Neutral Citation Number: [2024] EWHC 347 (Ch)

Case No: PT-2022-000129

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 26 February 2024

Before:

MASTER BRIGHTWELL

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Between :

(1) CAROL FRANCES GOWING	**Claimants**
(2) ANGELA ST MARSEILLE	
(3) AMANDA BARBARA HIGGINBOTHAM	
(4) CHRISTINE WARD	
(5) JANET PETT	
- and -	
(1) TERENCE ARTHUR WARD	**Defendants**
(2) SUSAN WILTSHIRE	

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James McKean (instructed by **Coodes Solicitors**) for the **Claimants**
Maxwell Myers (instructed by **JMW Solicitors LLP**) for the **Defendants**

Hearing dates: 20, 21, 22, 23, 29 November 2023

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Approved Judgment

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Master Brightwell :

1. This claim concerns the testamentary dispositions of Frederick Ward ("Fred"), who died on 17 February 2020 at the age of 91. He had three children, Fred (who predeceased him on 2 September 2015) ("Fred Junior"), and the two defendants, whom I will refer to as Terence and Susan. Fred Junior had five daughters, who together are the claimants in this probate claim.

2. On 8 September 2020, Terence and Susan obtained a grant of probate of their father's apparent last will, executed on 28 November 2018 ("the 2018 Will"). The principal provision of the 2018 Will is that it leaves the residue of the estate to Terence and Susan in equal shares. This was subject to specific gifts of chattels and pecuniary legacies of £50 to each of the testator's grandchildren.

3. It is common ground that Fred had made an earlier valid will on 3 August 2011 ("the 2011 Will"), whilst Fred Junior was still alive. That left the residuary estate to Fred Junior, Terence and Susan in equal shares. If the 2011 Will is Fred's last valid will then, by virtue of section 33(1) of the Wills Act 1837 (as amended), the claimants will take the share which would have passed to their father, as he was an intended beneficiary who died before the testator being a child of the testator.

4. The claimants claim that the 2018 Will was invalid, and they seek an order revoking the grant of probate in favour of the defendants. They contend that Fred lacked capacity to make the 2018 Will and/or that he did not know and approve its contents, and/or that it was made as a result of undue influence and/or fraudulent calumny on the part of the defendants. The claimants argue that his true testamentary intention up until his death was that his residuary estate be divided into three shares, with one share passing to Fred Junior's issue.

5. At this point, I record that the claimants withdrew a serious allegation under the heading of fraudulent calumny before the trial began. I accordingly gave permission for the evidence of one of the defendants' witnesses, Zara Thorn (who discussed the allegation but was not connected to it), to be amended so as to omit reference to it. Mr Myers invited me to take into account the claimants' conduct in withdrawing the allegation when considering the credibility of their claim. Given that the claimants place no reliance on the matter and given the decision I have reached without taking it into account at all, I do not consider that anything further now needs to be said about it.

Background to the dispute

6. Fred was born on 14 February 1929. He married once, to Lillian Ward. She died on 20 January 1971, and he survived her by nearly half a century. Little was revealed in the trial about his earlier adult life and, as is to be expected in a

probate trial, the focus was on his family relationships in his later years. He at one time served in the Armed Forces, and I heard unchallenged evidence describing him as a younger man as independent and strong minded. With a series of medical conditions, he was undoubtedly less independent in his final years.

7. He suffered from emphysema and chronic obstructive pulmonary disease ("COPD"). Terence explained that his father was a heavy smoker as a younger man, but that he gave up smoking before he was 40. His medical records reveal that in his last decade or so, he also suffered from heart disease. His hearing was impaired, and Terence and Susan indicated that he did not wear his hearing aid, but insisted that he could hear nonetheless. There was some macular degeneration, and he experienced urological issues, around the time the 2018 Will was made, and thereafter. From mid-2018 onwards, he was admitted to hospital on a number of occasions, including in both September and October 2018 and, apparently, from 17 to 27 November 2018, meaning that he was discharged from hospital on the day before the 2018 Will was executed. On that occasion, he was treated for a urinary tract infection.

8. As I will explain further below, his capacity was assessed on a number of occasions for different reasons, based on mini-cognitive tests or an abbreviated mental test score ("AMTS"). He failed a mini-cognitive dementia screen on 25 October 2016, but there is no suggestion from his medical records that he lacked capacity when the issue was considered on any other occasion. When his capacity was considered, this was for medical purposes, not for the purposes of assessing his testamentary capacity.

9. During his later years, Fred lived in a maisonette on the first floor at 12A Willow Road in Ealing, West London. Susan, his only daughter, lived in the neighbouring block, together with her husband, Carl, until his death in May 2019. It was not disputed that she was his carer at least during the period with which this dispute is concerned. This was effectively a full-time job given his medical conditions (and Susan had previously worked as a full-time carer). Terence had at one time lived with his father, but latterly moved to the Isle of Wight.

10. Up until a few years before his death, Fred liked to socialise, particularly at a local working men's institute known as the Grosvenor Club. It was there that he met his friend, Dennis Taboney, also a friend of Terence, who appears to be the one person outside the family with whom he remained in regular contact after he was unable to leave his flat without assistance. Latterly, he experienced difficulty when moving around, and required an oxygen tank. This could at times make it difficult for him to speak. In his medical notes his daughter Susan is referred to on one occasion as his "interpreter". This note, made on 3 January 2019, indicates that he had 'difficulty hearing, understanding and walking' and

that he used a walking frame. This is consistent with the evidence from the defendants that Fred was not able to leave the flat alone and was in that way somewhat isolated in his later years.

11. The circumstances in which the 2011 Will came to be made are not discussed in the evidence. It was drafted by the firm of Elliots, Bond and Banbury ("EBB"), who were also the solicitors who prepared the 2018 Will. Fred also gave instructions to EBB in early 2017 for the drafting of a new will. It was engrossed and sent back to Fred for execution, but in the event was not executed.

12. Before his death, Fred Junior had moved to Cornwall with his wife, Ann. He died there in 2015 from myeloma. His eldest daughter, Carol, has lived in Devon throughout the relevant period. The next eldest daughter, Angela, has lived in Canada for many years. Relations between the three wings of the family appear to have been relatively good during Fred Junior's lifetime, although there is evidence to suggest that Fred Junior appears to have complained about Terence's conduct both in their early adult life and in later years. Despite that, there is no suggestion of the claimants having an impaired relationship with Terence or Susan in earlier years and, in particular, Susan and Carol were once close.

13. It appears to have been at around the time of Fred Junior's funeral that a rift opened. Fred attended the funeral, and was taken there by Terence, which was a difficult enterprise given his father's medical condition. There seems to have been some disharmony at that time between Susan and Carol regarding the arrangements for the visit to Cornwall, but text messages between them on that subject are still friendly. The way in which each of them explain what happened is somewhat different but for present purposes the key point is that their previous close relationship had later disintegrated. At around that time, Carol indicated to Susan that her father had expressed the feeling that Fred did not love him. In her evidence, Susan explains her reaction to this as a perception that Carol had been "slagging off" both her father and her late brother, and she says that she then blocked Carol's number.

14. Whatever the true cause of the rift, it is clear that Carol has subsequently had a strained relationship with Susan. An allegation is made that Susan hit Carol at Ann's 70th birthday party, in December 2018. Whilst this was not explored in cross-examination, it is common ground that they at the least had a heated argument on that occasion. In evidence Carol expressed a strong perception that Susan had excluded her, and had made it difficult for her to see her grandfather and monitored her whenever she visited. Susan's stated views of Carol were that she never had a good word to say about anybody and was always talking about someone, and that she was obsessed with money, a sentiment also expressed by Terence and Daniel. Despite her evidence that her father often said that he did not want to see the claimants as they had no time for him, Susan did

say that he had loved Carol as he had loved all his grandchildren, a confirmation which Terence would not provide.

15. It was the defendants' evidence that, at some point after the death of Fred Junior, Carol indicated that she was going to build an extension to the house that had been her father's, and then to sell it and to move her mother in with her. Both defendants gave evidence that Fred had mentioned this to them on several occasions and that he had been upset by it. In particular, they said that Carol had indicated that Angela would not receive anything from the sale, as she had moved to live in Canada. Terence gave evidence that Carol had said this in 2017 or 2018; Susan suggested that it was sooner after the death of her brother. Carol denied that she had said anything of this kind, and pointed to the fact that her father's bungalow had not been sold and that Ann continued to live in it.

16. As noted above, in 2017 Fred met with a local solicitor to give instructions for a new will. A draft was prepared by EBB following those instructions but was not executed. Further instructions given in late 2018, leading to the execution of the 2018 Will. The preparation of the draft 2017 will and the 2018 Will are discussed in greater detail below.

17. Fred was hospitalised again in March 2019, and was not expected to survive. Daniel Ward, Terence's son, informed Christine and Amanda that he was in hospital. This led to Amanda and her husband, Paul, visiting him and expressing a wish to return the following day. Terence's daughter, Michelle, then text messaged Christine, asking her and Amanda not to visit because their grandfather wanted rest and too many people were going to the hospital. It would appear that Terri Ward then indicated that she would let them know when they could visit, but then never did so. I would note that this was several months after the 2018 Will was made, and thus could be relevant only to the claim in undue influence, if it were evidence of continuing controlling behaviour on the part of the defendants.

18. In the event, Fred lived until 17 February 2020. On 5 March 2020, the day after his funeral, Terence read out the 2018 Will at Fred's flat. Carol made a secret recording of this occasion, giving evidence that this was not just because of a suspicion that his will might have been changed but because she thought something was not right, because of her poor more recent relationship with Susan and her stated concern that Terence was and always had been greedy.

19. The parties have provided competing, albeit similar, transcripts of that recording. Part of the recording was played to the court during Terence's cross-examination, as he was being questioned about what he had said on that occasion. This caused those of the claimants in court to become upset, and the hearing was briefly adjourned accordingly.

Approach to evidence

20. Apart from Fred's medical records, some text messages and the will files held by EBB, there is very little contemporaneous documentation against which the allegations in the claim fall to be considered. There is also, of course, the recording and transcript of the reading of Fred's will and the argument which entailed after it had been read. I consider what was said on that occasion to be of some significance, recognising that the comments made were both to an extent in the heat of the moment and some months before the present proceedings had been conceived of. Generally, however, to the extent that there are factual disputes about what was said and done, they fall to be resolved on the basis of competing recollections of what was said and done, to be assessed as against the limited documents available, and the inherent probabilities of the competing cases.

21. As discussed with counsel at the trial, I consider that the following summary of the approach adopted by HHJ Cawson KC in the recent case of *Shovlin v Site Civils & Surfacing Ltd* [2023] EWHC 1658 (Ch) at [176]–[178] to be applicable to a case such as the present:

> '176. ….I consider that I must bear firmly in mind the much repeated observations of Leggatt J (as he then was) in *Gestmin SGPS S.A. v Credit Suisse Limited* [2013] EWHC 3560 (Comm) at [15]–[22] with regard to the unreliability of memory, and his caution to place limited, if any, weight on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts.
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> 177. A particular concern identified by Leggatt J was the ability of a witness, in seeking to recall events that took place some time ago, to falsely do so, but with genuine conviction and belief that their recollection is accurate. Thus, as Leggatt J cautioned in *Gestmin* at [22]: "… it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth." Allied to this is a concern that a witness seeking to recall events over a significant period of time is liable, in reconstructing those events in his or her own mind, to do so in a way that inaccurately recalls the same in his or her favour, and to exaggerate perceived advantages to his or her own case, and to do so without deliberately giving false evidence.
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> 178. The Court of Appeal in *Kogan v Martin* [2019] EWCA Civ 1645 at [88] stressed the importance of making findings by reference to all the evidence, that is both documentary evidence and witness evidence, placing

> such weight as the circumstances require on each. As I have indicated above, a difficulty in the present case is a paucity of contemporaneous documentation to assist in the resolution of questions of fact. In these circumstances, it will be of importance to test the witness evidence against the inherent probabilities of the relevant situation, and considerations such as the consistency (or otherwise) of a particular witness' evidence with other evidence, the internal consistency of that evidence, and the consistency of that evidence with what the witness might have said on other occasions – see *Kimathi v The FCO* [2018] EWHC 2066 (QB), at [98].'

22. It will be particularly important to consider the inherent probabilities of the allegations and the fact that, given the unreliability of memory, it is possible for a genuine recollection to be incorrect. I also bear in mind that it is some time since the claimants first made allegations concerning the validity of the 2018 Will and that the claim has been ongoing for some time. The parties will naturally have discussed the claim amongst themselves, no doubt from the perspective of their entrenched view of those on the other side of the proceedings, and this may well have cemented slight misrecollections which may have a significant impact on the allegations in dispute. Especially in a case such as this, where serious allegations are made but which are based largely on inferences sought to be drawn from primary facts, it is quite possible for such evidence to be put forward in good faith even if the allegations are ultimately found to be inaccurate.

The witnesses of fact

23. At this point, I would note that none of the witnesses had, as required by CPR r 57.5(3) filed witness statements of testamentary documents and this had not been directed at any earlier hearing. Accordingly, each witness who was also a party to the claim confirmed in evidence in chief that they were not aware of any other testamentary document made by Fred.

24. The first witness from whom I heard was Carol. She was calm and composed in giving her evidence, except for when she was referred to the evidence given by Terence about the alleged conversation between her and her grandfather after her father's death, when it is said that she indicated that she would like to sell the bungalow left by Fred Junior in order to build an annex for her mother, Ann, to live in. Carol indicated that it was the reference to her father which upset her, although it is also relevant to note that this allegation is one which is heavily relied on by the defendants as a reason which led to Fred making the 2018 Will in the terms in which he did.

25. It was apparent to me that Carol was careful not to express her case too highly, and she acknowledged the limits of her knowledge, and stated when she was relying on what she had heard from others. There is a dispute about whether

those statements from others are true and accurate. Carol accepted that her grandfather was able, if he wished, to make a new and different will in 2018, but felt that something was not right. She also accepted where she was asking the court to make inferences rather than relying on direct evidence, and at one point retracted evidence she had given earlier in her cross examination, where she initially said that she had heard others accuse Terence and Susan of bullying their father (although she maintained that she believed that they bullied him). I consider that there is a real risk that she has conflated her beliefs as to what happened with her grandfather more recently before he died with her recollections of what others have said about the defendants in the past.

26. Carol's husband, Andrew Gowing, gave oral evidence next. He was also calm in his demeanour, and gave his evidence with confidence. He recognised the difference between fact and opinion. When asked why Dennis Taboney had a different perspective on the level of independence and strength latterly displayed by Fred, Andrew recognised that Mr Taboney (who saw a great deal more of Fred) was entitled to have a different perspective. He also gave evidence about the difficulties faced within the claimants' side of the family after Fred Junior's death. He said that this was particularly so from mid-2018 when Ann, his mother-in-law, was unwell. She seems to have required surgery around the time Fred was hospitalised in March 2019.

27. I consider Andrew's evidence that, at the will reading, he heard Susan say in the middle of an outburst to Carol that 'we made sure that you weren't going to get anything' to be too selective to be a reliable recollection. There is no indication what was said before and after this alleged statement, there were a lot of people simultaneously making a great deal of commotion (as is clear from the recording, where this alleged comment cannot be heard), and he does not identify the cousin whom he says had a swing at Ann at the same time. Carol herself does not give such evidence even though she is alleged to have been the recipient of the comment.

28. The second claimant, Angela St Marseille, gave evidence by video-link from Canada, to where she moved in 2004. She had seen less of her grandfather (and other family members) since then. She was also confident and assured in her answers and was not argumentative. Angela did not seek to deny at all or minimise the care that Susan had provided to Fred. She acknowledged that she could not give much direct evidence but clearly aligned herself with Carol, saying that what Carol said would be correct, likewise what she had heard from her father when he was alive. When she indicated that she believed Terence and Susan had told lies to their father in order to cause him to make a new will, she was asked what those lies were. She indicated that Carol would not have said anything about Ann's bungalow, and therefore anything said about that to Fred will have been a lie. She gave direct evidence about a statement made to her

privately by her grandfather at Fred Junior's funeral, that her father's share of his inheritance would go to Ann.

29. I then heard evidence from Amanda Higginbotham, the third claimant. She gave her evidence in a much less confident manner, especially when pressed as to the consequences if her evidence was fully accurate. For instance, she indicated that Fred expressed to her on more than one occasion how petrified he was of Terence, who frightened and intimidated him (and going well beyond any other witness other than her husband in this regard). When it was put to her that, if that were right, Terry would not have been given a right to occupy his father's property, by clause 4 of the 2011 Will, Amanda merely replied that that is what it said. She also gave evidence that, at the will reading, Terence's daughters, Terri and Deborah, said to her words to the effect that, 'Because of Carol, that's why you're not getting anything, I made sure of that'. The allegation that Terri and Deborah sought to influence Fred's testamentary wishes is not made by anyone else. In cross-examination, she indicated that she was not alleging that they had controlled their grandfather in that way. When it was said that was the only meaning of the words she had used, she indicated that 'that is what happened'. I did not consider this to be credible.

30. Amanda's husband, Paul Higginbotham, gave evidence next. He did so in a quiet demeanour, but was able to state his point forcefully when pressed. He seemed keen to stress his detachment from the issue of the will, he not being Fred's blood relative. He showed a willingness to accept points where they ought to be accepted, acknowledging more realistically that Terence latterly had a better relationship with his father. He also said that he did not accuse Susan of controlling or coercive behaviour. On the serious allegation of Terence having been violent towards his father, I note that there is a discrepancy with what Amanda says, as he indicates that Fred Junior knew about it and the two men decided not to say anything to Terence about it at Fred's request. Paul acknowledged that, even then, Fred would have wanted to ensure that Terence had somewhere to live and it is not surprisingly that in closing Mr McKean indicated that the claimants did not pursue the allegation that Fred did not want Terence to live with him and had asked him to move out.

31. Fred's great-granddaughter, Georgina Serpanchy, daughter of the fourth claimant, gave evidence in an engaging manner. Her evidence dealt in substance only with the time when Fred was very seriously ill in hospital in March 2019. She was cross-examined at some length, on the reasonableness of her perception that Susan and Michelle sought to exclude Fred Junior's family from the hospital, an issue which I consider to be peripheral to the issues in dispute in the claim despite the importance the claimants appear to have attached to it.

32. The next witness for the claimants was Joan McBain, the sister of Fred Junior's widow, Ann. She is hard of hearing and gave evidence very softly. She was

questioned only on what she alleges to have heard Terry and Fred say at Fred Junior's funeral, i.e. that they would make sure that Fred Junior's inheritance would pass to his family. It was not suggested to her that what she described did not happen at all, but rather that she was describing Terry comforting his family.

33. Robert McCarthy, a lifelong friend of Fred Junior, was the last witness for the claimants. He gave evidence of bad conduct alleged on Terry's part alleged by Fred Junior many decades ago. His evidence was very tentative and based on what he had heard from others. He was prepared to back down on allegations, such as that Susan was lazy because she had never worked, when asked whether that took account of the fact that she had acted as Fred's carer. Given the historical nature of most of his allegations, the accuracy of his recollection of which can no longer be corroborated, and their distance from the matters in issue in this claim, I do not consider that weight can be placed on them when for the purposes of considering the claims in undue influence and fraudulent calumny. I consider that he was seeking to support and vindicate his late friend's view of Terence, which is understandable but of limited assistance in resolving the issues in the present dispute.

34. Terence Ward, the first defendant, gave his evidence in a bluff and direct manner. His evidence was interposed with that of the solicitors and experts, so there was a gap of more than a day between the first and second half. For the first hour or so he tended instinctively to describe much of the evidence given on behalf of the claimants as 'rubbish' or 'nonsense'. At that point, he described Carol as a renowned liar and a bully, and said that his father had not loved her. As his evidence progressed and, particularly on the second day, he became somewhat more measured. I bear in mind the nature of the allegations made against him in considering the vehemence of his response, including serious allegations of historical violence which were not pursued in cross examination and which I have therefore not taken into account. Later in his evidence, Terence displayed genuine emotion when talking his father and their relationship, saying that they spoke on the telephone four or five times a week, and describing him more than once as his 'friend'. It was not suggested to him, and there was no evidence from anyone else, that this was not an accurate description of their relationship, at least in Fred's later years.

35. I consider Terence's evidence to have been unreliable in several respects. At times, he indicated that he could not remember the answer to a question, such as whether he had been told about the 2011 Will, which had been witnessed by Jamie Dale, his son-in-law. He also prayed in aid a lack of memory when asked to explain his response to Carol putting an earlier family meeting to him at the will reading (which I discuss further below). A matter of moments thereafter, when he was asked about what he was alleged to have said at his brother's funeral, he retorted: 'They have short memories. I don't'. His answers on key

points could also change. When asked, with reference to the recording of the will reading, whether he knew that Carol had been cut out of the 2011 Will (i.e. asking whether he knew the terms of the 2011 Will), he denied it, saying that he had surmised what the 2011 Will said. Shortly after that, when asked directly whether he knew the terms of 2011 Will, he said he did at the time of the will reading because EBB had provided the paperwork.

36. With this in mind, there were also points on which his evidence was plainly incorrect. He was cross examined on how and when he became aware of the terms of the 2018 Will. He suggested that EBB had provided it with the paperwork, 10 months after his father's death. Given that the will reading took place shortly after Fred's funeral, this is not plausible. It is, however, relevant to point out that this key line of questioning came shortly after he (and, indeed, I) had been significantly confused by questions about what was said at the will reading. Terence clearly did not understand whether he was being asked to confirm what was said then or whether he was being cross examined on the truth of the underlying events discussed on that earlier occasion. So, while satisfied that his answers were incorrect in key respects, compounded by his defensive approach to the cross examination, I was not satisfied that he was deliberately lying on this issue. But, when viewed together with his answer concerning the family meeting (see [53] below), I treat Terence's evidence with caution.

37. The evidence of the second defendant, Susan Wiltshire, was clear and direct and, in my view, generally straightforward. She also demonstrated a strong dislike of Carol, although somewhat less viscerally than did Terence. She appeared to be angered and saddened by the allegations that were made against her by the claimants. It was clear, and not disputed by the claimants (who relied on it as a part of their allegation of controlling behaviour) that she had been devoted to her father's care on a full-time basis. She indicated more than once that she did not have a good memory, for instance (and in my view plausibly) in relation to an allegation that a large-buttoned telephone had been removed from Fred's flat (the claimants alleging that it had been removed in order to prevent him from calling them, which I do not consider to be the case). Any error in the date of death of her husband (who died in 2019) was, however, inadvertent – it was clear from her evidence that he assisted in looking after Fred in his final years.

38. Whereas much of Terence's evidence was both defensive and aggressive, and therefore less reliable, I found much of what Susan said to have a ring of truth to it. Her explanation for her presence when the claimants visited is that her flat was in the neighbouring building and that Carol or another of the claimants would ask her to come and see them, too. They had once been close. Susan said that she did not stand constantly looking out of the window, but that her father was never left alone for longer than an hour or so. She also described how, when

the claimants did visit, they never stayed long, indicating that they were making only a 'flying visit'. Given the limited attempts to visit, the deteriorated relations between Carol and Susan and the fact that Fred's physical condition had changed as he was less mobile and required oxygen, Susan's description of her own conduct concerning the claimants' visits is considerably more plausible. I find this is true also of her evidence that Fred complained that the claimants did not bother with him or care about him. I find that he did also say on occasion that he did not want to be left alone with certain people, but think that was likely largely a result of his general state of health. I consider that, in saying that the claimants should have enquired after him more, Susan was being to an extent unrealistic, not least as she had blocked Carol from calling her but the other claimants were still able to contact her, as Angela did in March 2019.

39. The other witnesses who gave evidence for the defendants were Daniel Ward, Terence's son; Terri Dale, one of his daughters; and Fred's great-niece, Zara Thorn.

40. It was apparent from Daniel's evidence that he and his father do not have a close relationship and have for considerable periods been essentially estranged. Daniel was clearly uncomfortable giving evidence. He was somewhat emotional when discussing his grandfather, with whom he appears to have had a close relationship, saying he would rather have him still alive than any money from his will. Daniel also brought Fred's 2019 hospitalisation to the attention of Fred Junior's family. Mention of Carol made him visibly angry: when it was put to him that he had at the will reading called her a 'horrible cunt', he immediately (and accurately) retorted that he had added the words 'money-grabbing' to the epithet.

41. Terri Dale was a personable witness who gave evidence about Fred Junior's funeral, saying that any promises made there were of the nature of general reassurances. Her evidence about Fred's medical condition was straightforward, accepting that there were times when he grunted or mumbled, and she indicated that there were times when he did not want to see anybody. Terri said that once when she forgot her grandfather's birthday, he telephoned her and said he was upset, suggesting that despite his frailty he was quite capable of asserting his feelings. She said that he did not want confrontation or drama.

42. Zara Thorn's evidence was limited; she had initially made a witness statement dealing with the allegation not pursued by the claimants, and I gave permission for it to be treated as excluding reference to those matters. She gave evidence that Fred had told her that pretty much all Carol wanted in life was money, and that he was upset that certain people had not been to see him.

43. I also read a witness statement from Dennis Taboney, who was medically unfit to attend court. He kept in touch with Fred after he could no longer go to the

Grosvenor Club. He said that Fred had told him (at an unspecified date) that 'all of his grandchildren would "be around for the money" after he had died'. He also gave evidence about the execution of the 2018 Will on 28 November 2018, to which he was an attesting witness, indicating that Fred wore his glasses to read the draft will and that he did not recall any difficulties with Fred's hearing on that occasion that were apparent to him. I bear in mind that he has not been cross-examined. Mr McKean indicated the line of questioning that he would have pursued with him, especially concerning the allegation that Terence was involved in the will-making process and that Fred was more open about his affairs than the defendants suggest (on the latter of which points I do not accept all the defendants' evidence).

44. I will deal with the evidence of the two solicitors involved in the preparation of the draft 2017 will and the 2018 Will below.

45. It was not put to the claimants and their witnesses that they had conspired to put forward an entirely false case. Certainly, Mr Myers suggested to them that a number of statements made by those witnesses were not true, especially where they referred to promises alleged to have been made by Fred or Terence, or allegations of bad behaviour by Terence or Susan. They were not cross-examined on the footing suggested by Terence in his evidence, that Joan McBain had been coerced by Carol into giving deliberately false evidence of what she heard after Fred Junior's funeral. Furthermore, a significant number of the criticisms mounted by the claimants relied on allegations made or things said by Fred Junior to them during his lifetime. Some criticisms also depended on a subjective understanding of the explanation for facts that were not essentially in dispute (e.g. that Susan had not left her father alone with the claimants since 2015), or a differing recollection of events (e.g. what Terence said about promising to see that his brother's family was all right after his funeral). The claimants withdrew or moderated some allegations, and not all were put to the defendants. I have sought only to take into account those pleaded allegations that were pursued, which does not include several allegations of earlier bad conduct by Terence which depended heavily on hearsay. Mr Myers complained with some justification that it was not a simple task to work out which allegations were maintained.

46. My overall assessment of the claimants' evidence is not that they have come together to put forward a case which they know to be false. The view they have formed, both of Terence and Susan and of the reasons why their grandfather made the 2018 Will in the terms in which he did, is a collective view. The experience of the will reading and discovery of the terms of the 2018 Will, together with the obviously strained relationship they had with Susan in particular and the sense that this fractured their bonds with Fred, will undoubtedly have led them to consider what had happened and why. This

explains the thesis put forward in the particulars of claim, and I consider that the claim has been put forward in good faith. It may also explain why there is now a collective memory of the precise words used, such as at their father's funeral in 2015, even though there would not have been cause to consider the potential importance of those words until many years after the event, at which point they will have had cause to consider and discuss them at great length. Even though the claimants and their witnesses may be clear in their recollection, memory of undocumented oral statements is prone to being unreliable.

47. Mr McKean has set out in his closing submissions a summary of the factual case relied on by the claimants. I explain my view of certain key aspects of the witnesses' evidence both above, and below where I consider Fred's testamentary intention up to 2011 and the making of the 2018 Will and the giving of instructions both for it and for the earlier draft 2017 will.

48. As I explain below, I do not consider that the evidence supports the claimants' case that the defendants poisoned Fred's mind about the claimants generally, or about Carol in particular, in order to make him make a will in their favour. The pleaded allegations of fraudulent calumny, to the extent that they were maintained, allege that the defendants told their father that the claimants chose not to visit him despite knowing he was in hospital, and did not love or care for him. I also explain (see [103] and [125]-[126] below) that a more probable explanation for the change in Fred's testamentary intentions is the reduction in communication with Fred Junior's family more generally after his death, which may have been exacerbated by the falling out between Susan and Carol. Whoever is responsible for that state of affairs, it does not point to a fraudulent calumny, where statements are made for the purpose of persuading a person to make a new will.

49. While it is not directly relevant, I consider that I should comment also on a recurrent theme of the defendants' case, that Carol is "money mad" and that this was (at least in part) Fred's motivation for making the 2018 Will in terms which essentially excluded the claimants. I find that there was a view to this effect expressed by both the defendants and by Fred in the period after Fred Junior's death. I suspect it may have been to an extent an unfair characterisation, but think it most likely had some foundation in comments made by Carol in the past. This is both because of the pervasiveness of this theme throughout the evidence of the defendants and their witnesses, and because it was raised more than once at the will reading where this claim was not yet in the contemplation of, at least, the defendants. A comment made that Susan was expected to pay Carol petrol money for the lift to the coach station after her brother's funeral struck me as consistent with a generally held impression of Carol. I find that Carol made some comment about her father's assets after his death, of which Fred did not approve, although I think that the version recounted by Terence has probably

become embellished by having been reconsidered over the course of this litigation. Susan's more limited statement in this regard, that Carol said her father had promised to give her money for work done on her home, was more plausible.

50. The claimants made, but did not pursue at trial, serious allegations that Terence was violent towards Fred (and violent more generally), and wanted his son to leave when Terence was living with him. It was put to Terence in the context of his presence at Fred's flat on 28 November 2018 that Fred was scared of him. I accept Terence's denial of this, both in light of his evidence of their closeness in later years and also because the allegations of prior bad conduct by Terence were not pursued and because of Paul's acceptance that they were close in later years. As far as their relationship is concerned, it was also Terence's unchallenged evidence that during Fred Junior's lifetime all three of his children received gifts of £30,000 after Fred received an inheritance from his late brother, Edwin (known as Ted). Having watched Terence give evidence for several hours I have no difficulty in accepting that he can be and often is rude and abrupt but that is no sufficient basis for a finding that he controlled and coerced his father.

51. An issue also arises as to the allegation that both Fred and Terence made promises to the claimants and/or to Ann at Fred Junior's funeral, or at the wake afterwards, to the effect that Fred Junior's "share" in his father's estate would be left to his family. Carol's evidence was that Terence said to her, in the presence of others, 'I'll make sure that you get your Dad's third'. Angela gives evidence that Fred told her that her father's share of his inheritance would be passed down to his children. Andrew, Paul and Joan McBain give evidence of having overheard Fred and Terence make similar comments. Terence repeatedly denied having said any such thing, saying that any comments by him would have been offering support in a non-specific (and non-financial) way.

52. It is relevant at this point to consider the transcript of the will reading on 5 March 2020. There is no material difference between the parties' competing transcripts on the relevant point. Shortly after Terence had read out the 2018 Will's provisions, Carol approached him. The transcript reads as follows:

> 'Carol My mum said that when dad was, came over and before he died, urm you, he came up here and in front of you, Sue and Grandad, you all promised and agreed that if anything happened to either of you a third would be split and go to my mum.
>
> ….
>
> Terence Carol, A lot has happened since then love hasn't it? A lot has happened since then.
>
> Carol Yeah but you don't, you don't, you don't promise though do you…you don't promise.

Terence Sorry I don't, yeah but you don't promise to start things either do you.
Carol I'm not starting anything.
Terence The last will has been said and it has been said.
Carol I know it has.
Terence There is no money going anywhere towards anybody else. It's split between me and Sue, there wasn't, it was split between the three of us.
Carol Yeah.
Terence But I'll tell you the truth, but unfortunately, your mouth got you in a lot of trouble.
Carol What do you mean by that?
….
Terence For the arguments.
Carol What arguments?
….
Terence That is the last will and testimony, that is it, finished.
Carol What arguments?
….
Terence What arguments! What have you lost your brain as well?
Carol No I haven't lost my brain, don't be so rude.
Man Well you slagged me off, you slagged me off you slagged granddad off.'

53. It was shortly after this exchange that the occasion degenerated into a heated altercation. I consider it important to note that this was the first intimation to the defendants by Carol, or by any of the claimants, of concern about the 2018 Will. When Carol indicated that there had been a promise and agreement with her father that a third of Fred's estate would go to Ann, Terence immediately indicated that he was aware of this. He immediately started to explain that things had changed, referring to things that Carol had said. I do not accept Terence's evidence that what was described in the first exchange above was, as he described it, "rubbish". It is quite apparent from that recording that he was well aware of an understanding with his siblings and father, during Fred Junior's lifetime, to the effect that a third of Fred's estate would pass to Fred Junior's family if he died before Fred. It is also apparent from this, and from Dennis Taboney's evidence, that Fred did talk occasionally about his will and was not quite as intensely private a person as the defendants described him.

54. In light of that, it seems to me more likely than not that something along the lines of what had been agreed previously was said by either Fred or Terence on the day of Fred Junior's funeral. There are discrepancies in the claimants' version. Mr Myers referred to the fact that the particulars of claim plead that Carol heard one such representation, but that her witness statements referred to two; and that by the time witness statements were exchanged, more witnesses

had been identified to what had been said. Without finding that the claimants' evidence is deliberately untrue (which I do not consider to be the case), I think it likely that, as explained above at [46], their collective memory will have been influenced by long consideration of this litigation, including before the claim was issued. Terence does not strike me as someone who is prone to making offers of financial generosity. A promise about his father's will would also have been a very odd promise for him to make.

55. I find that Terence's representations on the day of the funeral were limited to general expressions of support, and that any more specific promises (i.e. of the kind previously discussed and mentioned by Carol at the will reading) were made by Fred. That is consistent with the evidence of Angela, whom I considered to be a reliable witness. I explain elsewhere why I find, on a balance of probabilities, that he later changed his mind. Statements made by testators regarding wills they have already made are notoriously unreliable; all the more so statements about wills that they may make in the future. I accept the evidence given by more than one witness, including Terence, that his father was a man of his word, but I am also satisfied that several years later he considered that he had reasons to make different provision.

56. Having referred to the will reading, I also note that the claimants allege that Terence gave them each on that occasion an envelope containing their £50 legacy under the 2018 Will, but that Carol later discovered that her envelope was empty. This was not put directly to Terence, but I think that what Carol says is probably correct.

57. I deal with the allegation that the defendants were involved in the making of the 2018 Will below when considering the process by which it was prepared and made.

The expert evidence on capacity

58. The claimants rely on the expert report of Dr Chris Hamilton, a consultant clinical psychologist. He is a clinical lead for capacity assessments, including where testamentary capacity is concerned. The defendants rely on the report of Professor Alistair Burns, a consultant psychiatrist and, until his recent retirement, Professor of Old Age Psychiatry at the University of Manchester.

59. Both experts gave oral evidence and were cross examined. Dr Hamilton accepted that Professor Burns' specialism was squarely in the category of patient within which Fred fell. Nonetheless, it is apparent that both experts are amply qualified to opine on the question whether he had capacity when instructions were given for the 2018 Will, and when it was executed (the questions on which permission to rely on expert evidence was granted).

60. In the event, there is little dispute between the experts. A joint statement produced by them correctly recognises that the question of capacity is one for the court and not the experts to determine.

61. Dr Hamilton suggests that the failed mini-cog test in October 2016 shows that cognitive problems could have impacted on Fred's executive functioning and his ability to plan, organise and see things from the perspective of others. He goes on to suggest that there may have been fluctuating capacity in 2016 and 2017. His conclusion is, however, based on Fred's increasing physical frailty, noting that after 2017 there appear to be no further concerns regarding the deceased's mental capacity.

62. At paragraph 6.6 of his report, Dr Hamilton says this:

> '6.6 In trying to understand the change in the 2018 Will one has to consider the Deceased's state of mind and obvious vulnerability at the time given that his medical notes suggest numerous hospitalisations and significant competing physical co-morbidities in the days prior to the Will. As outlined above, such competing co-morbidities have consistently been shown to impact on an individual's mental health which, in turn, can affect their capacity to make decisions in their best interests. Whilst there is no formal evidence to suggest a lack of capacity, these competing co-morbidities and the obvious concern for his health and well being from the Defendant/s confirm a state of frailty and dependency at the time.'

63. Then, after sections headed 'Review of Witness Statements' and 'Responses to Specific Concerns etc' (commenting extensively on the allegations of undue influence and coercion), he says this at paragraph 9.1 of his report:

> '9.1 As outlined above, it is not possible to say with any degree of certainty that the deceased lacked Testamentary Capacity at the time of writing the 2018 will. What is evident however, is that he was physically, and in all probability, psychologically frail at the time. This state of being may have played a part in him being more subservient. His obvious vulnerability, therefore, prior to the 2018 Will would have rendered him susceptible to acquiescence and undue influence (Lechner et, al 2015). This might help to explain why, when asked if he was able to "*comprehend and appreciate the claims to which he ought to give effect and whether there were any other parties that might consider themselves to have a moral claim on the estate,*" he told the solicitor at the time that there were no reasons to appreciate the claims of others who may have a moral claim on his estate. In my opinion, if the deceased had full capacity at the time, he would have been well aware that his deceased son's children had a moral claim on the Will. This again, is something for the Court to consider.'

64. Dr Hamilton, in his detailed review of the witness evidence, has descended into consideration of the merits of the allegations of undue influence, which is not within the scope of the permission for expert evidence. In cross examination he was quite clear that, even putting aside his comments on undue influence and in relation to the witness evidence, he would not change his view that this was an unusual case where he could not positively state an opinion that Fred was more likely than not to have had testamentary capacity in November 2018.

65. I consider that some care needs to be applied in understanding Dr Hamilton's comments. In the joint statement, his view is said to be that 'testamentary capacity and susceptibility to influence are inextricably mixed'. Professor Burns, on the other hand, did not comment on susceptibility as he was not instructed to do so. I understand that a person who lacks capacity, whether permanently or from time to time, may be particularly susceptible to coercion or other influence. I do not understand the experts to suggest that the fact that someone is susceptible to coercion through physical frailty without more points towards a lack of capacity. On analysis of his report, I consider that Dr Hamilton is inviting me to take account of my findings on the explanations put forward by the parties for Fred's actions in order to determine whether he had capacity. Of course, he is correct in saying that I should do so, and what he says in paragraph 9 of his report (set out above) about the importance of a finding as to Fred's awareness of the moral claims on him, is also correct. It does seem to me, however, that his conclusion is likely influenced by the view he has taken on the witness evidence, especially in the long section 7 in which he points out potential problems in the defendants' evidence, when that assessment can only be made of the evidence as a whole.

66. Professor Burns, on the other hand, expresses a clear view based on his reading of Fred's medical history. His report includes a table showing the most relevant medical entries which might impinge on the question of capacity, and it was accepted at trial that this table was accurate. His opinion is that, on a balance of probabilities, Fred had testamentary capacity to execute his will on 28 November 2018. His opinion in relation to the first three limbs of the *Banks v Goodfellow* test is that: 'There was no evidence that Mr Ward had any cognitive impairment due to dementia, delirium or that he was depressed'. He recognises when discussing the range of medical opinion that there was evidence of a urinary tract infection at the material time, which could have resulted in a significant degree of cognitive impairment which, in turn, could have affected capacity. When cross examined, he explained that co-morbidities themselves would not cause a lack of capacity; for that, there would need to be more evidence of confusion, delirium and lack of cognition. COPD can affect cognition, but this would be judged on any given occasion by an assessment of how the patient presented and the extent of the condition.

67. Paragraph 10 of Professor Burns' report sets out a useful summary of his comments on the question of capacity:

> '10.1 Mr Ward was an elderly gentleman with a number of physical health problems particularly affecting his respiratory system resulting in recurrent chest infections which were treated in hospital. The medical notes paint a picture of a person who was frail.
>
> 10.2 Many people with Chronic Obstructive Pulmonary Disease (COPD) have difficulties with memory, orientation and concentration. This is most likely because the brain is deprived of oxygen because of the inefficiency of the lungs transferring oxygen to the blood stream due to chest disease.
>
> 10.3 In October 2016 the notes state that Mr Ward "…*failed a dementia screen."* This does not indicate he had dementia it simply means that on a test to measure his cognitive function he did not do well. In those circumstances it is good practice to enquire further and do further, more detailed tests. I have got no evidence that these more detailed tests were carried out but there was no evidence the Mr Ward's cognitive impairment progressed over the next three years as one would imagine it would in someone with a progressive dementia. Mr Ward's death certificate did not record any evidence of dementia.
>
> 10.4 Mr Ward had an indwelling urinary catheter which is commonly associated with recurrent urinary tract infections which are a common cause of episodes of confusion. There is evidence at the material time at the end of November 2018, that he did have a urinary tract infection. However, although it could have affected his mental state and therefore testamentary capacity, I can find no evidence in the medical notes that I have seen that it did so. It is possible he failed the dementia screen because of an episode of delirium at that time which was two years before he signed his will.
>
> 10.5. Mr Ward had an episode of depression in 2009 but that seemed to have been treated successfully at that time and he was not on antidepressants at the time he instructed and executed his will.
>
> 10.6 During his many hospital admissions, there is evidence that assessments of his cognitive function were carried out. They used a measure called the Abbreviated Mental Test Score (AMTS). This is a measure of cognitive impairment scored out of ten, testing orientation and concentration. It is used particularly in the general hospital setting as it is a sensitive and quick to administer measure of delirium.
>
> 10.7 In the months running up to signing of the will, and once after, there are entries in the discharge letters from Ealing Hospital (on 6 June 2018, 21

> July 2018, 22 September 2018, 22 October 2018 and 4 February 2019) concerning the AMTS. The standard hospital discharge letter has a section about the AMTS (Appendix 2 is an example but it is the same template for all the discharge letters).
>
> 10.8 The letter has the letters, AMTS, then a space, then an oblique sign followed by the number ten. In my opinion, this is a template where the clinician puts the score out of ten in front of the oblique sign. None of the scores are filled in. This suggests to me, although it is ultimately a fact for the Court to determine, that the clinician was not concerned about impaired cognition and so considered there was no need to complete the test.
>
> 10.9 There is also a section on the same template entitled "*Capacity*" (also in Appendix 2) and the entries record "*not assessed*.". This suggests to me that the clinician had no reason to doubt the presence of capacity. On 4 February 2019, the question was answered "*Yes*", suggesting to me that capacity was definitely considered to be present.'

68. It can also be noted that the capacity assessment form was completed on 15 January 2020 on the question of CPR. The form said, 'Patient has full mental capacity. Does not want to be resuscitated in the event of cardiac arrest or respiratory arrest.' Professor Burns accepted that the relevant considerations in ascertaining capacity to give a Do Not Resuscitate instruction are very different from those where testamentary capacity is concerned, but he considered that the former were more complex.

69. It was not suggested to Professor Burns that the conclusion at paragraph 10.8 of his report (set out above) was incorrect. Furthermore, and as he said in cross examination, there are enough references post-2016 to Fred having capacity (and none to his not doing so) to be able to conclude that he probably did have capacity. An AMTS goes to cognition, not to capacity.

The evidence about the making of the 2017 draft will and the 2018 Will

70. At least some of the will file from when the 2011 Will was made is before the court. The note of instructions for the will is not there. In particular, there is no indication whether Fred had made any wills before 2011. This is relevant as the claimants submit that, in the absence of any such will, he can be taken to have had a settled testamentary intention arising from the intestacy provisions to leave his estate among his children or their own children. As the defendants point out in relation to the allegation that Terence had a poor relationship with his father, clause 4 provided that Terence should have the right to continue to live at 12A Willow Road rent free for so long as he wished (as he had been living there for a time up to 2011).

71. In early 2017, Fred wrote an undated letter to EBB, setting out in his own handwriting the gifts he wished to make. A copy of the instructions is with the 2017 will file, although it does not appear to be the entirety of the correspondence; one page is a photocopy of the envelope, and the other sets out the instructions (or draft provisions). There is no request for an appointment or a request that a will be prepared (although it is obvious that is what the instructions are for). The letter of instructions says, 'I leave to my son Terence Ward also to my daughter Susan Wiltshire to be equally divided. Other money left after expenses paid after my death goes to my son and my daughter.' It goes on to ask for pocket watches to be given to Daniel and Brian Wiltshire, £500 to each of his granddaughters, and a gold ring to Terence.

72. Given his physical condition by early 2017, it is clear that Fred himself will not have been able to post the letter of instructions to EBB. Mr McKean asks me to infer that one or both of the defendants sent the letter. I consider it most likely that the letter was posted by either Susan or her husband. I find it more likely than not that Fred will have told Susan that he was taking steps in relation to the making of a new will; he had discussed his will with his children before.

73. The fee earner who took on the role of advising Fred was Mr Taurean Drayak. There is a questionnaire consistent with the instructions above, next to which Mr Drayak has written, '~~No~~ substitute to grandchildren!' This also says that the family has used EBB for years with satisfaction (seemingly written in Fred's handwriting). The estate is said to be a freehold flat worth £300k and savings of £100k, with total approximate value, 'unknown'.

74. Mr Drayak's attendance note of a meeting with Fred on 9 February 2017 recounts that he had emphysema, explaining a home visit. It is said that the deceased had two children. At that stage, he asked for the appointment of partners in EBB as executors. The note says, 'I got the sense that he might have appointed Terence if he had been local.' Under the heading, 'Banks v Goodfellow test', the note says:

> '*Did the testator understand the nature of the act and its effects?*
>
> Frederick certainly seemed to understand the purpose of a will and the consequences of executing one.
>
> *Did the testator understand the extent of the property of which he is disposing?*
>
> Frederick's understanding of the extent of his estate is recorded above.
>
> *Was the testator able to comprehend and appreciate the claims to which he ought to give effect?*

> On being asked whether there were any other parties that he might consider themselves (or be considered by others) to have a moral claim on the estate I was told that there were not.
>
> *Was the testator's mind affected by any disorder or delusion which was active in bringing about a disposal which the testator would not otherwise have made?*
>
> I saw no evidence of this during our interview. I note that Frederick had a tendency to leave out numbers or letters on the questionnaire, so I was particularly alert for signs of mental impairment. However, he was engaging, cheerful and quite clear about what he wanted. He was able to discuss his medical condition and treatments in terms that were consistent with what I would have expected (my wife is a chronic asthmatic, and so is on many of the same treatments).'

75. As became clear during cross examination, EBB's standard form of attendance note includes the four questions above (reflecting the test as to testamentary capacity set out in *Banks v Goodfellow* (1870) LR 5 QB 549). The answers are essentially identical in Mrs Farooq's attendance note (save that she referred to him as Mr Ward rather than as Frederick). Mr Drayak has, however, written a bespoke answer to the fourth question. He also in his witness statement describes Fred as 'engaging and confident'.

76. The 2017 draft will was never executed. An engrossed copy was sent to Fred for execution, he having indicated that he was happy to arrange for that to be done by his neighbours. He again got in contact with EBB in autumn 2018 and this time was seen by Mrs Anila Farooq, Mr Drayak no longer being with the firm. He asked to cancel a meeting on 5 November 2018 saying he had just come out of hospital, then appears to have called two days later to enquire why no-one came, then indicating that there was a misunderstanding, and making an appointment for 14 November 2018.

77. Mr McKean suggests that the explanation for this is that either (a) Terence impersonated his father during the first call and (presumably) did not tell Fred, or (b) Fred made both calls but was so confused or disorientated that he forgot the appointment had been cancelled. I find that the most probable explanation is, rather, that Fred made both calls and that there was a misunderstanding (as he appears to have said during the second call). It is not in dispute that Fred's hearing was far from perfect and it is quite probable that the first call was left with Mrs Farooq having cancelled the appointment, but Fred not being sure what the next step was and not having heard exactly what she said. The brief attendance notes will also have been made in haste and Mrs Farooq will now have no recollection independent of those conversations. There was some debate at the hearing as to whether the claimants could now allege that Terence

had impersonated Fred, given that this allegation is not pleaded. As I am satisfied it is not what happened, the pleading point does not arise on the facts.

78. Mrs Farooq's first full attendance note is of a meeting with Fred, again at his flat, on 14 November 2018. This says that they talked through the questionnaire, and notes that he had 'a son and daughter and some grandchildren'. The note says that he did not seem interested in discussing his estate and inheritance tax in depth, but noted that his property was worth around £450,000 (more than he had guessed in 2017). The first three answers on *Banks v Goodfellow* essentially replicate those in the firm's pro forma, and the fourth (the first sentence of which at least likely also follows the pro forma) says (on disorder or delusion), 'I saw no evidence of this at all during our interview. Mr Ward was very personable and clear in his will instructions and I had no hesitation as to his capacity.' The attendance note was based on Mrs Farooq's handwritten notes taken during the meeting, shown on the questionnaire attached to it, which was worked through with Fred.

79. An important paragraph of the attendance note is that which begins, 'will instructions':

> 'He wants to update his will with a few small changes. Firstly he explained that he was in hospital 3 times recently with emphysema and none of his grandchildren visited him which hurt him. So he wants to reduce the gift to grandchildren from £500 to £50. He wants his son in law Carl to have one of his pocket watches in addition to his grandsons Daniel and Brian and wants to give his wrist watch to his daughter.'

80. It was common ground at the trial that Fred was readmitted to hospital on 17 November 2018 and returned home on 27 November 2018, the day before the will was executed. Terence gave evidence to this effect, also saying that he came from the Isle of Wight to surprise his father upon his discharge, which is why he was present on 28 November 2018 when the 2018 Will was executed. (Having said that, I note that the medical records show Fred being discharged from the Emergency Department at Northwick Park Hospital to home in the evening of 17 November 2018 after being taken in an ambulance with a catheterisation problem, and contact with his GP between those dates, and Professor Burns' detailed chronology of medical records does not show hospitalisation between those dates. The discharge note was not considered during the trial.)

81. The claimants contend that Terence came to London shortly after 17 November 2018, and before the arrival of a letter written by Mrs Farooq to Fred dated 21 November 2018, which enclosed the draft will and contained what Mr McKean describes as a threadbare explanation of the terms of the draft will. The letter sets out what the first five clauses of the draft will cover, without detailing their

provisions, then says regarding the sixth clause, 'Division of your remaining assets between your son and daughter equally'. On the agreed footing that Fred will have been in hospital when that letter arrived, I find that it was given to him by Susan who, as usual, will have been with him every day and that he was able to read it and to form the view that he wished to execute it. Another brief attendance note dated 26 November 2018 records that Fred wished to sign and that he would contact a friend to see if he could be the second witness on Wednesday morning (i.e. on 28 November 2018). Mrs Farooq had met Fred recently, and he was an elderly man with breathing and thus speaking difficulties so she will have recognised his voice. I find that Fred made that call, and that he was not impersonated by Terence. As Mr Myers said, telephone calls can be made from hospital.

82. As I have indicated when discussing Terence's evidence, I do not accept that he discovered the terms of the 2018 Will only after his father's death. His own witness statement indicates that Fred told him in the last two weeks of his life that he had made a will and that Carol had been essentially excluded. I am satisfied that Fred had made his testamentary intentions known in past, and it was accepted that Terence knew that a will was being made in November 2018. He may have been asked by Terence to ask Dennis Taboney to come round on 28 November 2018 to witness the 2018 Will; he certainly knew that is why Mr Taboney was there. It is also clear that Terence had a version of the 2018 Will, whether or not it was of a draft, available to him immediately after Fred's funeral and had thus known where it was kept. I am accordingly satisfied that Terence knew the contents of the Will during Fred's lifetime and that his evidence on this point was less than candid. I also consider it more likely than not that this information will have been shared with Susan, by either Terence or Fred.

83. There is then a second attendance note of Mrs Farooq, dated 28 November 2018, recording the meeting, again at Fred's flat, at which the will was executed. The witnesses were Mrs Farooq and Mr Taboney, and there is no claim that the 2018 Will was not correctly witnessed. Terence was at the property, but not present in the room, when the will was executed. The note says that Fred reviewed the engrossed will and indicated he was happy with it, Mrs Farooq explaining that it had been prepared in accordance with the initial instructions, and that she 'was satisfied that the client understood the basis on which the engrossed document had been prepared'. By a letter dated 29 November 2018, a copy of the signed will was sent to Fred, saying also that the original was kept at EBB's office for safekeeping.

84. The defendants called both Mr Drayak and Mrs Farooq to give oral evidence and they were both cross examined on their witness statements.

85. Mr Drayak qualified as a solicitor in 2006, and had run the wills and probate department of another firm before moving to EBB in 2014. He left the firm in March 2018 to be a stay-at-home father. He has not practised as a solicitor in England since then, but has qualified in Scotland where he now lives, and works as a service manager for an advocacy organisation. He was clear in acknowledging at the outset that he could not recall any specifics of his meeting with Fred and was generally frank in accepting what would and would not have happened but was articulate in his responses. In particular, he agreed that he would not have checked whether a previous will had been made. Mr Drayak was adamant that his assessment of Fred's capacity (or the possibility of undue influence) was not perfunctory or assumed, and that he carried out an assessment. He said he did not, as a solicitor with more than 10 years post-qualification experience, consider a medical assessment of capacity to be required.

86. Mrs Farooq qualified as a solicitor in 1998, working principally in residential conveyancing until moving to EBB in 2012, where Peter Reinold (who had prepared the 2011 Will) trained her in wills, trusts and probate work. She was less minded to admit possible failings in EBB's processes, and was articulate and confident in her answers and in her statements as to her awareness when dealing with clients generally of the need to be alert to doubts over capacity. I do not share Mr McKean's view of her evidence as "prickly". She was clear in her evidence that Mr Ward had not given her any cause to doubt his capacity, and that there had been nothing to suggest he was not acting of his own free will. She was adamant that she had considered the question of mental capacity and had no reason to question Fred's capacity, and that she would not hesitate to request a capacity assessment where it was required. Mrs Farooq accepted that the failure properly or fully to date the 2018 Will (it being dated '28th November 20__') was an oversight.

87. One feature of the evidence of both Mr Drayak and Mrs Farooq was that they (and particularly Mr Drayak) had detailed and articulately expressed answers, clearly thought out and prepared in advance, on the application of the so-called golden rule. The rule was described in the following terms by Briggs J (as he then was) in *Key v Key* [2010] 1 WLR 2020:

> '7 The substance of the golden rule is that when a solicitor is instructed to prepare a will for an aged testator, or for one who has been seriously ill, he should arrange for a medical practitioner first to satisfy himself as to the capacity and understanding of the testator, and to make a contemporaneous record of his examination and findings: see *Kenward v Adams* The Times, 28 November 1975; *In re Simpson, decd* (1977) 121 SJ 224, in both cases per Templeman J, and subsequently approved in *Buckenham v Dickinson* [2000] WTLR 1083, *Hoff v Atherton* [2005] WTLR

> 99, *Cattermole v Prisk* [2006] 1 FLR 693 and in *Scammell v Farmer* [2008] WTLR 1261, paras 117–123.
>
> 8 Compliance with the golden rule does not, of course, operate as a touchstone of the validity of a will, nor does non-compliance demonstrate its invalidity. Its purpose, as has repeatedly been emphasised, is to assist in the avoidance of disputes, or at least in the minimisation of their scope….'

88. Mr Drayak's view was that the rule provides guidance as to good practice, and that it would be unreasonable for most clients if rigidly followed. Mrs Farooq said that she understood that the rule applied where a client was seriously ill, and that she did not consider Fred to be that. Her view was that he was very capable, and clear and articulate on his instructions.

89. I bear in mind of course that no will was made in 2017 and that I am concerned with the validity of the 2018 Will. Nonetheless, there is a continuity in the communications and documents in both will files. There was a change in the gifts between the 2017 draft and the 2018 Will, including especially the reduction in the amount of the pecuniary legacy to each grandchild, and the appointment of the defendants as executors, but what remained constant was the division of residue between Terence and Susan, and the exclusion of the claimants from that residuary gift. I consider that Fred's understanding of the draft 2017 will is relevant to an assessment of his understanding, or knowledge and approval, of the terms of the 2018 Will.

90. Mr McKean was very critical of both solicitors, submitting that (in his words) Mr Drayak's well-meaning but unorthodox opinion about the will-creation process laid the groundwork for Mrs Farooq's mistakes. Mr Drayak's comments do not reflect what the case law says about the golden rule (although professional guidance given to solicitors involved in will preparation recognises that it need not invariably be followed, especially where there is no doubt as to mental capacity: see STEP Code for Will Preparation in England and Wales, 2016 edn, para.3.). But, I do not entirely follow Mr McKean's line of criticism about laying the groundwork for mistakes in 2018. There is no possibility on the evidence of Fred not having being capable at any time of understanding the terms of the draft 2017 will. That draft will was in his possession for more than 18 months before it was amended and then executed. It is wholly implausible that he was unaware of its key provision in November 2018 – i.e. leaving his residuary estate (and thus most of his assets) to Terence and Susan equally.

91. Given the passage of time since the events in question, the limited contact between the solicitors and Fred and the number of clients they would have seen, I am sure that the predominant source of the solicitors' recollection of this matter will be from their attendance notes. Both were able to describe the

building and had an independent recollection of Fred himself, but any memory retained of the meeting will inevitably be fragmentary.

92. One sound criticism made by Mr McKean is that, despite the 2011 Will having been prepared by EBB and the firm retaining it, neither Mr Drayak nor Mrs Farooq were aware of it. It was a significant omission to fail to ask Fred whether he had made a previous will and what its terms were (and I consider it obvious that Mrs Farooq knew that the 2017 will had not been executed, as only a draft of it was available). Consideration of the 2011 Will would have made the solicitors aware of Fred Junior and undoubtedly led to further questioning about the exclusion of the claimants from the residuary gift. There is no suggestion from the evidence generally that he may have forgotten who Fred Junior was or that he had five granddaughters through him, who might have a moral claim to some provision. The failure of the solicitors to ascertain that Fred had had another son means that the positive support it would give to the defendants' case is lacking, but it does not of itself suggest a lack of either capacity or of knowledge and approval.

93. Despite this criticism, however, I find that neither Mr Drayak nor Mrs Farooq were aware of any reason to doubt Fred's ability to understand what was said to him or to communicate and that they were aware of the need to consider this issue. Each solicitor had a meeting with him which lasted around an hour, and Mrs Farooq had a second meeting in which she was satisfied that he understood the will that he was about to make. Even though I do not consider the process followed by EBB in making attendance notes to be as robust as it might have been, I am satisfied on the basis of the file notes and evidence of Mrs Farooq that Fred conveyed to her that he understood the instructions he was given. The first meeting with him lasted around an hour, and there was a separate second meeting. He was able, accurately, to indicate the value of his flat and to articulate a reason why he was reducing (from the £500 for each provided for in the 2017 draft will) the value of the pecuniary legacy to each grandchild (a point I will discuss further below).

94. Mrs Farooq could not recall whether Fred was wearing his glasses to read or whether he was wearing a hearing aid. I am however satisfied from hearing from Mrs Farooq that if Fred had not been able to understand or communicate, including where associated with difficulties in breathing, this would have been apparent to her and she would not simply have proceeded to draw the will up and, at the second meeting, to have it executed. I do not agree that she simply assumed capacity, and find that she was generally well aware of the need positively to be satisfied that a testator had testamentary capacity. That Fred was able to communicate is consistent with the defendants' evidence, they saying that their father could understand what was said if he was spoken to slowly and carefully, even though he did not wear his hearing aid. Susan also gave

evidence, consistent with this, that he could sometimes speak with his oxygen mask on, and sometimes he took it off to speak. Furthermore, Mrs Farooq was an experienced solicitor and knew that the requirement to consider the *Banks v Goodfellow* test was not a mere box-ticking exercise. Even though the completion several days after the meeting of a pre-populated pro forma may not be the ideal way to record an assessment of capacity, Mrs Farooq was aware of the importance of the issue. With reference to the golden rule, and to the failure to comply with it, this is not a case where Fred was later diagnosed with dementia and thus might have been at a stage where he was able to conceal his failing memory. The reason put forward why he might have temporarily lacked capacity was his COPD and emphysema, with particular reference to the fact that the will was made a day after he returned from a further stay in hospital with a urinary tract infection. I consider it unlikely that a medical assessment, which would have been carried out separately from an appointment with a solicitor, would in the event have assisted in answering the question whether there was a temporary loss of testamentary capacity. This is so especially as it is not usually practicable for a doctor to be one of the attesting witnesses (see *Theobald on Wills*, 19th edn, at 4-022).

95. I will consider further below the effect of this evidence on my conclusions as to Fred's capacity and the question whether he knew and approved the contents of the 2018 Will.

Capacity

96. Briggs J summarised the *Banks v Goodfellow* test as to testamentary capacity in the following way in *Key v Key* at [93]:

> '93 ….The testator must be able (1) to understand the nature of his act, ie, making a will, and its effects (2) to understand the extent of the property of which he is disposing (3) to comprehend and appreciate the claims to which he ought to give effect. He must not be subject to any disorder of mind as shall "poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties".'

97. Also, at [96]:

> '96 *Banks v Goodfellow* was itself mainly a case about alleged insane delusions. Many of the cases which have followed it are about cognitive impairment brought on by old age and dementia. The test which has emerged is primarily about the mental capacity to understand or comprehend….'

98. As to the burden of proof, the application of the presumption of testamentary capacity and the role of experts, he added this at [97]–[98]:

> '97 The burden of proof in relation to testamentary capacity is subject to the following rules. (i) While the burden starts with the propounder of a will to establish capacity, where the will is duly executed and appears rational on its face, then the court will presume capacity. (ii) In such a case the evidential burden then shifts to the objector to raise a real doubt about capacity. (iii) If a real doubt is raised, the evidential burden shifts back to the propounder to establish capacity none the less: see generally *Ledger v Wootton* [2008] WTLR 235, para 5, per Judge Norris QC.
>
> 98 Finally, the issue as to testamentary capacity is, from first to last, for the decision of the court. It is not to be delegated to experts, however eminent, albeit that their knowledge, skill and experience may be an invaluable tool in the analysis, affording insight into the workings of the mind otherwise entirely beyond the grasp of laymen, including for that purpose, lawyers and in particular judges….'

99. As the editors of *Theobald* say at 4-019, at the conclusion of a probate trial, 'the true and modern analysis is simply to say that the court will address the question of capacity as an evaluation of all the evidence available to the court at the trial' (citing *Burns v Burns* [2016] EWCA Civ 37 at [56], McCombe LJ, there concerned with knowledge and approval).

100. The time for assessment of testamentary capacity is generally when the will is executed. This is subject to the rule in *Parker v Felgate* (1883) 8 PD 171. As summarised in *Theobald* at 4-018, a testator without testamentary capacity may make a valid will if:

> '(i) the testator has testamentary capacity at the time when he gives instructions to a solicitor for the preparation of the will; (ii) the will is prepared so as to give effect to the instructions; (iii) the will continues to reflect the testator's intentions; and (iv) at the time of execution the testator is capable of understanding, and does understand, that he is executing a will for which he has given instructions.'

101. There is no dispute in the present claim that the 2018 Will was duly executed in accordance with section 9 of the Wills Act 1837. That leads to the question: was the 2018 Will rational on its face? There was some debate in closing submissions as to whether an assessment of the rationality of a testator's testamentary provisions must be considered solely by reference to what is on the face of the document, or whether the court takes account of the background matrix of fact (as agreed or found). I consider that a view on rationality can be made only by the court placing itself in the position of the testator. For instance, a gift to a person unrelated to the testator may appear irrational unless the relationship between them is known and taken into account.

102. In the present case, however, I do not consider that it makes a difference. The will is clearly rational if considered only on its terms. Some may take the view that, as a general proposition, when a testator's child has predeceased him, he generally ought to leave an equal share of his residue to that child's issue. However, the decision not to do so, and to split the residue and thus the bulk of the estate between his surviving children, can hardly be said to be provision which no reasonable testator could make.

103. In light of the background facts, including those findings I have made above, I also consider the terms of the 2018 Will to be rational. I have found that Fred had, rightly or wrongly, formed a negative view of Carol. It also seems from Carol's own evidence that there was some breach in the relationship between Fred and Fred Junior during the lifetime of the latter. After his death in 2015, and certainly by the time the 2018 Will was made, there was very limited contact with Fred Junior's children (and their children), and this was not principally due to Terence and Susan. Carol's own location and circumstances meant she was not in regular contact and Ann's health was a concern for all her daughters. I accept Susan's evidence that her father complained that Fred Junior's family did not care about him, and that he was particularly hurt by the lack of contact from Georgina around the time of her wedding (he complained that he was not even sent a piece of wedding cake). Whatever problems they may have had in the past, Terence and his father were close and remained so when Terence moved to the Isle of Wight. Susan was her father's full-time carer, looking after him around the clock despite his poor health, which had worsened during 2018. In those circumstances, and despite a promise by Fred several years earlier to divide his estate between his children's children if anything should happen to any of them, the 2018 Will was in my view entirely rational. This does not mean that I cannot understand the claimants' disappointment at being essentially left out.

104. I do not consider Fred's knowledge of the intestacy provisions to be relevant. There is no evidence that he did know of them but, in any event, he had made a will in 2011 which left his residuary estate equally to his three children and, I find, promised to leave a share of his estate to their children if one died before him (which was the effect of the 2011 Will, although it is inherently improbable that he was aware of the existence of section 33 of the Wills Act 1837).

105. Mr McKean points out that what Mrs Farooq was told, that none of his grandchildren visited him in hospital, is not quite right. It seems that Terence and Susan's children did visit him. This makes clear that Fred did not tell Mrs Farooq about his late son. This does not make the 2018 Will irrational – Terence and Susan were the main beneficiaries, and in any event his expressed concern to Susan was that Fred Junior's children did not contact him, and they were the potential beneficiaries who missed out. It was they to whom he referred when

he spoke to Mrs Farooq. What this point might show, in other circumstances, is a risk that Fred had forgotten who his grandchildren were, which would be a concern on the question of capacity. In the absence of any general cognitive impairment, however, and the lack of any evidence that at any time he did not know who somebody was, I have no doubt that this was not the case. What he said to Mrs Farooq might also be relevant to the allegation of undue influence, which I deal with below.

106. Mr McKean also relies on the fact that the 2018 Will was not (fully) dated (i.e. the year was missing) as showing that it was created in a rushed and haphazard way. I do not understand why it is alleged that the operative provisions of the 2018 Will are irrational because of this. In any event, the will does match the instructions given for it and, in its central provision as to residue, mirrors the draft 2017 will.

107. In those circumstances, the evidential burden shifts to the claimants to raise a real doubt about capacity. In light of the expert evidence, which I have taken into account in forming my own evaluation, Fred's medical history does not cause me to have real doubts as to his capacity on 28 November 2018. As Professor Burns said, and Dr Hamilton did not contradict, there is no indication that he had any permanent impairment to his cognition at any time before his death. This, borne out by the medical records with a large number of entries, is consistent with all the witnesses who regularly saw Fred until his death. Furthermore, I do not consider that Professor Burns relied on Mrs Farooq's attendance note in forming his assessment that Fred probably had capacity when he made the will. This is first because he said so explicitly when cross examined, and secondly because he based his explanation on medical factors. But Mrs Farooq's evidence is not to be ignored; it is positive evidence of capacity.

108. Any loss of testamentary capacity would have been transient, brought about as a result of one or more of the medical conditions for which Fred was receiving treatment, most probably his COPD and/or the urinary tract infection he had recently had. Putting aside Terence's own evidence as self-interested, neither Mrs Farooq nor Mr Taboney were aware of signs of cognitive deficiency on the occasion when the 2018 will was executed. Despite Mr McKean's criticisms of her, I am satisfied that Mrs Farooq would have been alert to the presence of any such signs. It is relevant that transient loss of capacity would have been caused by a co-morbidity, not by memory loss or undiagnosed dementia. As Professor Burns said more than once in cross examination, lack of capacity would have manifested itself not through physical frailty (which undoubtedly was present), but through confusion and delirium. Whatever doubts I may have about the thoroughness of Mrs Farooq's will preparation process (a point urged on me by Mr McKean), I am satisfied that she would not have proceeded with the witnessing of the will if her client had been displaying signs of either confusion

or delirium. I have already indicated that there were some shortcomings in the preparation of the 2018 Will, but I do not accept that the capacity assessment was merely carried out 'after the event'.

109. In a real sense, therefore, and as the editors of *Theobald* suggest (see [99] above), my decision on capacity is not based on a rigid application of the presumption of capacity, but on an evaluation of all the evidence available. For that reason, it also takes account of the points raised by Dr Hamilton as to why I might not be satisfied that Fred had capacity when he made the 2018 Will. I find that Fred did have testamentary capacity when he made it.

110. In light of my conclusion on the question of capacity, I do not need to consider separately whether Fred might have executed a valid will by reference to the test in *Parker v Felgate*. I am, however, fortified in my assessment above by the fact (as I find it in light of the evidence of Mrs Farooq and Mr Taboney) that he knew that he was making a will for which he had given instructions. Even if (contrary to my finding) Fred temporarily lacked capacity on 28 November 2018, it is improbable that he would also have lacked capacity on 14 November 2018 when Mrs Farooq met him, and he gave instructions for his last will, revised but substantially based on those given to Mr Drayak early the previous year.

Knowledge and approval

111. In *Schrader v Schrader* [2013] EWHC 466 (Ch) at [86]–[88], Mann J set out the following summary of the considerations to apply when considering whether a testator knew and approved of a contested will:

> '86. On this issue I was invited to follow the approach of Norris J in *Wharton v Bancroft* [2011] EWHC 3250 (Ch) at paragraph 28:
>
> "(a) The assertion that Mr Wharton did not 'know and approve' of the 2008 Will requires the Court, before admitting it to proof, to be satisfied that Mr Wharton 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.
>
> (b) The burden lies on Maureen to show that Mr Wharton knew and approved of the 2008 Will in that sense.
>
> (c) The Court can infer knowledge and approval from proof of capacity and proof of due execution (neither of which the Daughters now dispute).
>
> (d) It is not in issue that the 2008 Will was read over to Mr Wharton**.** The Court of Appeal observed in *Gill v Woodall* at paragraph [14], that, as a matter of common sense and authority, the fact that a will has been properly

executed, after being prepared by a solicitor and read over to the testator, raises a very strong presumption that it represents the testator's intentions at the relevant time.

(e) But 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.

(f) So the Daughters 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.

(g) It is not for them positively to prove that he 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.

(h) 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."

87. I can safely follow that helpful encapsulation. The real question is that appearing in paragraph (a) – whether Jessica "understood what [s]he was doing and its effect (that is to say that [s]he was making a will containing certain dispositive provisions) so that the document represents [her] testamentary intentions."

88. My attention was also drawn to the judgment of Chadwick LJ in *Hoff v Atherton* [2003] EWCA Civ 1554 at paragraph 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."'

112. The 2018 will was duly executed by Fred with testamentary capacity. It was prepared by a solicitor, whose attendance note records that Fred reviewed it before execution and confirmed he was happy with it. There is therefore a presumption that he knew and approved the contents of the will. While Mrs Farooq does not recall whether he was wearing his spectacles, the evidence is that he indicated that he was able to read the engrossed will and that, having done so, he confirmed he was happy with it.

113. Where a will has been professionally prepared by a solicitor, there is a strong presumption of knowledge and approval of the will by the testator. Mr McKean submits that the presumption does not apply at all, as the 2018 Will was not "professionally prepared". I do not accept this submission. I have in my discussion of the role of the solicitors above commented on the criticisms made of them. As I have found, Mrs Farooq was an experienced solicitor who was aware of the need to be aware of signs indicating problems with capacity, and who had recently spent around an hour with Fred at their first meeting. Signs of problems with capacity might include apparent difficulty in reading or hearing (although such difficulty may be present without there being any impairment to testamentary capacity). Those criticisms made of EBB's processes which I have accepted do not lead me to the view that the attendance note dated 28 November 2018, likely made when a copy of the 2018 Will was sent out the following day, is inaccurate. There is no reason to suppose that Fred would indicate that he had read and approved the contents of the engrossed will when he had not done so unless, perhaps, he was acting under undue influence, a separate ground of challenge which is dealt with below.

114. Mr McKean goes on to submit that the suspicion of the court should be aroused by the following factors:

i) The 2018 Will is surprising and unexpected, departs from previous promises and intentions on the part of Fred. The explanation given for the change was irrational and bizarre.

ii) The 2018 Will was created in a careless manner (reliance being made on the lack of dating or proper explanation for the change in terms).

iii) Fred was in poor physical and mental health, with poor vision and, in particular, poor hearing.

iv) The defendants were involved in the creation of the 2018 Will, and approved the draft will while Fred was in hospital.

115. It will be clear from the discussion at various points elsewhere that I do not agree with this characterisation and that these matters, to the extent that I accept them, do not cause me to consider that the 2018 Will is invalid for want of knowledge and approval. In summary:

i) I have explained above why I do not consider the terms of the 2018 Will to be irrational.

ii) Any criticism of the process by which a solicitor takes instructions for, prepares and oversees the execution of a will fall to be taken into account in determining whether there is any reason to doubt the strength of the presumption of knowledge and approval, where that presumption would otherwise apply. As I have indicated, I accept that the attendance note from 28 November 2018 is accurate in recording that Fred read the engrossed will and confirmed that he was happy with it (and I also accept that he was able to read it and not impaired from understanding its terms).

iii) I have found that Fred had testamentary capacity when executing the 2018 Will, despite his physical frailty. There is no evidence to suggest that he was unable to read the draft will before signing, and the attendance note records that he did read it. As set out in the sub-paragraph above, I accept what is recorded in the attendance note, that Fred indicated that he was happy with the contents of the draft will before signing it. I find that, if any problem with hearing had interfered in this process, Fred would have indicated accordingly. In so doing, I accept the evidence of Susan that he was able to understand but that she sometimes had to repeat for him what had been said. I find that if he had not heard what Mrs Farooq said at first, he would have asked her to repeat, and that she would have done so.

iv) I have also found that Terence knew in November 2018 that the 2018 Will was being made and that he knew its terms, both when it was made and thereafter, and that it is more likely than not that Susan did likewise. I have found that Terence did not approve the terms of the 2018 Will before it was made; nor did he impersonate his father at any point in the

process. Together with the comments I make in relation to the allegations of undue influence below and, in particular, the length of time for which Fred had expressed a wish to leave his residuary estate to Terence and Susan, this does not cause me to suspect that Fred did not know or approve the 2018 Will.

116. Not least because Fred's intention to leave his residuary estate to Terence and Susan had been settled for more than 18 months, and any cognitive impairment in the interim will have been temporary only, I find that the contents of the draft 2017 will became settled in his mind. In particular, the key provision as to residue, including only Terence and Susan and therefore excluding the claimants, had been expressed and remained unchanged over a long period. It is wholly unrealistic to suggest that he was unaware of this.

117. As Mr McKean stresses, a testator must understand not only the words of the will, but also the effect of those words. He submits that there is no evidence that Fred was ever told of the effect of the 2018 Will on his previous will, and that the court therefore cannot find that he knew and approved its contents.

118. The effect of the 2018 Will was straightforward. It left specific legacies to Fred's grandchildren and certain specific gifts, with the residue to be divided equally between Terence and Susan. There is no suggestion that he ever forgot who his children were or that Fred Junior had died. His instructions to EBB in 2017, in his own handwriting, were for the balance of his estate (after specific gifts) to go to Terence and Susan. That was then reflected in the draft 2017 will which was sent to Fred for execution and, I infer, then retained by him. Mrs Farooq's note in the questionnaire, completed at the meeting on 14 November 2018, is 'everything still to son + daughter'. The note also records Fred's understanding that the gifts to each grandchild were reduced from £500 to £50. If Fred understood that the claimants were to share one-third of the estate (which is the only possible basis of Mr McKean's submission although he did not put it in such terms), there would be no obvious reason to leave a specific legacy to each grandchild. No such gifts had been included in the 2011 Will.

119. In light of these matters, and of the totality of the evidence, I am satisfied on the balance of probabilities that Fred understood the nature and effect of and sanctioned the dispositions in the will he actually made. He thus knew and approved the 2018 Will.

Undue influence and fraudulent calumny

120. The claimants allege that the 2018 Will was procured by the undue influence or fraud of the defendants, such that it is invalid.

121. The relevant legal principles were set out by Lewison J in the following way in *Edwards v Edwards* [2007] EWHC 1119 at [47]:

> '47. 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.'

122. As Master Pester said in *Abdelnoor v Abdelnoor* [2022] EWHC 1468 (Ch) at [49]:

'49. Whilst Lewison J stated that what must be shown is that the facts are "inconsistent with any other hypothesis" other than undue influence, this is to overstate the position. The standard of proof is the normal civil one of the balance of probabilities. As counsel for the Claimants pointed out, an allegation of undue influence is a most serious one to make: see *Re Good (deceased) Carapeto v Good* [2002] EWHC 640 (Ch). It is a species of fraud, which requires strong and cogent evidence to prove, citing *Re H (Minors)* [1996] AC 563, in the well-known speech of Lord Nicholls, at p. 586:

> "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence… Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.
>
> Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred."'

123. As far as fraudulent calumny is concerned, it is clear from the summary in *Edwards v Edwards* that for a will to be vitiated, the person who has poisoned the testator's mind must have done so for the purpose of causing him to alter his testamentary dispositions. If the will were so vitiated, it would thus be because

the testator had not acted as a free agent. See *Kunicki v Hayward* [2017] 4 WLR 32 at [122].

124. In closing submissions, Mr Myers submitted with some force and in my view some justification that it was far from clear which of the pleaded allegations on undue influence or fraud were being pursued by the claimants. Mr McKean's closing submissions on this aspect of the claim, both written and oral, were brief.

125. I will say at the outset that it was not directly put to the defendants that they made knowingly false statements to their father for the purpose of causing him to alter his testamentary dispositions, i.e., to cause him to make the 2018 Will. The claimants ask the court to infer that the defendants represented to him that the claimants knew that he was in hospital but chose not to visit, and that the claimants did not love or care for the deceased. My assessment of Fred's feelings about the lack of contact with the claimants and the cause of those feelings is set out at [103] above. It is most likely that given the changed circumstances following Fred Junior's death and the limited contact with the claimants after then that Fred became disappointed with the claimants. That he felt such disappointment is consistent with Terri's evidence that when she once forgot his birthday he called her to tell her that he was upset. This is consistent with the close relationship it appears that they had. By the time the 2018 Will was made, there was not as I find it that sort of closeness with the claimants or their families. The explanation given by Fred to Mrs Farooq as to why he was reducing the grandchildren's gifts was most probably an accurate reflection of subjective feelings he had developed towards the claimants through changed circumstances (and whether or not those feelings were objectively reasonable), and not the result of the defendants having poisoned his mind.

126. I also do not doubt that there were conversations between the defendants and their father in which Carol was criticised as being too interested in money. Zara Thorn gave evidence to this effect, and Terence said in his witness statement that his father had told him several times that he 'saw right through Carol'. This has run like a theme through the defendants' case and this was clearly their own perception about Carol. This is vividly evidenced by Daniel's somewhat unpleasant words to Carol at the will reading. But it was not pleaded or put in cross-examination that the defendants made untrue statements to their father in this regard in order to persuade him to cut out the claimants from his will. Further to the point made in the paragraph above, however, I do find that Fred had (again, whether or not objectively reasonably) become disenchanted with the claimants collectively and not just with Carol. I find that he perceived an emotional distance had grown between them.

127. The pleaded case on undue influence begins by alleging that Fred was vulnerable to undue influence from 2017 because of his age and physical (and

mental) condition, his physical and social isolation, inability to communicate and the positive actions of the defendants to isolate him. I accept that his frail physical condition, and his social isolation, made him vulnerable. I have already found that he was able to communicate, and that the defendants did not seek to isolate him from the claimants; as I have found that happened because of the life circumstances of the claimants and their families.

128. The claimants then plead that Fred was dependent on the defendants and reposed trust and confidence in them. I accept that was so, especially with regards to Susan who was his full-time carer for several years but, as I indicate below, I do not consider this in all the circumstances to be a cause for suspicion. Whilst I find that the defendants knew that the 2018 Will was being made and, on a balance of probabilities, knew its key terms when it was being made, I again do not consider this to be an indicia of undue influence or fraud when considered with the matters set out below and the lack of any positive evidence of coercion.

129. The claimants then plead that the defendants exercised control over Fred in the relevant period, in ten respects. As Mr Myers invited me to do, I consider each in turn:

i) First, it is said that the defendants exercised emotional control over Fred by telling him upsetting stories, including the matter I refer to at [5] above. This serious allegation was not pursued. I have found that the defendants did not say things about the claimants and in particular about Carol which they knew or believed to be untrue for the purpose of causing him to make the 2018 Will.

ii) Secondly, it is said Fred confided to Daniel that the defendants had in or around early 2017 attempted to "make" him change his will and that Daniel repeated this to Christine. It suffices to say that this allegation was not pursued with either Terence or Susan. What was put to them was that they knew that a draft will was being prepared, which is a very different matter.

iii) Thirdly, it is alleged that at Fred Junior's funeral Terence assured Carol that her father's third of the estate would pass to the claimants. My findings in this regard are at [55] above. There was no indication from Terence that he was able to, or could, exercise control over his father's testamentary affairs.

iv) Fourthly, it is alleged that the defendants hid the 2018 Will from the claimants by (Susan) refusing to allow the claimants to be alone with Fred when they visited him on 8 December 2018. I find that Susan's presence during the claimants' very occasional short visits to Fred is

explained by her role as Fred's carer, and that he looked to her for support in the presence of others as he became more frail, rather than any more sinister motive.

v) Fifthly, it is alleged that Terence occupied his father's home against his wishes. Whilst their relationship had previously had its difficulties, I find that they were genuinely close in Fred's Senior's latter years, as evidenced by the right of occupation given to Terence in the 2011 Will. By then, Terence had lived in the Isle of Wight for some years.

vi) Taking together the sixth to eighth factors relied on, the claimants allege that Susan requested in 2017 that she be given advance notice of any meeting with or between the claimants and their grandfather. It is alleged that Susan monitored each meeting and ensured that she was present and refused to allow the claimants to be alone with Fred. As I have indicated, the suggestion that Susan coerced her father into making a will he did not want to make was not seriously pursued in cross-examination. I am satisfied as explained above that the likeliest reason for Susan's presence is that she was with her father much of every day in any event, and the claimants' visits were infrequent and brief in any event.

vii) Ninthly, it is said that the steps taken by the defendants to prevent the claimants from visiting Fred in hospital are an indicia of undue influence. There is no evidence that anyone positively prevented such visits; I consider the fact that the claimants were not informed of Fred's stays in hospital is because of their frequency, and because contact between the parties had stopped in any event. Furthermore, on admission to hospital, he was seriously unwell. As Susan said in evidence, each time he went in she thought it would be the last time. I do not consider the March 2019 hospital visit to be directly relevant – this was some months after the making of the 2018 Will and it appears to have been believed that Fred would not survive long. It is inherently improbable that Susan did not tell Carol or the other claimants that he was in hospital because she feared he would tell them that he had been forced to make a will he did not want to make and far more probable that she did not do so because she had fallen out with Carol and was preoccupied with her father's condition. I also find that the claimants were asked not to visit on a second day in March 2019 because Fred was very unwell and indicated that he had had too many visitors.

viii) Finally, it is said by the claimants that the involvement of the defendants and the process by which the draft will was repeatedly redrafted even though Fred had approved the 2017 draft, shows undue influence. I do not entirely understand this point. The will was not repeatedly redrafted; it was redrafted once with relatively minor amendments. I have found

that the defendants did not 'approve' the contents of the 2018 Will before it was executed, even though I consider that they knew it was being made and, on a balance of probabilities, knew that it cut out the claimants from substantial benefit.

130. There is another point about the timescale. I have commented in the context of the arguments on knowledge and approval of the 2018 Will that there was a period of more than 18 months from the creation of the draft 2017 will, which was sent to Fred for execution but not in the event executed, and the process by which the 2018 Will was prepared and made. If the defendants had coerced their father into cutting out the claimants contrary to his true wishes, that coercion must presumably have occurred at least in part before the 2017 draft was made because that is when the significant change was first indicated. And, if that were so, a question would naturally arise about the cause of the delay between March 2017 and November 2018. The long delay might have been caused by the testator not wanting to think about his demise, or considering not making the new will in such terms, or just because he simply did not get around to it, especially during 2018 when he was increasingly frequently hospitalised. Putting aside the claimants' difficulty in that none of this was explored in evidence, it seems to me that any of the above explanations are more likely than the presence of undue influence.

131. The claimants also plead that Terence had a financial incentive to increase his share of the estate. It was not suggested that there was any particular reason for this in 2017-2018. The claimants also did not pursue the allegation that Terence had been physically violent to his father, or that they were not close in his final years. I have borne closely in mind that I have found Terence's evidence to be less than completely truthful on his knowledge of the terms of the 2018 Will. I consider this to be a result of his defensive and aggressive response to the allegations made against him. It does not lead me to the view that the pleaded indicia of undue influence are the most probable explanation for the 2018 Will having been made in its terms.

132. Susan was the person closest to her father, both emotionally and also literally because she was his full-time carer at a time when he had great care needs. It was put to her that she controlled her father, but I have found that not to be the case. She was the one with the real opportunity to coerce her father. There was no suggestion to either defendant that they had planned any coercion together. Given her almost constant presence, it is hard to imagine how Terence could have coerced his father without Susan's awareness and involvement. It seems to me to be very relevant that it was not put to Susan that she had coerced her father into making a will that did not reflect his true wishes.

133. As will be apparent from my discussion above of the factors relied on by the claimants, the evidence does not come close to persuading me that it is more

likely than not that the 2018 Will was procured by the undue influence (or fraud) of the defendants or either of them.

Conclusion

134. I am satisfied that Frederick Ward had testamentary capacity when he made the 2018 Will and that he knew and approved it. On a balance of probabilities, and by some considerable margin, I find that he made the 2018 Will as a free agent and that it was not vitiated by undue influence or fraud.

135. The claim will therefore be dismissed.