instruction that it be confidential, I can confirm that there is nothing of note in the letter of wishes which conflicts with clause 12.1 mentioned above." This statement is an outright lie. First, as Mr Isaacs recognised in cross-examination, there is no express provision anywhere in the 2009 Will, the Letter of Wishes, or the Will File, that the Letter of Wishes is to be kept confidential. Secondly, there are numerous provisions in the 2009 Letter of Wishes which conflict with Henry's claim that the fund is to be divided equally between the grandchildren with no distributions of capital prior to Susie's death: (a) paragraph 2.2 of the letter states "… I anticipate that Susie will have sufficient assets of her own and from the residue of my estate to enable her to [maintain her current standard of living]… and therefore assets from [the nil rate band discretionary trust] should be used for the other beneficiaries of the fund"; (b) paragraph 2.2 states that Richard would "prefer that any capital entitlement [for the grandchildren] be deferred until they are 25". Richard anticipated that the grandchildren might receive distributions whilst under 25 (though he preferred that they did not), and it is therefore inherently likely that he anticipated capital distributions during Susie's lifetime; (c) paragraph 4 states "I do not believe [Susie] … will have need of significant further capital or income than is available to her from her resources as increased by the one-half share of my residuary estate [in which she has an absolute interest]." This statement makes no sense if Richard did not anticipate appointments out of the life interest fund during Susie's lifetime; (d) paragraph 4 states "You will have a discretionary power to advance capital to [the grandchildren]… or for their benefit which I want you to feel free to exercise without some special regard to Susie's position unless in your estimation there is some unforeseen reason for not doing so.. I am particularly anxious that my grandson Leo Gabriel should be adequately provided for, so as to ensure that he has a good education". This statement clearly anticipates appointments during Susie's lifetime, otherwise there would be no reason to refer to any regard for Susie's position. In addition, it was very likely that Gabriel's education would take place in Susie's lifetime; (e) paragraph 4 states that "Lucy may need to be helped financially bearing in mind that she is now divorced and has the responsibility of bringing up on her own two children on modest means…. I therefore would want my Executors to bear in mind particularly her and her family's needs which I consider should be given some priority over the interests of my other grandchildren… Subject to the foregoing, I would want you to treat each of my grandchildren as having an equal interest in the discretionary trust fund" (emphasis supplied). Richard clearly anticipated appointments to Lucy and her family, and for these appointments to have priority over the interests of the other grandchildren. Only *subject* to that, were the grandchildren to be treated as having an equal interest.

(7) The Court should draw the following conclusions from the letter and e-mail: (a)

notwithstanding the terms of the 2009 Will and Letter of Wishes, and his fiduciary duty to periodically consider exercise of his powers, Henry has already decided not to make appointments under Clause 10 during Susie's lifetime; and (b) notwithstanding the terms of the 2009 Will and Letter of Wishes, and his fiduciary duty to periodically consider the full range of objects of the power in Clause 10 and the appropriateness of individual appointments, Henry has already decided that, on Susie's death, the life interest fund should be divided equally *per capita* between the grandchildren; and (c) Henry was willing to mislead beneficiaries about the effect of the 2009 Will and the contents the Letter of Wishes.

(8) Henry has given every indication that he intends to commit a breach of trust by refusing to consider exercising a fiduciary power, by refusing to take into account material factors (such as Lucy's needs and Richard's wishes), and by giving capricious levels of weight to the default trust in Clause 12 of the 2009 Will. Henry has also shown a willingness to mislead the beneficiaries when it suits him.

(9) These issues must be seen in the context of Henry's hostility to Lucy and her family. The breaches of trust outlined above are likely motivated by a desire to prevent Lucy receiving any part of the trust fund, and her family receiving the priority desired by Richard.

(10) The statement by Mr Isaacs in cross-examination that if Henry is not fair, he would not have the support of the trustees, is not sufficient to contain the problems discussed above. If Henry decides, as he has indicated he has already decided, not to make any appointments under Clause 10 during Susie's lifetime, and then not to make any appointments other than a distribution amongst the grandchildren, then the other trustees will not be able to resolve those problems. Henry, like Susie, has a veto, subject to applications being made to the court. His apparent ability and willingness to use it in breach of his fiduciary duties, and Lucy's justified concerns that he will do so, are not in the interests of the efficient administration of the trust. The only way to contain these problems is to remove Henry as a trustee.

314. Finally, for reasons that I have already indicated above, in light of Lucy's concerns about Mr Isaacs and Mr Sutch, and where there is so much distrust and hostility within the family, Mr Macpherson submitted that it would be in the interests of the efficient administration of the trust for an additional independent trustee to be added to them.

Discussion and conclusion on the facts

315. I have dealt with, and rejected, a number of the points made by Mr Macpherson in the course of the findings of fact that I have made above. In particular, I have rejected the allegation that Susie gave dishonest evidence, which forms the basis of a number of Mr Macpherson's submissions relating to her suitability as an executor and trustee.

316. The allegation that Susie bears animosity toward Lucy, Mary and their families is based on a misunderstanding (whether wilful or unintentional) or distortion of past events. Most of the points relied upon by Mr Macpherson were explained in Susie's evidence, which I accept, and many of them are difficult if not impossible to reconcile with the contemporary documents, which I have rehearsed in detail above. In any event, having heard and seen Susie give evidence, I do not believe that she will allow her feelings towards the beneficiaries under the 2009 Will to cloud or distract from the conscientious performance of her duties and obligations as an executor and trustee in any of the ways suggested by Mr Macpherson. Among other things, I consider that Susie's undoubted love and respect for her late husband, whose wishes are expressed in some detail in the 2009 Letter of Wishes, and the input and guidance that she will get from Mr Isaacs and Mr Sutch, are more likely than not to ensure she achieves that end.

317. The matters relied upon in support of the suggestion that the relationship between Susie, Lucy, Mary, and their families deteriorated significantly after Richard made the 2009 Will are, in my view, partly misconceived, and partly based on attacks on Susie's credibility which I reject. In any event, I consider not only that I am entitled to find, but also, having heard all the evidence, that it would be right for me to find, as I do, that Susie's words in the recordings are not a reliable reflection of her current views: it is crystal clear that they were said when she was under significant pressure and when she was being tested by the circumstances, and by the behaviour of Lucy and others. The premise for the risks that are said to flow from such animosity is, therefore, lacking.

318. I also reject the argument that hostility and distrust from the beneficiaries towards Susie (or for that matter Henry) may prejudice the efficient administration of the trust, and is therefore a reason for the removal of one or other or both of them in the circumstances of this case. It will be unfortunate and regrettable if the beneficiaries, or some of them, maintain animosity, distrust or dislike towards Susie and/or if she continues not to be on speaking terms with them. I am hopeful that this will not happen. However, even if it does, I do not consider that it will have the dire effects submitted by Mr Macpherson: there is no reason why contact between the beneficiaries and Mr Isaacs and Mr Sutch should not suffice to enable the trusts to be administered. I am unimpressed by the notion that Susie's continued presence as a trustee will make it more likely that the trustees' decisions will be viewed with suspicion and challenged, especially as the beneficiaries' existing grounds for distrust and so forth are based on their own distorted perceptions, and their grounds for distrust going forward ought logically to be dissipated by the entirely reasonable and, on the face of it, and as I find, *bona fide* 2015 open letter from the trustees and executors and

the presence of Mr Isaacs and Mr Sutch.

319. So far as concerns the weight to be attached to Richard's choice of Susie as an executor and trustee, Mr Macpherson's submissions are based on a number of points which are inaccurate and/or which I have already dealt with and rejected above. In any event, I prefer Mr Dew's submissions on this issue. Susie was expressly chosen by Richard, notwithstanding that the grounds now relied upon in support of her removal, or many of them, were in existence at the time that his decision was made. That decision deserves to be respected, as one might hope that the beneficiaries might understand if they were only prepared to look at matters more reasonably and objectively. In my view, hostility and disagreement on their part are not grounds for her removal on the facts of this case, and no case of positive wrongdoing justifying Susie's removal has been made out.

320. So far as conflicts of interest are concerned, I accept the submissions of Mr Dew. In particular, the possibility of conflicts of interests where family members are appointed as executors and trustees was plainly a matter about which Richard was well aware.

321. Mr Macpherson's argument to the effect that Susie was appointed for an improper purpose is contrary to my findings above concerning Mr Cooke's email of 16 September 2009, and his argument that even if the purpose of her appointment was to protect her that purpose is no longer sustainable is also wrong. The considerations that Richard may have been over concerned about the state of the economy and that Susie is a very wealthy woman do not warrant the conclusion that it is fanciful to suggest that she will require capital or income from the life interest fund. Richard's concerns about unearned income yields were justified, and, by way of a single example, Susie stated in evidence that there has been no major expenditure on Pelham Place for 20 years. No figures were given for Susie's likely annual income requirements, but she currently enjoys all the income from the life interest fund and I know of no grounds for saying that the Claimants were wrong to have allowed her this. Nor has Lucy said they were.

322. For all these reasons, I do not accept that Richard's purpose in appointing Susie has been rendered otiose, or that there has been a radical change in the circumstances pertaining to Susie's suitability as an executor and trustee, such that Richard's views about these matters in 2009 should not form a significant factor in the Court's decision.

323. Many of the points made above apply to the appointment of Henry *mutatis mutandis*. In one respect, however, as Mr Dew rightly submitted, namely that Richard's choice of Henry as an executor and trustee was more longstanding, the case for resisting the removal of Henry is stronger than the case for resisting the removal of Susie.

324. So far as concerns Mr Macpherson's arguments based on Henry's letter dated 18 February 2013, and his e-mail dated 24 January 2014, I consider that many of the points that he makes on the documents themselves are either incorrect or exaggerated. In addition, I

wholly reject the argument that those points, even if right, demonstrate Henry's unsuitability for the role of trustee. The premise does not, in my judgment, justify the conclusions asserted by Mr Macpherson concerning what Henry is alleged to have already decided about appointments under Clause 10 of the 2009 Will and division of the life interest fund, and still less the conclusion that Henry intends to commit a breach of trust and the serious allegation that he was willing to mislead beneficiaries about the contents or effect of the 2009 Will or Letter of Wishes.

325. The open letter that the Claimants sent to Lucy in 2015 plainly contradicts these assertions, and they have yet to be given a proper chance to perform their trust duties. When the time comes, Henry will not be acting alone, but instead in conjunction with Mr Isaacs and Mr Sutch, and even if, contrary to my views, Henry had behaved wrongheadedly or misleadingly when sending the letter dated 18 February 2013 or the e-mail dated 24 January 2014 as alleged by Mr Macpherson, it does not follow that Henry would be likely to persist in behaving in that way in those future circumstances.

326. Although Mr Macpherson made a great many points, I believe that I have dealt with all those of significance. To the extent that I have not dealt with any point specifically, I should make clear that I prefer the submissions of Mr Dew to those of Mr Macpherson.

327. Accordingly, the claim for removal of Susie and Henry as executors and trustees fails.

328. Nor am I persuaded that it is necessary or desirable for an additional independent trustee to be added to the existing executors and administrators, if indeed that suggestion is pursued in circumstances where Susie and Henry are not being removed.

Conclusion

329. For all these reasons, this claim succeeds and the counterclaim must be dismissed.

330. I ask Counsel to agree an order which reflects these rulings. I will hear submissions on any points which remain in dispute, and on any other issues such as costs and permission to appeal, either when judgment is handed down, or at some other convenient date.