Neutral Citation Number: [2018] EWHC 2476 (Ch)

HC-2017-001771

Case No: HC 2017 01771

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

Royal Courts of Justice
The Rolls Building
London EC4A 1NL

Date: 24/09/2018

Before :

MASTER SHUMAN

- -

Between :

(1) JANE GOSS-CUSTARD	Claimants
(2) SARAH EDWORTHY	
- and -	
(1) LESLEY TEMPLEMAN	Defendants
(2) MICHAEL RICHARD TEMPLEMAN	
& OTHERS	

- -
- -

The First and Second Defendants (acting in person)
Alexander Learmonth, (instructed by Foot Anstey LLP) for the Claimants

Hearing dates: 23 March 2018

- -

Approved Judgment

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

.....

MASTER SHUMAN

MASTER SHUMAN :

1. The claimants by claim form issued on 16 June 2017 seek an order pronouncing for a will dated 22 August 2008 ("the 2008 Will") of Sydney William Baron Templeman of White Lackington ("the deceased") in solemn form. The 1st and 2nd defendants defend the claim on the basis that the deceased lacked testamentary capacity and that therefore the 2008 Will is invalid. They have also counterclaimed for an order pronouncing for the will dated 25 April 2001 ("the 2001 Will") and the codicil to it dated 3 December 2004 ("the 2004 Codicil"). There are 12 defendants to the claim but only the 1st and 2nd defendants defend the claim and have brought a counterclaim.

2. This is the 1st and 2nd defendants' application made by application notice dated 23 August 2017 for an order that the court pronounce against the 2008 Will by way of summary judgment.

3. The application is supported by: two witness statements of the 1st defendant dated 21 August 2017 and 9 January 2018; and two witness statements of the 2nd defendant dated 21 August 2017 and 9 January 2018. The application is opposed by the claimants and the 1st claimant has filed a witness statement dated 14 December 2017. The 2nd claimant has filed a witness statement dated 14 December 2017. The claimants also rely on statements from five witnesses and an expert report of Professor Robert Howard dated 20 September 2017, on the deceased's testamentary capacity.

Summary Judgment

4. Pursuant to CPR 24.2 a court may give summary judgment on the whole of a claim or on a particular issue if:

> "(a) it considers that—
>
> (i) the claimant has no real prospect of succeeding on the claim or issue; or
>
> (ii) the defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

5. In the notes to Volume 1 of the White Book 2018 at 24.2.3 it is commented that,

> "In order to defeat the application for summary judgment it is sufficient for the respondent to show some "prospect", i.e. some chance of success. That prospect must be "real", i.e. the court will disregard prospects which are false, fanciful or imaginary. The inclusion of the word "real" means that the respondent has to have a case which is better than merely arguable". … The

> respondent is not required to show that their case will probably succeed at trial. A case may be held to have a "real prospect" of success even if it is improbable. However, in such a case the court is likely to make a conditional order…"

6. The hearing of a summary judgment application is not a summary trial. The court will therefore only consider the merits of the respondent's case to the extent that it is necessary to determine whether it has sufficient merit to proceed to trial. As Lord Hope of Craighead said in Three Rivers DC v Bank of England (No 3) [2003] 2 AC 1 at paragraphs 94 -95,

> "94. For the reasons which I have just given, I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is — what is to be the scope of that inquiry?"
>
> 95. I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in Swain v Hillman , at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all."

7. The criterion to be applied by the court under CPR 24, unlike a trial, is not one of probability but the absence of reality.

8. The evidential burden is on the applicant to establish that there are grounds to believe that the respondent has no real prospect of success and that there is no other reason for a trial. If credible evidence is adduced in support of the application then the respondent becomes subject to an evidential burden of proving some real prospect of success or some other reason for a trial. The standard of proof is not high. As the notes to the White Book 2018 24.2.5 emphasise,

> "the Court hearing a Pt 24 application should be wary of trying issues of fact on evidence where the facts are apparently credible and are to be set against the facts being advanced by the other side. Choosing between them is the function of the trial judge, not the judge on an interim application, unless there is some inherent improbability in what is being asserted or some extraneous evidence which would contradict it".

9. The other limb of the summary judgment test must also not be overlooked, that there is "no other compelling reason [for] a trial". This is a claim in which the claimants seek a pronouncement for the force and validity of the 2008 Will and the 1st and 2nd defendants by this application seek an order pronouncing against the 2008 Will. The court will only make a grant in solemn form if it is satisfied on the balance of probabilities that the testator was free to make the will, had the requisite testamentary capacity and knew and approved of the contents of the will. Mr Baron Parke in Pendock Barry v James Butlin (1838) II Moore, PC 480, 482 ,"the onus probandi lies in every case upon the party propounding a Will; and he must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable Testator". Mr Justice Henderson in Cushway v Harris [2012] EWHC 2273 (Ch) at paragraph 8, commented, "the court always has a supervisory, and to some extent, investigatory, jurisdiction in probate matters".

THE BACKGROUND

10. The deceased was born on 3 March 1920 and died on 4 June 2014, aged 94 years. He was an eminent judge and retired from being a Law Lord in 1994. The deceased married Margaret Rowles in 1946 and she died on 21 August 1988. They had two children, the 2nd and 3rd defendants, who are the only children of the deceased and the residuary beneficiaries named in the 2008 Will. The 2nd and 3rd defendants are also the residuary legatees under the 2001 Will and the 2004 Codicil.

11. The 1st defendant is married to the 2nd defendant and she is now the sole executrix of the 2008 will; the other executrix, Ann Templeman ("Ann"), having renounced her role. I am told that the 1st defendant obtained a grant of representation dated 23 June 2016 limited for the purpose of collecting getting in receiving the estate and doing such acts as may be necessary for the

preservation of the same. The 1st defendant is the sole executrix appointed under the 2001 Will.

12. The 4th to 12th defendants are legatees under the 2004 Codicil but not under the 2008 Will.

13. On 12 December 1996 the deceased married his second wife, Sheila Edworthy ("Sheila"). He was her third husband. Sheila had a son, Bruce, from her first marriage to Tony Hughes ("Tony") and two step-daughters, the claimants, from her second marriage to Dr John Edworthy ("John").

14. Between 1974 and 1975 Sheila had the property known as Mellowstone, 1 Rosebank Crescent, Exeter, Devon EX4 6EJ ("Mellowstone") built in the paddock adjacent to the house where she lived with Tony until his death in 1970. In August 1974 Sheila married John. They lived at Mellowstone with Bruce. In the early 1980's a property known as Rock Bottom, Rock, Cornwall ("Rock Bottom") was purchased and vested in Bruce's name. Bruce moved into a nursing home in 1994. John died in 1995.

15. At some stage prior to Sheila's marriage to the deceased she employed Leslie Woods and Ann Chave (now Ann Woods) to help with running Mellowstone. They worked for Sheila and then the deceased for around 20 years.

16. After the deceased and Sheila married he sold his Woking house for £815,000, dividing the net proceeds between the 3 beneficial owners: the deceased, the 2nd defendant and 3rd defendant. The claimants assert that the deceased gifted a proportion of the sale proceeds to the 2nd defendant and the 3rd defendant. The deceased moved into Mellowstone. It is the claimants' evidence that Sheila paid all of the household bills and the deceased paid for holidays and outings. This they say is the same arrangement that had existed between Sheila and John.

17. The deceased made a number of wills between 1982 and the 2008 Will. The 2001 Will was prepared by Crosse and Crosse, solicitors, of 14 Southernhay West, Exeter ("CC"). The deceased appointed the 1st defendant to be the sole executrix and trustee of the will. He gave the sum of £50,000 and all of his personal chattels to Sheila. Clause 3 (2) provided "I have found great happiness in both my marriages and it is at the request of my said Wife that I leave the remainder of my estate to my family by my first wife Margaret."[1] He gave his tiara to Sheila, the 1st defendant and Ann jointly. The residue of his estate was given to the 2nd and 3rd defendants with gifts in substitution.

18. The deceased made a subsequent will on 14 April 2003. However the 2nd defendant submits that "it is common ground that this will is of no importance to the dispute before the court" as the deceased made the 2004 Codicil which was a codicil to the 2001 Will.

[1] The deceased's will dated 4 August 1997 also contained this clause.

19. Bruce died on 24 October 2004 and his estate passed to Sheila. The gross value of the estate was £2,456,764[2]. On 23 November 2004 Sheila entered into a deed of variation transferring Rock Bottom to the claimants and the 6th defendant, who is the 1st claimant's daughter.

20. On 3 December 2004 Sheila executed a will. On the same day the deceased made the 2004 codicil. The 1st defendant emphasises that the effect of these testamentary documents was: (i) Mellowstone was not left to the claimants by either Sheila or the deceased; (ii) the deceased's grandchildren would each inherit £20,000 free of IHT directly from Sheila's estate if the deceased predeceased her or indirectly from Sheila's assets if the deceased survived her and inherited Mellowstone; (iii) Sheila left Mellowstone to the deceased, if he survived her. By the 2004 codicil the deceased left £20,000 to each of his 6 grandchildren and £120,000 to Sheila's 5 residuary beneficiaries (£42,000 to Christopher Blasdale, £24,000 to the 6th defendant, £18,000 each to the claimants and the 6th defendant), should he inherit Mellowstone from Sheila.

21. The 2nd defendant submits there is evidence that the deceased's memory began to deteriorate by about May 2006. The deceased's GP patient record has an entry on 24 June 2008 by Dr Duncan McFadyen "memory loss symptom – for short-term last year or two". In an email from Richard Jacoby to the 1st claimant and the 2nd defendant dated 27 September 2015 he said that he took his brother, Robin Jacoby, to visit Sheila and the deceased in 2006 and on the way home Robin commented to Richard that the deceased was perhaps showing early features of age-related memory loss. Robin Jacoby is Professor emeritus of old age psychiatry and provides expert reports to the court on testamentary capacity. However this is a comment recorded by his brother in an email written 9 years later. Richard also commented that he had a vague recollection, although Sheila and the deceased never discussed the details of their own wills with him, that Mellowstone was a house that Sheila had built as Mrs Edworthy and that it would pass to her step-children, the claimants. The 2nd defendant also relies on an email that was sent by the 1st claimant to him on 14 July 2008 where she informs him that Dr Richard Jacoby felt very strongly that the deceased should not drive anymore because of his short-term memory loss and because he is probably a bit depressed at the moment. David Merrick ("DM"), the solicitor at CC who drew up the 2008 will, noted on 19 August 2008, "at times it seems as though his short-term memory was not as good as when they last met [on 11 August 2008]. DM wondered whether seeing him later on in the day and whether he was more tired might be the reason". Although this immediately follows a note that, "His thinking and logic about the estate seemed faultless".

22. On 11 June 2008 Sheila died. The 1st and 2nd defendants plead that the deceased was shocked by her death, not grasping that she was dying, and was grief stricken.

23. Under Sheila's will the deceased inherited Mellowstone. In August 2008, probably early in the month, the deceased had a conversation with the 2nd claimant, asking her who owned Mellowstone. She told him that it was his

[2] Grant of Probate dated 10 February 2005, extracted by CC.

home and Sheila had left it to him in her will. The deceased's response was to say, "This is not right" and he told her that he would arrange to see his solicitor to put it right. The 1st and 2nd defendants consider this to be significant. Had the deceased remembered the events of October to December 2004 he would have known that their joint wishes were reflected in Sheila's will and the 2004 Codicil.

24. In August 2008 the deceased instructed DM to prepare a new will for him. The will file is in the bundle before me.

25. On 30 March 2016 DM was struck off the roll of solicitors. The charges do not relate to this case. They included allegations of dishonesty, that DM created bills for work that had not been carried out and withdrew money from client account for fees that were not due and failed to deliver bills to clients. DM has also been involved in an accident which may have affected his recollection of events although there is no medical evidence before me.

26. On or about 11 August 2008 the deceased and DM met, testamentary instructions were given. The meeting lasted 42 minutes. The key instructions were that Mellowstone and the household chattels were to be given to the claimants and the residue to be divided in equal shares between the 2nd and 3rd defendants. There is a manuscript note of the instructions. Further there is a typed up attendance note which starts, "DM attending Lord Sydney Templeman at his request to complete a Will. He seems very much better, while still obviously upset by the death of Sheila and was much more willing to engage in conversation." This certainly suggests that DM had some contact with the deceased before 11 August 2008. CC suggest that a phone call was made on 9 August 2008 either by the deceased or on his behalf. There is no reference in the manuscript note or this attendance note to the 2001 will and the 2004 codicil, although the claimants plead that DM has confirmed that his normal practice was to refer to previous wills and codicils. He believes that the deceased had copies of his previous wills with him at the time he gave instructions and referred to them. The Manuscript note records under cremation "similar as before - memorial service". The attendance note records "funeral arrangements as are set out previously in 2003". This is a reference to a letter dated 5 May 2003 which sets out the final arrangements for Sheila and the deceased and is signed by both of them. On 13 August 2008 DM sent a letter to the deceased setting out the testamentary instructions. By this stage a draft will and letter of wishes had been drafted. The provisions of the will were straightforward. On 19 August 2008 there was a further meeting between DM and the deceased. That meeting lasted 30 minutes. The draft will was discussed and the deceased explained the reasoning for his testamentary instructions. He felt it was only right that the claimants should benefit from Mellowstone as it was their home. He then wanted to ensure that his own assets were shared between his children. A copy of the will and the letter of wishes was sent to the deceased on 20 August 2008.

27. On 22 August 2008 DM together with a CC employee, Elaine Tadd now Mrs Davis, attended Mellowstone. The 2008 will was executed by the deceased and witnessed by DM and Miss Tadd. A copy of the executed 2008 Will and the letter of wishes was sent to the deceased on 26 August 2008.

28. On 6 November 2008 the deceased signed a letter to DM asking him to send a copy of the 2008 Will and a copy of Sheila's will to the 1st defendant.

29. On 4 June 2014 the deceased died.

30. Larke v Nugus requests were made independently by the 1st defendant and Foot Anstey solicitors ("FA") on behalf of the claimants. CC replied by letter dated 16 September 2015. CC referred to DM having suffered severe PTSD following an accident at sea in May 2013 and that since late 2013 he had been signed off by his doctor as unfit to work. They did not say that he had been suspended by the firm on about 5 December 2013 and that there was an investigation being carried out by SRA. The letter records that DM had been able to provide some additional information from his recollection and having seen copies of the file papers, relayed via his wife, also a practising solicitor. The 2nd attesting witness, Elaine Davis, was able to provide information.

31. The 1st and 2nd defendants' defence paragraph 30(1) pleads that Sheila instructed CC from time to time to give her legal advice. I am unclear of the connection between CC and the Hughes trusts, whether they acted as trustees, were instructed by the trustees or simply acted for Sheila. In any event there was a long standing relationship between Sheila and CC. CC's letter records that DM had no doubt about the deceased's capacity to make the 2008 Will.

32. CC have also provided a statement from Mrs Davis dated 4 August 2016 setting out her recollection of the execution of the 2008 will.

THE APPLICATION

33. The 1st and 2nd defendants challenge the 2008 will on the basis that the deceased lacked testamentary capacity both when he gave will instructions on 11 August 2008 and when the will was executed on 22 August 2008. This is pleaded in sub-paragraphs 2(3) and (4) of the 1st and 2nd defendants' defence dated 2 August 2017. I infer from the manner in which the application has been presented that it is also their case that the deceased lacked testamentary capacity on 19 August 2008 when the deceased discussed the draft will with DM and his rationale for the will instructions, although this is not specifically pleaded. The claimants admit that the deceased had mild short-term memory impairment in 2006 but deny that it was so severe as to deprive the deceased of testamentary capacity: paragraph 17a of the defence to counterclaim.

34. The 1st and 2nd defendants must adduce credible evidence in support of the application before the evidential burden transfers to the claimants to prove some real prospect of success or some other reason for a trial.

35. The test of testamentary capacity remains that set out by Cockburn CJ in Banks v Goodfellow (1869-70) L.R. 5 Q.B. 549 at 565,

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

36. In Hawes v Burgess [2013] EWCA Civ 94, which was an unsuccessful appeal from a probate trial, Mummery LJ at paragraph 14,

> "… The freedom of testation allowed by English law reads that people could make a valid will, even if they are old or infirm or in receipt of help from those who they wish to benefit, and even if the terms of the will are hurtful, are grateful or unfair to those whose legitimate expectations of testamentary benefit or disappointed. The basic legal requirements for validity are that people are mentally capable of understanding what they are doing when they make their will and that what is in the will truly reflects what they freely wish to be done with their estates on their death."

37. The 1st and 2nd defendant submit that the deceased's lack of testamentary capacity is made clear by contemporaneous documentary evidence and that this evidence is confirmed in paragraphs 18 and 19 of the 2nd claimant's witness statement dated 14 December 2017. The relevant parts of the 2nd claimant's statement are:

> "18 During one of my stays with Sydney in 2008, when we talked about Mellowstone, he asked who it belonged to. I reminded him that it was his home, as Sheila had left it to him in her will. He said to me that "this is not right", he went on to say that Mellowstone was my family home and he felt it did not belong solely to him. He said he would arrange to see his solicitor to put it right, so he organised a visit. I was not present at this visit and we didn't talk about his will specifically after that, but I did know that he had made arrangements that Mellowstone would come to Jane and I. I have a very open and honest relationship with Sydney.
>
> 19 I do not believe that Sydney had really forgotten that he had been left Mellowstone, the conversation was more like he was mulling things over. His memory was not a concern to me at the time and it certainly didn't trigger any worry. Sydney was very clear about his view that

> Mellowstone was mine and Jane's family home and in his view, we should have the property when he died."

38. In his submissions the 2nd defendant argued that the conversation relayed by the 2nd claimant was impossible if the deceased had remembered the 2004 Codicil. He put it with some force that this conversation was "game, set and match" as "no-one with testamentary capacity could have said what [the 2nd claimant] says". The necessary and only conclusion the 2nd defendant says to be drawn from this was that the deceased lacked testamentary capacity: he did not change his mind, he had forgotten about what happened in 2004.

39. However, in Simon v Byford [2014] EWCA Civ 280 the issue on appeal was whether the deceased had testamentary capacity and knew and approved the contents of her will. The trial judge found that she did and upheld a will that she made in December 2005. The deceased had made a number of wills before the disputed will. The trial judge made a finding that the deceased always insisted on treating her children equally. She had tried to be fair in helping her children financially but thought it was time to review the position in order to 'level her children up'. It was common ground that from 2001 her mental health deteriorated. By December 2005 she was suffering from mild to moderate dementia. However as is often the case she had good days and bad days. In her previous will she had left shares in a company and a Westcliffe flat to her son Robert. The judge found that it was just possible that her long-term memory enabled her to remember how her previous will benefitted Robert but it was very unlikely. The trial judge found that she was not capable of remembering her reasons for preferring Robert in her previous wills but nevertheless pronounced for the 2005 will. The appeal was dismissed. Lewison LJ made the following observations which are relevant to the issues before me,

> "40. … capacity depends on the potential to understand. It is not to be equated with a test of memory. …"

> "41. He did not say that the testator must actually remember the extent of his property. Mrs Simon did in fact remember the extent of her estate, partly as a result of executing the deed of gift, and partly as a result of the discussions that followed. In my judgment, when the judge said that Mrs Simon was not "capable" of remembering why her earlier will had benefited Robert, he meant no more than that she had forgotten. Once I knew the dates of all the Kings and Queens of England, and the formula for Hooke's law; and was "capable" of remembering them. Now I would have to look them up. The judge's important finding was not that Mrs Simon had forgotten the terms of and reasons for her earlier will. It was that she was capable of accessing and understanding the information; but chose not to. Her decision to benefit her children equally was a perfectly

> rational decision, which many parents would make even if their children were in different financial circumstances. …"
>
> 43. Ms Reed's more substantial point was that by dividing her shareholding equally between her children Mrs Simon must have overlooked the reason why in her earlier wills she had left them all to Robert. Although she might, with the help of an explanation, have been able to understand why she had done that, in the absence of an explanation she could not. Thus while she might have understood that she owned the shares (as was apparent from the deed of gift) she did not understand their significance. Their significance was that if they all went to Robert then deadlock in the company would be prevented; whereas if divided equally among the children deadlock was possible. …
>
> 44. Although Ms Reed did not put in quite this way it seems to me that the question that divides the parties is whether a testator or testatrix must not only be capable of understanding what assets are at his or her disposal and the persons who have claims on those assets, but must also understand not simply the direct consequences but also the collateral consequences of disposing of them in one way rather than another. …
>
> 45. I do not believe that previous authority goes to the length of requiring an understanding of the collateral consequences of a disposition as opposed to its immediate consequences. Nor do I think it desirable that the law should go that far. …"
>
> 46. The significance of the shares on their own was slight. What gave them significance (at least to Robert) was the fact that, combined with his existing shareholding in the company, acquisition of Mrs Simon's shares would give him the power to avoid deadlock. But that would have required Mrs Simon to have understood (and remembered) not only what her own estate was, but also what Robert's assets were. I do not think that any of the authorities requires as a condition of testamentary capacity that the testator should understand or remember the extent of anyone else's property. …"

40. Counsel for the claimants reminds me that in Banks v Goodfellow Cockburn CJ specifically referred to the case of Stevens v. Vancleve where it is said,

> "The testator must, in the language of the law, be possessed of sound and disposing mind and memory. He must have memory; a man in whom the faculty is totally extinguished cannot be said to possess understanding to any degree whatever, or for any purpose. But his memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons, or the families of those with whom he had been intimately acquainted; may at times ask idle questions, and repeat those which had before been asked and answered, and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigour of intellect to make and to digest all the parts of a contract, and yet be competent to direct the distribution of his property by will."

41. I do not accept the 1st and 2nd defendants' submissions that the 2nd claimant's evidence is "game, set and match". I certainly agrees that it raises issues that require investigation and a finding as to whether the deceased was 'possessed of sound disposing mind and memory'. This militates firmly in favour of a trial not a summary disposal.

42. As to the documentary evidence the 1st and 2nd defendants rely on: (i) a file of correspondence by Peter MacDonald ("PM"), a partner at CC, in December 2004 and January 2005; this relates to Sheila's last will and the 2004 codicil; and (ii) the will file.

43. As to PM's file the 1st and 2nd defendants consider the letter from the deceased to PM dated 29 December 2004 to be significant.

> "Sheila is anxious for me to be free to live at Mellowstone if I survive her or to sell and spend the proceeds. She values Mellowstone at £400,000 which will incur inheritance tax of £160,000 on her death if she survives me, leaving £240,000. She divides this between my grandchildren at £20,000 each making £120,000 in all and £120,000 to her residue which should be something like one million or £800,000. She does not require me to make any particular disposition of Mellowstone or its proceeds of sale if I survive her but by my codicil I have restored the £20,000 for each of my grandchildren and restored the £120,000 for Sheila's residue whether or not I retain Mellowstone or any of its proceeds when I die. Sheila has made ample provision for the Edworthy, and Hughes families and I have made ample provision for my family."

44. The 2nd defendant submits that the importance of this is apparent when it is put in its factual context. In December 2004 Sheila had gifted Rock Bottom to the claimants and the 6th defendant. Had the deceased "had such a huge change of mind" he would have explained that to DM in 2008. Indeed he goes further to conjecture that had the deceased been asked to leave Mellowstone to the claimants in early 2005 he would not have done so. The 2nd defendant made a number of hypothetical comparisons of what the deceased would have said had he been asked about his testamentary dispositions in early 2005 with what he would have said if the 2008 reflected his true testamentary intentions. As I commented to the 2nd defendant during the hearing conjecture of hypothetical comparisons are unhelpful, especially in a summary judgment hearing.

45. DM's file records that on 11 August 2008 the deceased "seems very much better, while still obviously upset by the death of Sheila and was much more willing to engage in conversation. … He wishes Mellowstone and the household chattels to pass to Jane and Sarah". On 19 August 2008 DM records "DM discussing with Lord Templeman the Will DM had drafted. He felt it only right that Jane and Sarah should benefit from Mellowstone as it was their home. He wants to ensure that his own assets then are shared between his children…" In a gifting note dated May 2009 the 1st defendant accepts that the deceased instructed her to write "Mellowstone is being left to Jane and Sarah in my will (subject to inheritance tax)".

46. The 2nd defendant submits that no evidence can change the case for the claimants; when the deceased said that he would put right a wrong there was no wrong to put right. He relies in particular on Re Bellis (45 TLR) 452. A woman aged 93 years had a solicitor prepare a will which she executed a few months before her death altering the principle of equal division of her property between her children. It was held that she entertained an illusory belief that she had benefitted one daughter far more than the other. Her memory had so far failed that she could no longer remember her past actions towards her daughters so as to displace illusory notions. The court pronounced against the will as she did not have a disposing mind and understanding within the meaning of Banks v Goodfellow when she made that will. The 2nd defendant took me to passages within the judgment to support his case that the deceased had an illusory belief in 2008 that he was putting right a previous wrong; Mellowstone was not his home and it should be left to Sheila's step-children. These are all valid points but at trial not on a summary judgment hearing. As the 1st and 2nd defendants say the deceased was a fair minded and honourable man and a generous man. Whether he had the requisite testamentary capacity to make the 2008 Will needs testing in evidence and findings of fact made. I note that the judge in Re Bellis had the benefit of hearing the evidence of witnesses familiar with the deceased in everyday life. He was able to assess that evidence against that of the plaintiff and the solicitor who prepared the will.

47. There is a fundamental issue between the parties about the state of the deceased's mental health in 2008. I have referred to the 1st and 2nd defendants' case at paragraph 21 above. In addition they point to DM's file,

for example, to a note on 19 August 2008 that "at times it seems as though his short term memory was not as good as when they last met. DM wondered whether seeing him later on in the day and whether he was more tired might be the reason".

48. The claimants rely on the expert report of Professor Robert Howard dated 20 September 2017. He is a Professor of Old Age Psychiatry at University College London and Honorary Consultant Old Age Psychiatrist with Camden and Islington Mental Health Foundation Trust. He has been involved in research into dementia and psychosis in older people since 1991 and has published widely. Professor Howard was instructed to provide an expert opinion on the deceased's likely diagnosis and testamentary capacity. His opinion in summary is that,

> "I consider that Lord Templeman was probably suffering from a mild degree of dementia, caused by Alzheimer's disease, when he made his will in August 2008. On the balance of probabilities, I consider that he probably had adequate testamentary capacity to make a valid will at this point."

Professor Howard at page 6 comments,

> "From the descriptions of Lord Templeman in his clinical records, I would consider that he was probably at the earliest stages of diagnosable Alzheimer's disease in 2008. At this point I would consider that, had he been assessed within a Memory Service, the diagnosis of Alzheimer's disease would have been made and that Lord Templeman would probably have been considered to have been mildly affected by dementia. Because of his extraordinary premorbid intellectual ability, Lord Templeman would have had significant 'cognitive reserve'. This is a quality, seen in people with superior intelligence and high educational attainment, whereby the patient is able to compensate to some extent for the loss of cognitive function caused by the dementia. Such compensation only occurs at the early stages of the dementia and they will eventually reach a point where the loss of cognitive functions consequent upon the progressive neuropathology of the dementia overcomes their cognitive reserve."

Further he says,

> "based upon what I have been able to read in the medical records and by knowledge and experience of testamentary capacity assessments in patients who are mildly affected by Alzheimer's disease, I consider that Lord Templeman was likely to have had adequate capacity to make a valid will in August 2008. I consider

> that he was likely to have understood the nature of the act of making a will and its effects, that he would have been able to recall the assets that constituted his estate and that he would have been able to appreciate the claims of others upon his testamentary bounty."

49. The 1st and 2nd defendants are critical of the expert report. They refer to the fact that the original version was sent to them in February 2016 but has now been changed. When they asked for disclosure of documents that the expert relied on the claimants' solicitors refused to provide them. The 2nd defendant's submissions were that this report cannot "undo the conversation between Sarah and the deceased" and furthermore there is no reference to this conversation in the report. They were dismissive of the results of abbreviated mental tests in 2012. The deceased had scored 8.5 out of 10 in November 2012 and 8 out of 10 by February 2013. Professor Howard was not the deceased's treating physician. It may be that the evidence of the parties' witnesses may carry more weight. However this report supports the claimants' case that there is a triable issue and one that it cannot be said has no real prospect of success.

50. In addition the claimants have served witness statements from four witnesses and a witness statement from the claimants' solicitor who records DM's recollections as relayed to her by his wife. The witnesses include Leslie Woods and Margaret Ann Woods who worked for Sheila and the deceased. Not only do they describe the deceased both before and after the death of the deceased but Margaret offers perhaps an explanation as to why he decided in 2008 to gift Mellowstone to the claimants. The 1st and 2nd defendants are critical of the claimants' evidence. When Margaret says that the claimants were brought up in Mellowstone they point to the fact that they were adults by the time that Sheila moved into the property. Again these are issues that require testing in cross-examination. Mr Learmonth, counsel for the claimants, also submitted that it was impossible to say at this point whether DM would attend trial or not.

51. The 1st and 2nd defendants have also referred to seven 'oddities' in the 2008 Will, listed in paragraphs 17(1) to (6) and 18 of the 2nd defendant's first skeleton argument. For example, Ann was appointed co-executrix but not appointed under the 1982, 1996, 2001 and 2003 wills; legacies were reduced from £5,000 to £500. Again I accept that these are points that can be raised but at trial not for summary disposal.

52. The 1st and 2nd defendants' arguments are in effect asking me to do what I cannot do at the hearing of a summary judgment application, conduct a summary trial. The case presented on behalf of the claimants and the evidence that they rely on present facts that are credible. It is the task of the trial judge to choose between their facts and those presented by the 1st and 2nd defendants. I am not satisfied that what is being asserted by the claimants is inherently improbable.

53. Counsel for the claimants has also raised the point that the 2nd and 3rd defendants received lifetime gifts from the deceased in 2009 and 2011

amounting to £400,000, the implication being that the 2nd defendant was content to receive gifts from the deceased at a time when he says that the deceased lacked testamentary capacity. The claimants' defence to the counterclaim, settled by Mr Learmonth, at paragraph 5 goes further to assert that the 1st and 2nd defendants cannot have a bona fide belief that the deceased lacked testamentary capacity by 2008. In oral submissions that appeared to be being developed as a form of estoppel. This allegation has not helped the hostility in this case. The 1st and 2nd defendants are outraged by this, explain that the capacity necessary for inter vivos gifts is not the same as testamentary gifts and moreover these gifts can easily be explained away as gifts to the deceased's children. For the purposes of the summary judgment application I have disregarded this allegation. I consider it unhelpful and a distraction from the key issue as to the deceased's testamentary capacity in 2008. I do not at present see how it assists me to determine this issue. It may be that the claimants may wish to revisit how this part of their case is put.

54. Counsel for the claimants also raised the need for caution when the court is concerned with the reliability of human memory. He referred me to the decision of Leggatt J in Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 and his observations about evidence based on recollection at paragraphs 15 to 23 preferring where possible to base factual findings on inferences drawn from the documentary evidence and known or probable facts. At paragraph 23,

> "This does not mean that oral testimony serves no useful purpose - though its utility is often disproportionate to its length. But its value lies largely, as I see it, the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations of working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events."

Although this was in the context of the trial of a commercial case, caution about the fallibility of memory is still apropos. Although again I am not sure how this assists me given this factual matrix for the purposes of summary judgment.

55. In summary the 1st and 2nd defendants' case whilst put with care and thoroughness depends on the hypothesis that the deceased had no good reason to make the 2008 Will other than he was operating under an illusory belief that he was putting right a wrong that never existed. As Lewison LJ stated in Simon v Byford, "44. … the question that divides the parties is whether a testator or testatrix must not only be capable of understanding what assets are at his or her disposal and the persons who have claims on those assets, but must also understand not simply the direct consequences but also the collateral consequences of disposing of them in one way rather than another. …45. I do not believe that previous authority goes to the length of requiring an understanding of the collateral consequences of a disposition as opposed to its immediate consequences. Nor do I think it desirable that the law should go that far. …"

56. This case raises triable issues that require determination at trial after the judge has assessed all of the evidence before him or her. There is no inherent improbability in anything that the claimants have asserted or extraneous evidence that contradicts the claimants' case. As the 1st and 2nd defendants freely acknowledge summary judgment in a probate claim is unusual, although possible. However here given the issues raised by the parties I do not accept that the claimants have no real prospect of successfully establishing that the deceased had the requisite testamentary capacity to make the 2008 Will. Moreover given the issues raised I consider that there is a compelling reason for this claim to go to trial.

57. I will hear submissions from the parties on any further directions as to evidence but this claim will now proceed to be listed for trial.