Neutral Citation Number: [2020] EWHC 632 (Ch)

Case No: HC-2017-001771

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

In the estate of THE RIGHT HONOURABLE SYDNEY WILLIAM, BARON TEMPLEMAN OF WHITE LACKINGTON, deceased

Rolls Building
7 Rolls Buildings
Fetter Lane, London
EC4A 1NL

Date: 19/03/2020

Before :

THE HONOURABLE MR JUSTICE FANCOURT

- -

Between :

(1) JANE GOSS-CUSTARD **Claimants**
(2) SARAH EDWORTHY

- and –

(1) LESLEY TEMPLEMAN **Defendants**
(2) MICHAEL RICHARD TEMPLEMAN
(3) PETER MORTON TEMPLEMAN
(4) TIMOTHY BLASDALE
(as executor of Mr Christopher Blasdale, deceased)
(5) DAVID TEMPLEMAN
(6) GRACE GOSS-CUSTARD
(7) GAIL HEDLEY
(8) CLARE TEMPLEMAN
(9) LAURA TEMPLEMAN
(10) DEBORAH BUTTERY
(11) RACHEL CLARKE
(12) DAVID TEMPLEMAN

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- -

Alexander Learmonth (instructed by **Foot Anstey LLP**) for the **Claimants**
The Second Defendant in person and for the **First Defendant**
No attendance by or representation for the **Third to Twelfth Defendants**

Hearing dates: 20-24, 27, 28 January 2020

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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.

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THE HON. MR JUSTICE FANCOURT

Mr Justice Fancourt :

Introduction

1. This trial concerned the validity of the last will of Lord Templeman. The only issue is whether Lord Templeman had testamentary capacity when he executed the will before a solicitor and another witness in August 2008. This was a little under 6 years before his death in June 2014. The Claimants propound the 2008 will and the First and Second Defendants, the younger son and daughter-in-law of Lord Templeman, contend that it is invalid. None of the other Defendants challenges the validity of the 2008 will.

2. The effect of invalidity of the 2008 will would be that Lord Templeman's final will was one that he made in 2001, subject to a codicil of 2004. The principal difference in their effect relates to the house in which Lord Templeman had lived from the time of his second marriage, to Sheila Edworthy in 1996, until his death in 2014: Mellowstone, in Exeter.

3. In this judgment, for convenience, I shall refer to each of the family members involved in the events by their first names, with no disrespect intended to any of them. I shall refer to Lord Templeman by that name. The Defendants represented themselves at the trial, with the Second Defendant, Michael Templeman, performing the role of advocate on behalf of them both. I shall refer to him in that capacity as Mr Templeman. The Claimants were represented by Alexander Learmonth of Counsel.

4. Under the 2001 will and 2004 codicil, in the event that Sheila predeceased him and left Mellowstone to him under her will, Lord Templeman left £20,000 free of tax to each of his six grandchildren and £120,000 free of tax to Sheila's residuary beneficiaries. Any greater value of Mellowstone would fall into his own residuary estate, which was to be shared by his two sons, Peter and Michael.

5. Sheila died in June 2008, two months before the 2008 will was made, and Mellowstone was left to Lord Templeman by her last will.

6. By the 2008 will, Lord Templeman left Mellowstone to the stepdaughters of Sheila, Jane Goss-Custard and Sarah Edworthy. He left no legacies to his grandchildren or to Sheila's residuary beneficiaries and, after some modest gifts, the entire residue of his estate was left to Peter and Michael in equal shares.

7. The First and Second Defendants (hereafter "the Defendants") contend that there was, is and can be no rational explanation for the change that Lord Templeman made in his 2008 will as regards Mellowstone. They say that the explanation that he is recorded as having given to his solicitor, David Merrick, namely that the house really belonged to Sheila's family and should be left to them, was irrational and so was no good explanation at all.

8. It was irrational, they say, because the explanation given was equally the case in 2004, when Lord Templeman and Sheila made testamentary arrangements that did not leave Mellowstone to Sheila's family after the death of the survivor of them. Nothing had changed in that regard by 2008. Accordingly, it should be inferred that Lord Templeman had forgotten the arrangements made in 2004 and was acting under

an illusory belief that he had not provided in his will for the eventuality that he inherited Mellowstone from Sheila. That illusory belief provided a false premise for the 2008 will, namely that in fairness Mellowstone should be left to Jane and Sarah. By reason of that illusory belief, the argument proceeds, Lord Templeman did not sufficiently appreciate the relative nature and extent of the calls upon his bounty from his own family (sons and grandchildren) and from Sheila's family, and so he lacked testamentary capacity.

9. It is not in dispute that the 2008 will was rational on its face and duly executed; that Lord Templeman sufficiently understood the act of making a will and its effect, and sufficiently understood the extent of the property of which he was disposing. It is not in dispute that he knew and approved of the contents of the will. The basis of challenge to the validity of the will is therefore a narrow one.

10. It is common ground that Lord Templeman started to experience difficulty with his episodic (short-term recall) memory in 2006 and that it gradually deteriorated over the remaining 8 years of his life. Expert evidence now attributes this to early symptoms of dementia attributable to incipient Alzheimer's disease, though in fact Lord Templeman was never diagnosed with or treated for this disease during his lifetime. Apart from a short stay in hospital in early 2014, he continued to live in Mellowstone for the rest of his life, supported to an increasing extent by Jane and her husband, John, by Sarah and her partner Mike, and by professional nursing support only in 2014. It is equally common ground that Lord Templeman's working memory gave him no difficulty. He was able to capture and use information, converse and be witty and observant, however he would commonly forget what had been said earlier in a conversation or repeat himself.

11. There is therefore a broad question of fact about how serious the problem with Lord Templeman's episodic memory had become by August 2008. There is, more particularly, the question of whether Lord Templeman remembered, or had reacquainted himself with or was made aware of, the terms of his 2001 will and 2004 codicil when he made his 2008 will. If he was not aware of those documents and was indeed, as the Defendants submit, acting in the mistaken (or illusory) belief that he had not already provided for what was to happen to Mellowstone under his will, there is then a question of law as to whether such a mistaken (or illusory) belief negates testamentary capacity, on the basis that Lord Templeman did not sufficiently comprehend and appreciate the characteristics of his potential beneficiaries. It is convenient to deal first with the law relating to testamentary capacity in general terms.

Testamentary Capacity: the Law

12. It is agreed that the law relating to testamentary capacity is as set out by the Court of Queen's Bench in the case of Banks v Goodfellow (1869) LR 5 QB 549, as cited (with sub-paragraphing added) by the Court of Appeal in Sharp v Adam [2006] EWCA Civ 449. The requirements are:

> "…that a testator '[a] shall understand the nature of the act and its effects; [b] shall understand the extent of the property of which he is disposing; [c] shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, [d] 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."

In Burns v Burns [2016] EWCA Civ 37, the trial judge had paraphrased this formulation in more modern language, as follows:

> "[33] … the testator must:
>
> (a) Understand that he is giving his property to one or more objects of his regard;
>
> (b) Understand and recollect the extent of his property;
>
> (c) Understand the nature and extent of the claims upon him, both of those whom he is including in his will and those whom he is excluding from his will;
>
> (d) Ensure 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."

McCombe LJ in the Court of Appeal approved the paraphrase as accurately representing the law, though the Court of Appeal in Sharp v Adam had concluded that no reformulation of the language of Banks v Goodfellow was needed. I therefore approach the matter on the basis that the modern formulation is to the same effect as the original language and does not substitute any different test.

13. It is important to note that where, in the Banks v Goodfellow formulation, reference is made to the "understanding" or "comprehension" of the testator, that is not a reference to what they actually remember but rather a requirement that they have the capacity to understand and comprehend such matters: "capacity depends on the potential to understand. It is not to be equated with a test of memory…." (Simon v Byford [2014] EWCA Civ 280, at [40-42], per Lewison LJ).

14. That conclusion was reached following an earlier decision of the Court of Appeal, Hoff v Atherton [2004] EWCA Civ 1554; [2005] WTLR 99, which was concerned with the testamentary capacity of a testatrix and whether she knew and approved the contents of her will. Peter Gibson LJ said that testamentary capacity must not be conflated with knowledge and approval of the will and, at [34]:

> "Mrs Talbot Rice fastens on the words 'shall understand'and elevates that to a rule that actual understanding must be proved in every case of doubtful capacity. But in my judgment that is an over-literal approach to a judicial statement and one which ignores the subsequent words 'shall be able to comprehend and appreciate'. Further, it ignores other statements in the same judgment, such as the approval given at p557 to the words of

> Lord Kenyon in charging the jury in *Greenwood v Greenwood* 3 Curt App:
>
> > 'If he had a power of summoning up his mind, so as to know what his property was, and who those persons were that then were the object of his bounty, then he was competent to make his will.'
>
> See also the similar statements in *Stevens v Vancleve* 4 Washington at p267 (' was he capable of recollecting the property he was about to bequeath; the manner of distributing it; and the objects of his bounty?') and in *Harwood v Baker* 4 Moo PC 282 at p291 (' a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard, but he must also have capacity to comprehend the extent of his property, and the nature of the claims of others'), those statements being cited with approval by Cockburn CJ at pp568 and 569 respectively. If there is evidence of actual understanding, then that would prove the requisite capacity, but there will often be no such evidence, and the court must then look at all the evidence to see what inferences can properly be drawn as to capacity. Such evidence may relate to the execution of the will but it may also relate to prior or subsequent events. It would be absurd for the law to insist in every case on proof of actual understanding at the time of execution"

15. The Court of Appeal in Simon v Byford expressly held that capacity does not require a testator to remember the terms of a past will that they made, or the reasons why it provided as it did, as long as they are capable of accessing the information, if needed, and capable of understanding it if they had been reminded of it ([41]). Lewison LJ (with whom the other members of the Court agreed) held at [45] that it was not necessary for a testator to understand the collateral consequences of disposing of assets in one way rather than another, as distinct from the direct consequences.

16. The parties in this case agree that the legal onus of proving the validity of a disputed will falls on the party propounding it, and that if a will is rational upon its face and duly executed there is a presumption of testamentary capacity. Accordingly, the initial evidential onus is placed on the Defendants to adduce some evidence capable of showing that the deceased lacked testamentary capacity. If that onus is discharged, the evidential onus reverts to the Claimants to prove that the testator did in fact have testamentary capacity: Cattermole v Prisk [2006] 1 FLR 693. However, the modern approach is to address the question of capacity as an evaluation of all the evidence available to the court at the trial: Burns v Burns at [56].

17. It is agreed that: Lord Templeman's will was taken and prepared by an experienced private client solicitor, Mr David Merrick of Crosse + Crosse; that a first draft was prepared and sent to him for consideration; then discussed at a further meeting with Mr Merrick; then a final draft prepared, sent to Lord Templeman and read over by the

solicitor to him at a third meeting to obtain his approval. Mr Merrick recorded in his notes of the second meeting that "[Lord Templeman's] thinking and logic about the Estate seemed faultless".

18. In such circumstances, Mummery LJ (with whom Patten LJ agreed) concluded in Hawes v Burgess [2013] EWCA Civ 94; [2013] WTLR 453 at [57] that it would be a "very strong thing" to conclude that a testator lacked testamentary capacity because he did not "comprehend and appreciate the claims to which he ought to give effect". Mummery LJ continued at [60]:

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

In the current case, there is no expert evidence of lack of capacity. The only expert witness, Professor Howard, was called by the Claimants and testified that there was a relatively high degree of probability that Lord Templeman had testamentary capacity in 2008.

19. Nevertheless, the Defendants contend that lack of testamentary capacity is established on the basis of the documents and the undisputed evidence. They contend that this is a case in which an after-the-event opinion expressed even by an eminent psychiatrist cannot provide evidence as reliable as what is shown by the contemporaneous evidence. This, they say, establishes that Lord Templeman cannot have "comprehended and appreciated" the claims to which he ought to give effect, and that his will was being influenced by an illusory belief that caused him to make a disposition that he would not otherwise have made.

The Facts

20. There are very few disputed primary facts. The dispute between the parties is largely about the proper inferences to be drawn from the primary facts.

21. The Claimants themselves each gave evidence and were cross-examined by Mr Templeman, as was the husband of Jane, John Goss-Custard. Live evidence was also given on behalf of the Claimants by Mrs Eileen Turnham, aged 91, the sole surviving sibling of Lord Templeman. The Claimants also relied on the witness statements of Michael Samuel, the long-term partner of Sarah Edworthy; Richard Jacoby, who was Sheila's consultant rheumatologist during the last five years of her life and became a friend of Lord Templeman at that time; Robin Jacoby, Richard's brother and a

professor of old age psychiatry at Oxford University, who met the Templemans once; and Elaine Davis, who witnessed the 2008 will. None of these witnesses was cross-examined by the Defendants.

22. The Claimants also relied on hearsay evidence in writing of Mr Merrick, provided by his wife Christine Nicholl and Lucy Gill, a solicitor at Crosse + Crosse; Ann Woods, who was Lord Templeman's part-time housekeeper, and Leslie Woods, who was Lord Templeman's part-time gardener and handyman. I do not feel able to place reliance on the hearsay evidence of what Mr Merrick told others more recently. He suffered a traumatic injury in a sailing accident in 2013 and has had problems with memory since, and was unfit to give evidence in court. Further, he was struck off the roll of solicitors in 2016 because of dishonest conduct of a client's affairs. I give some weight to the other hearsay evidence, though none of it is of primary importance in forming my conclusions of fact.

23. The Claimants called Professor Robert Howard, a consultant old age psychiatrist, to give expert opinion evidence based on Lord Templeman's medical records and the factual evidence of his condition at various times. Professor Howard did not of course examine Lord Templeman during his life. He was cross-examined by Mr Templeman.

24. The Defendants both gave evidence and were cross-examined at length. They called no other witnesses and no expert opinion evidence.

25. I am satisfied that each of the witnesses who gave oral evidence was doing his or her best to remember what truly happened and that I can rely on most of what they said. There are, nevertheless, certain matters on which I believe that one or other witness is mistaken, either because of inaccurate recollection over the substantial passage of time since the events in question, or because their memory has been influenced to some degree by the content of the dispute between the parties. In other cases, I consider that they are wrong in the inferences that they draw from the primary facts. I will indicate in dealing with the evidence where I consider this to be the case, and why.

Findings of fact

26. My findings are the following. I set out first the primary facts and what the evidence about them shows. I then explain my evaluative conclusions on the issues in dispute.

27. Lord Templeman's first wife, Margaret, the mother of Peter and Michael, died in 1988. Lord Templeman retired as a member of the Judicial Committee of the House of Lords in 1994.

28. Sheila's first husband, Tony Hughes, had died in 1970. They had one son, Bruce, who was mentally and physically disabled. Her second husband, John Edworthy, the father of the Claimants, married Sheila in 1974 and they built Mellowstone on land left to Sheila by Tony. John Edworthy died in 1995.

29. In 1996, Sheila married Lord Templeman. They were in fact distant cousins. Until then, Lord Templeman had continued to live in his home in or near Woking, not far from the Defendants, but upon re-marriage he moved to Exeter to live in Mellowstone

with Sheila. At that time and for most of the remainder of Lord Templeman's life, Peter lived in the north-east of England with his wife Ann and children, a long way from Exeter. Michael and Lesley continued to live in Surrey.

30. The evidence is clear that Lord Templeman was a loving husband to both his wives and was blessed with two very happy marriages. It is also clear that, following his second marriage, Lord Templeman became very much part of Sheila's family and developed close bonds with Jane and Sarah in particular. By the time of Sheila's death, he had come to love them as if they were his own daughters and they him as if he were their father. That did not detract in any way from the love that Lord Templeman had for his own sons and they for him, though he saw Sarah and Jane much more frequently than he did his own sons, once he had moved to Exeter. That remained the case until Lord Templeman's death. As a result, Peter, Ann and Lord Templeman only saw each other briefly at Christmas and Easter, and for occasional special occasions. Michael and Lesley similarly saw Lord Templeman on such occasions, and an occasional joint holiday or for a round of golf, but not much more frequently.

31. In 2001, Lord Templeman made his 2001 will. He appointed the First Defendant, Lesley, to be his sole executrix. Subject to a pecuniary legacy and some bequests of chattels to Sheila and his daughters-in-law, he left his residuary estate to his two sons in equal shares, and to their widows or their children if either son, or son and widow, should predecease him. He left no gifts to any grandchild (of which he had six).

32. On 24 October 2004, Sheila's son Bruce died. At the date of his death he was the owner of an attractive property in Cornwall called "Rock Bottom", which had been bought with Hughes family money. Rock Bottom was significantly more valuable than Mellowstone. For the last years of his life, Bruce had lived in a nursing home, and so the Edworthy family, including Lord Templeman and on occasions members of his family, had been able to make use of Rock Bottom for family holidays. Sheila was the sole beneficiary of Bruce's estate and so stood to inherit Rock Bottom. However, on 23 November 2004 she made a deed of variation of Bruce's will so that Rock Bottom was left instead to Sarah, Jane and Jane's daughter, Grace. This gift was presented to them on Christmas Day 2004, with which they were naturally delighted.

33. In the knowledge of the intended gift of Rock Bottom, Sheila made a will on 3 December 2004. On the same day, Lord Templeman made a codicil to his 2001 will. The will and codicil were "home made", and the solicitor at Crosse + Crosse who was acting for them at the time, Peter Macdonald, made various comments on documents sent to him by Lord Templeman.

34. By her will, Sheila appointed Christopher Blasdale, Tony Hughes's cousin, as her sole executor and made various bequests to cousins, friends, Grace (Jane's daughter), John, Ann, Lesley and Lord Templeman and left the rest of her personal chattels to Jane and Sarah in equal shares. She left Mellowstone to Lord Templeman or, if he predeceased her, she gave £20,000 to each of his grandchildren. After various pecuniary legacies she left the residue of her estate on trust for sale in the following shares: 35% to Christopher Blasdale; 20% to another Templeman cousin, David, and 15% to each of Jane, Sarah and Grace.

35. By his codicil, Lord Templeman provided as follows:

> "If I survive my wife and inherit her property Mellowstone I Give the sum of £120,000 … free of Inheritance Tax to the Trustees of her Will to be held upon the trusts declared by her concerning her residuary estate … and I give the sum of £20,000 … free of Inheritance Tax to each of my six grandchildren."

He then left £5,000 to each of Leslie Woods, Ann Chave (later Woods) and Sylvia Woodgate.

36. Sheila's will and Lord Templeman's codicil are clearly intended to work in parallel. Sheila wished to make a gift to his grandchildren if he predeceased her, but if he did not and inherited Mellowstone the gift to the grandchildren would be made out of Lord Templeman's estate instead. The amount of the gift was (as will become apparent) related to the value of Mellowstone, being half its estimated value in 2004 after Inheritance Tax. However, Mellowstone itself was not to be left in part to the grandchildren. So if it subsequently increased substantially in value, the additional value would go into the survivor's residuary estate.

37. A further conclusion that can be drawn from Sheila's will is that she clearly took the gift of Rock Bottom into account in making it. That is evident not only from the date of the will, following shortly after the deed of variation of Bruce's will, but from the fact that, apart from bequests of personal chattels, Sarah and Jane were only left 15% each of residue. That compares with 35% for one cousin and 20% for another. Although Sarah and Jane were Sheila's stepdaughters from her second marriage, they were as close to her (and she to them) as if they were her own blood and they were her closest relations. The size of the gifts to Jane and Sarah makes sense in the light of the recent gift of Rock Bottom, but not otherwise. It is also evident from Sheila's will that she did not intend Mellowstone necessarily to remain in the family, because Lord Templeman was empowered to do as he pleased with it.

38. Mr Macdonald wrote to Lord Templeman questioning whether it was appropriate only to leave £120,000 net of tax to Sheila's residuary beneficiaries if he inherited Mellowstone, given that the net value was probably double that amount. Mr Macdonald obviously thought that Sheila intended to leave Mellowstone to Lord Templeman on the basis that it or its value should then revert to her family. That question provoked letters in response from Lord Templeman and from Sheila. Lord Templeman wrote:

> "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 a 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 have

> 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."

39. Mr Macdonald tried to persuade Sheila to endorse that letter to indicate that she agreed with it, which caused Sheila some annoyance. She wrote:

> "Any suggestion or inference from your letters or acknowledgment that my Will might not faithfully carry out my intentions or that I might wish to fetter Sydney's power, if he survives me, to dispose of Mellowstone as he thinks fit is quite wrong and hurtful to us both. Please repudiate any such suggestion or inference."

40. It is clear therefore that, as at December 2004, Lord Templeman and Sheila intended £120,000 originating from her to go to his grandchildren, and that she did not intend Mellowstone necessarily to remain in her family.

41. In April 2006, Lord Templeman and Sheila went on holiday to Portugal with Sarah and Mike, Michael and Lesley and two of their daughters and Christopher Blasdale and his wife. After lunch one day, Mr Blasdale commented to Michael Templeman that Lord Templeman's mind was still logical but that he had a poor short-term memory. This was about the first time, according to Michael, that memory loss became noticeable. Lord Templeman was then aged about 86. On that holiday there was an incident when Lord Templeman briefly drove on the wrong side of the road and froze, but I do not attribute any real significance to that. It happens to people of all ages when driving rarely on the continent.

42. At about the same time, during the last two years of Sheila's life, Dr Richard Jacoby got to know Lord Templeman socially. He said that when he visited Sheila, Lord Templeman and he would have good conversations; Lord Templeman continued to read Hansard and would pass on any information in it that he thought might be of interest to Richard Jacoby. It is agreed that at this time and well beyond the date of the 2008 will, Lord Templeman was an assiduous reader of the Times and the Telegraph each day.

43. At about the same time, in 2006, Richard Jacoby took his brother Robin to meet Lord Templeman. Richard says in his statement that Robin commented that Lord Templeman had been "a little repetitious" in some of his questions and was perhaps showing early features of age-related memory loss. In his witness statement, Robin Jacoby accepts that he might have said that, though he could not recall having done so, but adds that had that been very marked, or if there were other signs of cognitive impairment, he would have picked them up and remembered them, given who Lord Templeman was (and given his own medical expertise).

44. By the Spring of 2008, Sheila was very unwell. Lord Templeman helped to nurse her, and Jane and Sarah helped both of them to cope. Sheila was no longer able to look after the household finances and affairs, and Lord Templeman became anxious about the arrangements and particularly about money. He had never previously looked after the household finances. Sarah said that by May 2008 she was conscious

that his short-term memory was not as good as it had been, but that beyond that she had no concerns. On 29 May 2008, Mr Blasdale wrote a letter to Lord Templeman to seek to put his mind at rest about the state of his finances. He also commented that Lord Templeman had been and was being wonderful to Sheila.

45. In June 2008, Lesley wrote to Lord Templeman setting out the details of his different bank accounts and how much money he had in each, offering to help him deal with payment of bills and his finances if he needed help. I find that by this time Lord Templeman did not have a good grasp of the detail of his finances from his own memory, but he was perfectly well able to understand when someone explained it to him or wrote the details down on paper. The problem for him was short-term recall of what he had recently been told. His difficulty in coping must, at that precise time, have been accentuated by the fact that Sheila was no longer able to contribute to the household affairs, and indeed was dying, which placed added stress and pressure on Lord Templeman.

46. Sheila died on 11 June 2008. It is agreed that Lord Templeman suffered greatly from this loss and, understandably, needed a lot of support. Jane in her witness statement said that she found Lord Templeman "incredibly capable" after Sheila's death. I find that that overstates things in objective terms. I prefer John's evidence that he thought that Lord Templeman was capable of managing and that it occurred to no one that the way that he was living needed to be changed. He had help, but with the help he was able to live alone.

47. Within a month of Sheila's death, however, he flew on his own to Canada, having been dropped at Heathrow Airport by Leslie Woods, and he visited his cousins in Nova Scotia. He spent a month there. On 11 July 2008, his cousin emailed Jane saying that he had been swimming most days and was back to reading, eating well and taking short walks. "We do notice the short term memory is not too good but he always manages to find missing glasses and the reminders of 'what we are doing today' don't seem to bother him. He has in the last day stopped carrying around Sheila's picture in the little photo album tho he still misses her terribly of course …"

48. While Lord Templeman was in Canada, Richard Jacoby telephoned Jane and said that he felt strongly that he should not be driving anymore "because of his short-term memory loss, age and because he is probably a bit depressed at the moment". On 30 July 2008, an email to Jane from the Canadian cousins said:

> "We have been having a wonderful time with Sydney he has been great company for my Mum and they chatter away all day long … between short periods of drifting off!! He has been eating and sleeping well and is brown as a berry from sitting in the garden …
>
> Over the weekend he started to talk of going home and yesterday he and I booked him a return flight … It seems a bit short notice but he wanted to go once he had made up his mind. He is talking about booking his driver but as yet has not done that."

An email of the same day to Michael said "he seems very well and is certainly eating and sleeping well. A bit forgetful but aren't we all!!"

49. On 1 August 2008, Lord Templeman flew back to London and was met at the airport. Between 6 and 8 August, Sarah and her partner stayed with him at Mellowstone on their way to holiday at Rock Bottom. She said that when she talked to Lord Templeman 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 …" Cross-examined about that, Sarah said that she was a little surprised that he had asked, but that he had some papers in his hand and she thought that he wanted reassurance, or confirmation. She said that he felt that Mellowstone, which had been built by Sheila and John Edworthy, really belonged to Jane and her and that for him to be the sole owner was not correct. I accept fully Sarah's evidence of what happened on that occasion.

50. On 9 August 2008, Jane emailed Sally in Canada, saying that Lord Templeman was going to stay with his sister near Reading the following weekend and was buying a train ticket, but was coming to visit them the next day. She said that "He has decided that he will stay living at Mellowstone".

51. On 11 August 2008, Lord Templeman met David Merrick in Mellowstone and gave instructions for a new will. It is therefore evident that, having discussed seeing his solicitor with Sarah on a day between 6 and 8 August, Lord Templeman remembered to make the appointment for a day when he was in Mellowstone, and that when Mr Merrick attended Lord Templeman remembered what it was about and was ready for the meeting. The first paragraph of Merrick's attendance note records "he seems very much better, while still obviously upset by the death of Sheila and was much more willing to engage in conversation."

52. The instructions given to Mr Merrick are recorded as being that Mellowstone and household chattels were to go to Jane and Sarah, with gifts over to Grace and Jane respectively, subject to paying a proportionate part of the estate's tax liability. The remainder was to go to the two sons, in equal shares, with gifts over to widows and then issue; no pecuniary gifts apart from £500 to each of Ann Chave, Leslie Woods and Sylvia Woodgate. Lesley and Ann Templeman were to be the executors. There is reference to certain points numbered 1-5 on a previous letter of wishes. (For Mr Merrick to record that, either he or Lord Templeman (or both) must have had the letter of wishes at that meeting.) The attendance note records that 42 minutes were spent with Lord Templeman on that occasion.

53. Two days later, Mr Merrick wrote enclosing a draft will and (probably) the previous letter of wishes, summarising the terms that he had drafted and raising a few minor questions. The letter invited Lord Templeman to contact him to arrange a further meeting. It appears that such a meeting was then arranged for 19 August 2008. Notably, Lord Templeman – who did not rely on anyone else to make these arrangements or discuss them with anyone else at the time – remembered to book the further appointment. It seems clear to me that, in 2008, when his mind was set on something, he had little difficulty in either focussing on it or remembering it.

54. On 15 August 2008, Lord Templeman travelled by himself on the train to Reading to stay with his sister Eileen for 3 days. He slept on the train and missed his station, and had to catch a return train from London to Reading. Eileen Turnham said that he arrived eventually, very relaxed and quite unperturbed. She said that on the occasion of that visit she noticed that he had with him a handwritten list of gifts that he had made or planned to make, which someone had written for him. It had Michael's and Peter's names at the top. She also said that he was quieter than usual, but that neither she nor any of the ten family members present noticed that his behaviour was in any way unusual. She considered that he was still grieving for Sheila.

55. Lord Templeman returned alone on the train to Exeter on 18 August 2008. On 19 August, he met Mr Merrick at Mellowstone to discuss the draft will. The attendance note of the meeting reads:

> "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 with gifts over to widows and then children as appropriate.
>
> The contents of Mellowstone should go to Sarah and Jane as they are very much in the main the property of Shelia [sic] accumulated over the years.
>
> He would like DM to provide an additional copy of the draft Will and then arrange for the engrossment and execution of the Will shortly.
>
> His thinking and logic about the Estate seemed faultless. He makes reference to this because at times it seems as though his short-term memory was not as good as it had been when they had last met. DM wondered whether seeing him later on in the day and whether he was more tired might be the reason.
>
> Time involved 30 minutes"

The note clearly indicates that, despite Lord Templeman having previously given his instructions and Mr Merrick having drafted a will, they discussed its content and the reasons for the gifts. There is no reference in the attendance note to a discussion of the 2001 will and 2004 codicil. It also appears that Lord Templeman requested that a further copy of the draft will be sent to him.

56. On the following day, Mr Merrick sent Lord Templeman by post a further copy of the will and the letter of wishes. The letter of wishes therefore probably was considered at the meeting on 19 August and it is probable that Mr Merrick extracted this from his firm's files for the purpose. If he had done that, it seems probable that he would have extracted Lord Templeman's previous will and codicil too.

57. On 22 August 2008, the 2008 will was executed by Lord Templeman in the presence of Mr Merrick and Elaine Davis. Mrs Davis's evidence, which is not disputed, is that Mr Merrick asked Lord Templeman questions, which he answered, though she could not recall what they were, and that Mr Merrick read over the will that he had brought along before Lord Templeman signed it.

58. The 2008 will contains some errors. Peter Templeman's middle name, Morton, is written as "Mortimer"; the names of the putative widows of Peter and Michael are transposed. Further oddities, so far as the Defendants are concerned, are that the legacies to Leslie Woods, Ann Chave and Sylvia Woodgate were reduced from £5000 each to £500 each, and that Ann Templeman was appointed a co-executor, when she had not previously been so named. These are relied on by the Defendants as showing that Lord Templeman's mental functions were impaired, as is the fact that he did not himself suggest that he be medically examined to confirm the validity of his will (in accordance with the so-called Golden Rule: see Re Simpson (1977) 121 Sol Jo 224 (per Templeman J)).

59. Shortly after signing his will, Lord Templeman went with Sarah to spend time at Rock Bottom. Mr Merrick sent by post to Mellowstone a copy of the new will and letter of wishes for Lord Templeman to retain. Jane sent Lesley an email on 27 August, noting that Lord Templeman seemed to be reluctant to use his car and that "he told me all about the long chat he had with Michael about giving up driving and has obviously taken it to heart". Lesley had, in an email the week before, told Jane that she thought that Michael had successfully persuaded him not to drive any more, so the discussion between Lord Templeman and Michael was evidently something that had happened in the recent past, probably since Lord Templeman's return from Canada, and Lord Templeman remembered it.

60. The question of Lord Templeman's testamentary capacity falls to be assessed as at 22 August 2008, when he made his will, and at no other date. The events surrounding the making of the new will in that month, and the events shortly before and after it, are therefore of particular relevance to an evaluation of his mental capacity. However, it is wrong to confine the evaluation narrowly to the events of that month. Events that happened up to 2 years afterwards cast light on what probably happened in August 2008 and also enable one better to evaluate Lord Templeman's state of mind then. That is particularly so because it was Michael's evidence (consistently with others' evidence) that – with the possible exception of a time in early 2014 when Lord Templeman left hospital and seemed to improve significantly in condition for a while – his memory and mental condition did not fluctuate noticeably from month to month. His difficulty with his short-term memory got progressively worse as time went on but it was not surprisingly good one month and surprisingly poor the next. From day to day, or even hour to hour, mental performance is capable of being affected by mood, stress, illness or fatigue, but otherwise Lord Templeman's difficulty with his short term memory was reasonably consistent over shorter periods of time.

61. Beyond that period of up to 2 years there are particular later events (on which Professor Howard relied) that are also of assistance in enabling one to assess to what degree Lord Templeman's mental capacity was impaired by August 2008. I will return to those after making findings about the significant events of the two years or so following the making of the 2008 will.

62. At the end of September 2008, there was an exchange of emails between Jane and Michael. She told him that the Canadian relatives had invited Lord Templeman to spend Christmas with them and that John had booked him onto a flight out on 21 December and a return flight on 7 January. By return email, Michael thanked her for all she was doing for his father and requested that she buy for him a biro and a pad of paper for each phone in the house, as he could not remember to buy the pads, and to provide simple written instructions on how to operate the television and Sky box. Jane agreed to do so and said that she had left written instructions for the Sky box the previous week and would show him again each time she went to the house. It is common ground that Lord Templeman never did properly learn how to operate the Sky remote control. Asked to agree that his memory was so poor that he needed the notepads, Jane agreed that his memory was poor but that, depending on who it was and what they were saying, he might forget and often would remember. In his evidence, Michael said that neither he nor Jane was taken aback at the idea that he needed notepads by the phone but couldn't remember to buy them. Michael also accepted that he too kept a notepad and pen by the telephone.

63. On 23 and 24 October 2008, Michael and Lesley visited Lord Templeman in Mellowstone. Lesley said that "out of the blue Sydney said to me that as I was his executor I should have a copy of his will and that the original will was held by C&C." She said that Michael asked Lord Templeman if he had made a will since Sheila's death, and that he said in reply that he had not done so. They found his 2001 will and 2004 codicil in his study: Michael said that they looked in there with Lord Templeman's permission, but did not need to search very hard, nor did they do so.

64. In cross-examination, Lesley said that Lord Templeman stated that he had not made a will since Sheila's death in such a way that they were not convinced that it was the truth. She said that it was a firm "no", but there was something in the way that he said it that made them uncertain. They decided that it would be prudent to ask Crosse + Crosse for a copy of the last will that they were holding.

65. On 5 November 2008, Lord Templeman visited Eileen Turnham again, by train, and returned to Exeter on 11 November 2008. They visited Ann's mother, at her retirement home, and went shopping to buy items of clothing and gifts for Lord Templeman's impending winter visit to Nova Scotia. She said that they went to M&S in Beaconsfield and he bought a cardigan and an anorak, as being more suited to life in Canada. He bought and paid for them himself as normal. During that visit to Eileen Turnham, Lesley presented Lord Templeman with a letter of authority to Crosse + Crosse for them to release to Lesley and Michael a copy of his latest will. On 10 November 2008, Mr Merrick sent a copy of the 2008 will to the Defendants.

66. In describing their reaction to the 2008 will, both Lesley and Michael used the word "dismayed". Michael said that they were dismayed to discover that Lord Templeman had forgotten that he had made a new will, and further dismayed by its terms. Lesley said that they were dismayed that he had not told them about the will. That implies that she believed him to be capable of remembering it. They could see no logical reason for the change from the 2004 codicil: no good reason to increase Jane and Sarah's benefits at the expense of the grandchildren and Sheila's other residuary beneficiaries; no obvious reason for reducing the gifts to Leslie and Ann Woods and Sylvia Woodgate; and no rational reason for making Ann Templeman a co-executor with Lesley. They concluded that the only possible explanation was that Lord

Templeman had forgotten the terms of his 2004 codicil. "So we arranged to stay with my father from 30.11.08 to 2.12.08 in order to find out what he truly wanted to happen to his estate". To find out what Lord Templeman truly wanted, if it was different from the terms of the 2008 will, would have involved finding out whether he had made a mistake, or made the 2008 will having forgotten and not having consulted the terms of his previous will and codicil, and if so what having reminded himself of those documents he truly wanted. However, that did not happen.

67. During the November 2008 visit to Mellowstone, Michael and Lesley sat down with Lord Templeman in his sitting room and gave him a copy of the 2004 codicil and the 2008 will. Lesley said that "he just smiled" when they told him about the new will, and that this "seemed an inappropriate response". They asked him to read both documents. He did so, over a period of about 5 to 10 minutes, they thought, looking from one to the other. Michael said that he had the impression that his father was unable to follow because he was unable to remember the contents of one document after he had read the other. Michael then asked Lord Templeman if he would like him to explain the difference between the two documents and he said "yes", gratefully.

68. Michael said that he then explained that under the 2004 codicil, if Lord Templeman inherited Mellowstone, he left £120,000 to his grandchildren and £120,000 to Sheila's residuary beneficiaries (including Jane and Sarah), but under his 2008 will he left Mellowstone subject to Inheritance Tax to Jane and Sarah. In cross-examination he accepted that he certainly pointed out that his grandchildren would not receive £120,000. Michael said: "His immediate response was a look of concern and he said: 'This must be put right'". Nothing more was said on either side, save that before Lesley left the room to make a cup of tea Michael asked him why he had made Ann co-executor with Lesley, to which the response was "For equality". The matter was not further mentioned by anyone thereafter. Michael considered that Lord Templeman promptly forgot about it.

69. Asked why he did not ask Lord Templeman if leaving Mellowstone to Jane and Sarah was what he really wanted to do, Mr Templeman said he did not think it was worth it, as he had said that the 2008 will was not right. Lesley said that they left the "agency" of putting matters right to Lord Templeman ("we were leaving the agency to him"). I found that a strange answer at the time and still do. If they considered that he lacked capacity and would promptly forgot about the matter, leaving the means of correction to Lord Templeman (if correction was called for) seems particularly inappropriate, if a remedy of the matter was hoped for. If, on the other hand, they considered that, having been reminded of something that he had forgotten, he was then capable of deciding what he really wanted, leaving matters there makes sense (and does them credit in not seeking to influence the final decision).

70. Both Lesley and Michael said that on their way back to Surrey they discussed what had happened and decided that there was nothing that they could properly do. They considered that Lord Templeman might have lacked testamentary capacity, but were unaware of what had passed between him and Crosse + Crosse when the 2008 will was made. They said that they hoped that, in the light of Sheila's will and the 2004 codicil, the evident purpose emerging from them and the absence of any change of circumstances, Jane and Sarah would do what Michael and Lesley considered to be the right thing, namely let the intentions of 2004 be carried into effect. Whatever the thinking was, nothing further was said about Mellowstone until May 2009.

71. In January 2009, Lord Templeman mistakenly paid twice his tax liability for the preceding financial year. The sum of £4,818.86 had been notified by his accountant on 3 December 2008, then HMRC demanded £4,708.62 on 10 December 2008. Lord Templeman paid the latter sum on 15 January 2009 and the former on 23 January 2009. When the error was identified and a repayment made, John agreed to assist Lord Templeman with his financial affairs. Thereafter he dealt with payment of his tax and collated for him lists of assets and gifts.

72. Michael and Lesley visited Lord Templeman again in late February or early March 2009, shortly before his 89th birthday. He then spent his birthday with Sarah and Mike in Newport. On the occasion of the Templemans' visit, Lord Templeman gifted them his (now unused) Mercedes car. In a letter written after the visit, Michael said that he had notified DVLA of the change of owner but reminded Lord Templeman that he needed to contact his car insurers to cancel the policy and ask for a refund. He then stated:

> "It's hardly my place to mention it, but you asked what the Mercedes was worth because you wanted to give Peter a cheque for the same value as the Mercedes so as to be equally generous to him. I thought a dealer would probably give £10,000 for it. I mention this in case, after your week away you got back to Mellowstone and couldn't remember precisely how much you had intended to give Peter. Since he recently bought an Astra for about £7000 you would in effect be providing him with a car and a balancing lump sum."

Michael was clearly being tactful (as well as honourable) about his belief that Lord Templeman might have forgotten about the compensating payment, but the fact that the concern to make such a payment originated from Lord Templeman is also of interest. It shows his being aware of what he was doing and the implications of his gifting the car to Michael, and his concern to make an equal gift to someone equally deserving of his generosity.

73. In April 2009, Lord Templeman was the victim of a banking fraud. There is no suggestion that he was in any way to blame for what happened, or that the fraud resulted from any forgetfulness or lack of mental capacity.

74. In May 2009, Michael and Lesley again stayed with Lord Templeman at Mellowstone. On that occasion, Lesley and John worked together on some loose ends with Lord Templeman's financial affairs. Lesley prepared a hand-written list of all his assets and investments and a document (in typescript) showing capital assets, annual income and gifts ("the finances note"). The finances note sets out Lord Templeman's capital assets (including Mellowstone) and his annual after-tax income.

75. At that time, Lord Templeman (unprompted by anyone) had decided to make gifts of £100,000 to each of his sons and £20,000 to each of the six grandchildren. Lesley said that she explained his financial position to him at that time and was satisfied that he understood the nature and financial effect of the gifts. She said in cross-examination that Lord Templeman wanted to see that making the gifts would not affect his lifestyle, and Michael said that his father "needed to be absolutely clear about what his finances were". She and Michael had no concerns about his capacity

to make the gifts. The new gifts were included on the finances note, which stated "In the light of the above I have decided to give away £320,000". The "above" was the statement of capital assets and income.

76. The £20,000 to each grandchild was equivalent to the £120,000 that would have been left to them under the 2004 codicil, though Lesley and Michael regarded the gift in 2009 as being different because it did not come out of assets that Sheila had left Lord Templeman but out of his other assets. Lesley said that it did not occur to her that it was the same £20,000 that each grandchild was to receive under the 2004 codicil. I am unable to accept that. It is clearly no coincidence that the amounts gifted to the grandchildren are the same as the gifts that they would not now receive as a result of the 2008 will.

77. The effect was, of course, that the £120,000 came from assets that would have been part of Lord Templeman's residuary estate, which was destined to be left to Peter and Michael in equal shares. However, the effect of the immediate gifts of £100,000 to each of Peter and Michael and the gifts to the grandchildren was that, depending on how long Lord Templeman lived, his estate (and so his residuary beneficiaries, Peter and Michael) would be saved significant sums of Inheritance Tax.

78. There is no dispute that when the finances note was prepared, Lord Templeman (unprompted by anyone) required an amendment to be made to it, to record that Mellowstone was being left to Jane and Sarah (subject to Inheritance Tax) in his will. That was added in Lesley's hand to the finances note, as an addition to or qualification of the statement of capital assets. It is also notable that the approximate value of Mellowstone was recorded as £400,000 "at something of a guess after discussion with Michael and Lesley". That was the same value that had been used for the purposes of calculating the gifts by Sheila and Lord Templeman in their 2004 will and codicil respectively.

79. It is therefore clear that, on that occasion, Lord Templeman had in mind not just the value that had previously been put on Mellowstone but the terms of his 2004 codicil and of his 2008 will. Although Lesley said in evidence that "his memory was non-existent and I don't know if he remembered or someone reminded him", it is clear that in May 2009 Lord Templeman had the mental skills required to access (if not remember) the terms of previous testamentary dispositions and evaluate what gifts should appropriately be made to his family, bearing in mind the fact that Mellowstone was to be left to Jane and Sarah and what his future needs were in terms of capital and income. Michael said that he thought his father could understand the obvious sense of giving away some of his money (i.e. saving Inheritance Tax for the benefit of his residuary estate) and agreed that objectively he needed to consider various factors.

80. On about 13 July 2009, Lord Templeman returned to Mellowstone from Rock Bottom with Sarah and Mike. On opening the mail on arrival, there was an invoice from a travel agent for some flights and a holiday that had been booked on Lord Templeman's NatWest credit card. Mike Samuel said that Lord Templeman knew straight away that he had not booked those tickets and that this transaction was nothing to do with him. The Police were called and ascertained that his card had been cloned. Lord Templeman later called the credit card company to explain. The fraudsters were caught because they had had the tickets delivered to their home address.

81. That incident – the second time within a few months that Lord Templeman's bank cards had been used fraudulently – provoked anxious consideration of whether it would be better if someone else took care of his bank cards. This was not because Lord Templeman did not use them – he did regularly (Jane said that he knew his PIN and how to use it) – or could not use them. It was because, as Jane put it, he was increasingly at risk of being taken advantage of, and because he became very distressed when something went wrong with his bank accounts. A plan was put in place that Jane and John would look after his cards for him and go with him to the bank (he needed to be driven there in any event), so that he could use his card to withdraw weekly all the cash that he needed.

82. In August 2009, Lord Templeman stayed with his older sister, Olive, in Littlehampton for a week, and Eileen Turnham stayed nearby. She said that every evening Lord Templeman and Olive would play Scrabble together and that Olive was a very good player.

83. In October 2009, Jane became concerned that Lord Templeman was not eating properly (or occasionally at all) in the evenings. Jane and John started to prepare supplies of frozen meals for him and leave him food in the fridge. Jane explained that it was not that Lord Templeman could not cope on his own but that they wanted him to have every comfort. No one considered that he was unable to live on his own, but he needed some support, practical and emotional. For a while, Jane arranged for a carer from a commercial company to go in for 2 hours on 3 or 4 evenings a week, but after a while Lord Templeman preferred not to have that presence, so it was discontinued.

84. In January 2010, Lord Templeman told John (who assisted him with his finances and tax) that he wanted to give £10,000 to Sarah, Jane and John. John said that he suggested twice to Lord Templeman that he discuss the matter with his sons first, as it was ultimately their money, but that Lord Templeman very firmly said that he did not need to do that: it was his money and it was entirely up to him what he did with it. On noticing the large sums leaving the bank account, Lesley phoned to tell John and Jane that she thought there was something wrong with Lord Templeman's bank account. They told Grace so, in John and Jane's absence, and later John phoned back and spoke to Michael. Jane said that Michael and Lesley were very cross about the gifts and also raised the gift of Mellowstone in Lord Templeman's will. Jane and John had not read the 2008 will but they had read the finances note on which the gift of Mellowstone had been recorded at Lord Templeman's insistence and they knew that Lord Templeman intended to leave the house to them. Lesley and Michael Templeman dispute that they were "very angry" at the time about the gifts to Jane, Sarah and John.

85. In that conversation Michael raised his belief (which came from Peter) that Lord Templeman had paid for an extension of Rock Bottom in return for Sheila leaving him Mellowstone. I find that on that occasion there was annoyance communicated by Michael to John and Jane. This was not limited to annoyance at discourtesy in not forewarning Lesley about large withdrawals from the bank account. On top of the discovery of the 2008 will (which must have raised questions in Michael's and Lesley's minds about what influence Jane and Sarah were having on Lord Templeman), there was Peter's opinion that Lord Templeman had paid for work at Rock Bottom in return for Mellowstone, and now the discovery of £30,000 that would

otherwise have gone to Michael and Peter on Lord Templeman's death going to the Goss-Custard and Edworthy families instead. I find that something was said on that occasion by Michael about his doubts about Lord Templeman's state of mind when he made the 2008 will, sufficient to cause John and Jane to believe that it might later be said that the 2008 will was invalid. The issue was not raised again by the Defendants until after the death of Lord Templeman.

86. John and Jane said that they later raised the question of the validity of Lord Templeman's will with Mr Merrick. John says that Merrick said that he could not discuss the matter with John "but he did volunteer the comment that the only grounds for contesting the will would be that Sydney had been incapable of making a will in 2008. He added – without prompting – that this was 'clearly/obviously not the case' – or words to that effect". I accept that evidence. It is inherently likely that John or Jane would have raised the matter with Mr Merrick. What Mr Merrick is said to have volunteered is consistent with the evidence of what happened between him and Lord Templeman in August 2008.

87. By February 2010, Peter and Michael had come to the conclusion that Lord Templeman could not or should not be left to cope on his own in Mellowstone and that some other arrangement should be made. Michael's preference was for Lord Templeman to move to live with them. On a visit to Mellowstone early in 2010 they had proposed that and he had been enthusiastic about it. When they phoned him a few days later, he had forgotten about the proposal. Later, Lord Templeman himself had said in a phone call to Michael that he thought he might like to come and live with him and Lesley but that he needed time to think things over.

88. It is evident that this communication coincided with a growing realisation by Michael that Jane and Sarah would have to be told that Lord Templeman could no longer live at Mellowstone. Michael had prepared a long email (which Peter approved) setting out their reasons and what the alternatives were. The draft email says that "It's now clear that Sydney can't cope with living by himself" and cited his inability to use the Sky remote control and the lack of a social circle of contemporaries. The email explained why it would "feel entirely right for us to care for him, and entirely wrong for anyone else to do so".

89. In the event the email was never sent. Lord Templeman did not, as Michael and Peter had been hoping, tell Jane that he wanted to move to Surrey. He evidently did express the view that he wished to continue living in Mellowstone, and he continued to do so until shortly before his death. There were, in between times, one or two flirtations with residential homes, in 2013, but on each occasion Lord Templeman himself decided that he wanted to stay in Mellowstone. He was able to do so, with love and support from the Goss-Custards and the Edworthys and nursing care in 2014, until close to the end of his life.

90. In my judgment, Michael and Lesley's assessment that Lord Templeman could not continue to live alone in Mellowstone was overstated and erroneous, as demonstrated by subsequent events. It reflected, in February 2010, three things. First, a genuine concern on their part to care for Lord Templeman in his declining years and play a fuller part in trying to give him a better life with his own family. Second, a recognition that there would come a time when Lord Templeman really could not manage to live on his own. Third, a desire to put some distance between Lord

Templeman and Jane and Sarah. I find that Michael and Lesley had been concerned by the discovery of the 2008 will, which was then reinforced by the terms of the amendment to the finances note in May 2009. In the light of the January 2010 gifts to Sarah, Jane and John, Michael and Lesley were concerned about influence that Jane and Sarah might have over him, or at least the closeness of their relationship. Although there were certain disadvantages to Lord Templeman's living alone, he was able to do so and, ultimately, preferred to do so. He was able to do so partly because of the support and love that was given to him by Sheila's family. As Jane put it: "if it had become serious, so that he could not live alone, we would have done something about it. We felt he could live alone, with support". Ultimately, he chose to continue to live in those circumstances rather than with either of his sons.

91. Eileen Turnham said that Lord Templeman visited her from 20 May 2011 until 10 June 2011, during which time they visited his nephew, Tony, at Great Missenden. She said that Lord Templeman was alert and chatty on that visit.

92. In June 2011, Lord Templeman made further very substantial lifetime gifts to Peter and Michael of £100,000 each, and gifts of £10,000 to each of Jane and Sarah. That left him (as recorded in an updated finances note) with £235,000 of capital, in addition to his substantial annual pension.

93. In August 2011, Eileen Turnham and Olive visited Lord Templeman in Mellowstone. Olive stayed in the house and Eileen stayed nearby. They went on visits to Exmouth and Teignmouth, and Scrabble was played in the evenings. On one such occasion, Lord Templeman managed to beat the otherwise unbeatable Olive, to everyone's delight.

94. In December 2011, Lord Templeman went to spend Christmas with Michael and Lesley as usual. He was sent off by John with a black briefcase containing four sheets of paper, to remind him of the things that he should not worry about, including a reminder that John arranges his tax affairs, a summary of his income and a list of his investments and lifetime gifts. John's email to Michael at the time said:

> "I always put them somewhere prominent so that his eye catches them. This is because he not only forgets the content of the papers but also that these aide-memoirs exist! By his bed is a good idea, as he often wakes up early and worries, and there is a chance he'll catch sight of them if he turns his light on. It gives him such relief to be told after a long worry that his tax has been dealt with. By the way, he owes the IR nothing at the moment: all is in order on the tax front.
>
> Please could you make sure that, when you return him to Mellowstone, that he brings these four bits of paper with him and that he returns them to the dining room table, with the 'Reminder' sheet uppermost! It seems to work, happily."

This portrays very clearly the state of Lord Templeman's mind in December 2011, by now over 3 years after the date of the 2008 will. He had anxieties about payment of tax in particular and his finances generally that could not be allayed from his memory, because he could not remember having paid his bills; but the anxieties could be

allayed by reading a document summarising his financial position. As long as he did not have to remember what he had previously been liable to pay and what he had paid, he could understand his financial position by reading documents that summarised it. His anxiety stemmed from his inability to recall recent events.

95. Medical assessments were carried out on Lord Templeman when he attended hospital in 2012 and 2013. An abbreviated mental test (AMT) was carried out on both occasions. The AMT score in November 2012 was 8.5 out of 10 and in February 2013 it was 8 out of 10. Medical records of Lord Templeman's stay in hospital in January 2014 record that he was at that time muddled and disorientated; that he sometimes forgot and sometimes remembered previous conversations; and, on 6 February 2014, that he was assessed as having capacity to make decisions.

96. Having reviewed all available medical records, Professor Howard considered that it was very likely that Lord Templeman had testamentary capacity in August 2008 (relatively high degree of probability), and that at that point he was suffering from a mild degree of dementia caused by Alzheimer's disease, which caused him to have predominant difficulties with recent episodic memory, but with other cognitive functions and ability to manage day-to-day functioning largely unaffected at that stage.

97. He gave evidence that dementia caused by Alzheimer's disease was a progressive condition. After 2012, Lord Templeman's condition would be described as mild to moderate, though the AMT scores were high and provide objective evidence for that diagnosis. He considered that the reason why Alzheimer's disease was probably not diagnosed was Lord Templeman's high level of pre-morbid intellectual ability, which confers a degree of cognitive reserve, allowing him to compensate for some of the difficulties caused by the advancing dementia.

98. As to the likely progress of dementia, although this can vary from patient to patient, Professor Howard said that progress from very light symptoms to complete inability to live a normal life would be about 7 years, and that the 4 years between August 2008 and the first AMT score in November 2012 "would be a sufficient time for a significant deterioration to have taken place", and that accordingly on a balance of probabilities Lord Templeman would have performed significantly better in 2008 than he did in 2012 and 2013.

99. When cross-examined by Mr Templeman, Professor Howard said that the AMT scores in 2012 and 2013 indicated that there was a problem but that it was still quite a mild stage, and that the arrangements that had been put in place to prompt Lord Templeman's memory were very typical of those made by the families of patients suffering from mild Alzheimer's disease. He said it was also entirely typical for patients to ask the same questions or use standard conversational gambits as a means of coping with their difficulty and their embarrassment over their poor memory. He said that Lord Templeman's concern about paying his tax was not a delusion but merely a false belief: a person has a fixed delusion when they cannot be persuaded rationally that the belief is wrong. That was not the case here. If Lord Templeman woke every morning believing that his tax had not been paid, that was a serious problem of forgetfulness, but if on reading the aide memoire he then understood that it had been paid it was not a delusion.

100. Professor Howard commented that he considered that Mr Merrick's having noted that Lord Templeman appeared to be forgetful on their second meeting was reassuring, in that it was obvious that mental capacity was a matter to Mr Merrick's mind at the time when the will was discussed, rather than something that he ignored.

101. He said that the ability to play Scrabble against a good player and win on at least one occasion showed that Alzheimer's disease had not progressed beyond the initial stage of an episodic memory problem. As the disease became more moderate, other cognitive skills are impaired and very few people with moderate Alzheimer's disease could even attempt to play Scrabble. Lord Templeman's ability to do so when he did is a clear indication that his other cognitive skills were not impaired to any significant degree.

102. Lord Templeman's difficulty was with his episodic memory only, not his working memory. The working memory is what retains information when it is being used to make a decision. That is characteristically unaffected by early Alzheimer's, unlike with Parkinson's disease. Episodic memory (the ability to store and recall over a relatively short period of time – a few minutes to a few days) can however be very poor at the early stage. Professor Howard said that in general mild Alzheimer's sufferers have testamentary capacity; only about 50% of those with mild to moderate symptoms have such capacity.

103. Professor Howard's evidence was that the ability to recall information depended principally on the patient's condition at the time of the event in question. Thus, a mild to moderate sufferer would have a better chance of remembering something that happened four years previously, when his condition was only mild or less serious than that, but would struggle to remember something that happened a month previously, when his condition was worse. He also emphasised that those living with the patient notice things that they get wrong, but tend not to notice things that they get right. So, for example, Lord Templeman's ability immediately to realise that he had not booked the flight and holiday in the July 2009 fraud incident shows that it is wrong to say that he had no episodic memory at that time.

104. Finally, Professor Howard accepted that any emotional or physical trauma, or stress, or something else that increases pressure on the patient, is likely to cause episodic memory to function less well on a particular day than it otherwise would do. I accept the evidence of Professor Howard on the matters that I have summarised above.

105. Having reviewed extensively the evidence that is most material to the question that I have to decide, I can reach some conclusions.

Evaluative factual conclusions

106. First, there is no cogent evidence to suggest that Lord Templeman's mental functioning was impaired in 2008 to any significant degree except in respect of the difficulty he was experiencing with his episodic memory. In so far as Lesley said in cross-examination that his memory was virtually non-existent, I reject that characterisation. It is clear that his memory of more distant events was and remained very good and that his working memory, when he was discussing or considering an issue, was functional. In that regard his considerable pre-morbid intellect assisted him. He was able to retain things in his mind while they were the subject of discussion, or

while he was reading about them or addressing them in his mind. What was lacking was the ability easily to recall events from the recent past. The recent past might be earlier in the same conversation, once the conversation had moved on, or it could be weeks or months previously. Even then, it is clear that some recent events were not forgotten, though others were. The more significant and important ones, such as the making of arrangements to see Mr Merrick and discussions about deciding to give up driving, were often remembered; more trivial ones, such as buying pads and biros, were not.

107. Second, Lord Templeman was deeply upset by the death of Sheila and it is easy to accept that he was not functioning well in the aftermath of that. He was by then probably suffering from the early stages of dementia caused by Alzheimer's disease and he was undoubtedly grief-stricken. Profound grief would itself inhibit the functioning of his memory. However, the reports of his holiday in Canada in July 2008, and then his visit to Eileen in August 2008, strongly suggest that he was in a better state by the time of his discussion of Mellowstone with Sarah in early August 2008. I do not accept that his memory was significantly worse in August 2008 on account of his grief at the loss of Sheila or stress. He did however have real difficulty with his short-term memory by that time.

108. Third, I conclude that he was aware of his 2001 will and 2004 codicil when he spoke to Sarah and resolved to see a solicitor. That is for two main reasons. First, he would have remembered that he had a will. The will and codicil were made at a pre-morbid stage and it is therefore likely that he remembered them. Given his legal training and mental faculties, he would inevitably have been thinking about his will from time to time. Even if he did not distinctly remember the 2001 will and 2004 codicil, he had the mental acuity to seek them out and read them. Second, the documents in question were in his study: they were later found without any significant search by Michael and Lesley in October 2008. Given that, episodic memory apart, Lord Templeman's mental functioning was "largely unaffected" (in the phrase used by Professor Howard), and given his legal expertise and knowledge, he would in my judgment have had recourse to them either at that stage, or before seeing his solicitor. Moreover, Sarah's evidence, which I have accepted, is that at the time of the conversation he had papers in his hand and seemed to be seeking confirmation of the position with Mellowstone. In view of his mild dementia, he might very well have forgotten some of the events of June 2008, such as a reading of Sheila's will in the immediate aftermath of her death, and he might not have had a copy of her will in his study by August 2008. I therefore do not find it strange that he was asking for confirmation.

109. Fourth, when Lord Templeman said to Sarah "This is not right", I consider that, as Eileen Turnham lucidly explained, he was expressing an emotional feeling that Mellowstone was the Edworthy family home – it was Sheila's house and should belong not solely to him but to her family too. It is true that, as a matter of hard logic, Sheila's 2004 will and his 2004 codicil arranged how Mellowstone would be disposed of by him in the event that he inherited it. Nothing therefore needed to be done, unless Lord Templeman changed his mind about the arrangement that had been put in place in 2004 or had changed feelings about where he wanted Mellowstone to be left.

110. The Defendants' case is that there was no occasion for anything to be changed because nothing had changed: Mellowstone was just as much Sheila's family home in

2004 as it was in 2008 and Lord Templeman had inherited it just as the 2004 testamentary documents anticipated that he would. Sheila in 2004 had intended that Mellowstone would not pass to her stepdaughters as such, but that the value of it would be shared by the two families. Sheila had not changed her mind. But that legalistic analysis overlooks the emotional journey that Lord Templeman, Sheila, Jane, Sarah and Grace (together with John and Mike) had undertaken in the intervening four years.

111. For some members of the legal profession, who remember Lord Templeman on the Bench, this may require a little explanation. Contrary to his reputation as an uncompromising judge, what was striking in the evidence that I heard and read was that Lord Templeman clearly had a very different side to him: a warm, emotionally empathetic and loving side, with devotion to those who loved and cared for him. He may also have become a more emotional person as he grew older. It is very clear that, in sharing with Jane and Sarah the final years of his life with Sheila, he became very attached to them and was to all intents and purposes part of their family. They helped him to care for Sheila at the end of her life and they helped him to look after his and her affairs before her death and then helped him to cope with his grief. The period of their care was not limited to the two months after Sheila's death but would have included the many months when, towards the end of her life, Sheila was no longer able to do the things that she had done since 1996 in terms of running the household and looking after Lord Templeman. Sarah explained that her and Jane's relationship with Sydney had developed in the years before Sheila's death and that they had spent a lot of time together before 2008 because of Sheila's incapacity.

112. Fifth, it follows that I do not accept the argument that, had Lord Templeman been able to appreciate the terms of his 2004 codicil, he would have known that the right thing for him to do in relation to Mellowstone was nothing. Doing nothing was fully justified, if he was satisfied that the arrangement that he had agreed with Sheila remained the most appropriate arrangement; but that arrangement did not preclude his making a change if he considered that a change should be made. That would, of course, involve his departing from (or as the Defendants put it, "thwarting") what Sheila had wished in terms of who should ultimately benefit from Mellowstone. That gives one pause for careful consideration, given the recency of Sheila's death. However, Sheila had made it transparently clear to Mr Macdonald and her husband when making her will that he was not to be fettered in any way in how he dealt with Mellowstone or its proceeds.

113. All the evidence suggests that Lord Templeman was at all times a strong and decisive person, as well as someone who was concerned to do the right thing as he understood it to be. I consider that he was making a gift of Mellowstone because that is what he wanted to do. As for taking away a gift made directly to his grandchildren, such a gift had not existed in his previous wills: it was only in the 2004 codicil, pursuant to the wishes of Sheila to leave half of the then net value of Mellowstone to his grandchildren. While it is a point of interest that the gifts to the grandchildren were not recreated in his 2008 will, it cannot be said to be inexplicable or irrational: the residue of the estate was to be shared between their parents.

114. The facts that Lord Templeman made the decision and, unaided, made all the arrangements to make a new will show that he was not unduly hampered by his difficulty with short-term memory loss. I find, sixth, that it is more likely than not

that Lord Templeman had with him, at the first meeting with Mr Merrick, his 2001 will and 2004 codicil. It is, perhaps, a little surprising that Mr Merrick does not refer to the old will in his attendance note; however, Lord Templeman was making a new will, not a codicil, and I consider that Mr Merrick had formed the clear conclusion that Lord Templeman's testamentary capacity was beyond doubt, and therefore it was not appropriate to go through the terms of the old will and codicil with Lord Templeman. He must have formed that view, if he did not discuss it with Lord Templeman, because he would have had access to the will and codicil, together with the 2003 letter of wishes, in Crosse + Crosse's safe.

115. Given Lord Templeman's reputation, his evident intellectual resources even at that age and the perfectly rational terms of the new will on the face of it, I do not find it that surprising (the Golden Rule notwithstanding) that Mr Merrick decided not to enquire further or suggest that Lord Templeman be medically assessed, though of course as this litigation demonstrates he should have done. The difficulty that Lord Templeman had with his short-term memory by August 2008 obviously was not marked on the first meeting that they had, hence Mr Merrick's comment in the second attendance note that Lord Templeman's short-term memory seemed poorer on the second occasion. As a private client solicitor, that must have brought to Mr Merrick's consciousness the question of capacity, but evidently (as he later said to John) the question was easily dismissed once raised in his mind.

116. As previously stated, Mr Templeman relies on the fact that Lord Templeman did not (apparently) raise the question of a medical assessment as evidence of lack of testamentary capacity, on the basis that his father of all people would have raised it if he had had had a functional memory at the time. I do not accept that argument. The evidence establishes that Lord Templeman was well able to remember events from earlier in his life and would have remembered his landmark judicial decisions, including the Golden Rule cases. In my judgment, the assumed failure to suggest a medical examination is probably evidence of the commonplace that people who are able dispassionately to give good advice to others do not always follow such advice themselves, or believe themselves to be in need of it. It would, in any event, not necessarily be easy for an elderly but knowledgeable testator to admit openly to being of doubtful testamentary capacity. It cannot be inferred that Lord Templeman did not raise it because he had no functioning memory and so no testamentary capacity.

117. As for the reduced gifts to his home helpers, this is neither evidence of ignorance of the 2004 codicil nor evidence of lack of mental capacity. The reduction in gifts to the same individuals is not irrational even if the new legacies are significantly less generous.

118. I conclude, seventh, that when Lord Templeman made his 2008 will he was probably aware that under his 2004 codicil the assumed net value of Mellowstone was to be divided between his own grandchildren and Sheila's residuary beneficiaries. Whether at that time he fully recalled the reason why his codicil so provided, viz that Sheila would have made gifts to his grandchildren if he had predeceased her, is more difficult to say. That would have involved his remembering the December 2004 discussions with Sheila or having access to a copy of her 2004 will. It may well be that he did not recall that, but in my judgment it makes no difference whether in fact he recalled the reasoning that led to a previous version of his will. He was aware of the terms of his codicil and had the capacity to consider afresh to whom he wished to

leave the assets in his estate. He would have understood that he was leaving Mellowstone to Jane and Sarah instead of either dividing most or all of its net value between his grandchildren and Sheila's residuary beneficiaries or leaving it to his residuary beneficiaries.

119. By the time of Michael and Lesley's visit to Lord Templeman in October 2008, it is conceivable that Lord Templeman had forgotten the act of making a new will. It was he who volunteered that Lesley as his executrix should have a copy of his will. He did not also say that he had made a new will under which Lesley and Ann were co-executors. Forgetfulness would fit entirely Professor Howard's explanation of the effect of early stage dementia, where recent events that occur during the period of the illness are the difficult ones to recall. A copy of the 2008 will was not readily available in Lord Templeman's study (it was not found on that visit) and so he might well not have revisited it since August. Something in the way that Lord Templeman denied having made a recent will suggested to Lesley Templeman that they had better check. There may well have been an element of uncertainty in Lord Templeman's voice or demeanour, caused either by a partial recollection that he had done something with a will, or alternatively a consciousness that his memory was fallible. I accept Michael's evidence that his father was not the kind of person to play games about such matters and would not deliberately have misled or been coy about it.

120. At the November 2008 visit, Lord Templeman was confronted with the 2008 will. The Defendants' case is that he was on that occasion unable to take in the terms of either will so as to be able to understand where the difference between them lay. While giving due weight to Michael and Lesley's first-hand evidence of what they saw and their knowledge of Lord Templeman's character, I reject that interpretation. There is no cogent evidence to suggest that his mental faculties, other than his episodic memory, were significantly affected by his illness at that stage, or for the next few years. The evidence is that his working memory was still functioning and that his intellect was undimmed. What happened in May 2009 demonstrates clearly that Lord Templeman then had the mental acuity to be able to understand his affairs when he was actively considering them or reading them in documentary form. The events of May 2009 and July 2009 also demonstrate that even his episodic memory was not as deficient at that stage as the Defendants portray it.

121. In my judgment, in November 2008 Lord Templeman was most likely highly discomfited by, first, the realisation that he had forgotten the 2008 will previously, and secondly the fact that in it he had made a gift away from his own family in favour of his late wife's family. Lesley said that she thought he was embarrassed. I have no doubt that Michael and Lesley did their best on that occasion to make it non-confrontational and avoid awkwardness, but it was by its nature a confrontational and awkward occasion. Lord Templeman must have appreciated that he was being asked to explain himself and felt under pressure. He was in a difficult position. He was made aware that his new will had taken away a gift of £120,000 that he had previously intended to make to his own grandchildren – this was expressly drawn to his attention in that way by Michael. Given the other evidence of his mental ability at that time and afterwards, it is not credible that he was unable to read, understand and see the differences between the two documents. I find that he was, under the acute pressure of the moment, not able to recollect clearly his decision-making in August, and was therefore unwilling to volunteer his thoughts, or justify himself. When it

came, he took up the offered opportunity for Michael to do the talking, and then picked up the point that Michael emphasised about the grandchildren having their gifts taken away. In my judgment, "This must be put right" was a reference to the gifts to the grandchildren and not an acknowledgement that the gift of Mellowstone to Jane and Sarah was a mistake.

122. As for making Ann a co-executor, other evidence suggests that Lord Templeman was anxious to treat his two sons equally and fairly. Although Lesley had always been his nominated executrix and had been closely involved in monitoring his bank accounts and finances, it is far from perverse for him to want to nominate both daughters-in-law as executors. Again, the Defendants attack this as illogical and a sign of mental malfunction, given that Ann was unlikely to be able to take up the role. But Lord Templeman would have known that any such practical impediment was easily dealt with after his death; and the gesture of appointing both as executors is emotionally understandable. Further, the answer that Lord Templeman immediately gave Michael in November 2008 – "for equality" – is a sign of mental agility rather than something irrational that suggests mental incapacity. In my judgment, the Defendants are, in relation to this matter too, adopting an overly analytical approach and failing to make allowance for emotions and feelings.

123. On the undisputed evidence, neither the Defendants nor the Claimants mentioned again to Lord Templeman the terms of his 2008 will, or any arrangements for his estate, before May 2009, when the finances list was drawn up by Lesley in Lord Templeman's presence. It was Lord Templeman who raised on that occasion his desire to make lifetime gifts to his sons and grandchildren and required these to be recorded alongside the intended gift of Mellowstone to Jane and Sarah. The matters that were dealt with on that occasion were therefore the result of Lord Templeman's own deliberations.

124. The lifetime gifts to the grandchildren and the value ascribed to Mellowstone mirror the terms of the 2004 codicil. The amount of £20,000 per grandchild was the same as one-half of the (assumed) net value of Mellowstone. The gift of Mellowstone to Jane and Sarah reflects the terms of the 2008 will. As a matter of obvious inference, the lifetime gifts being made to the grandchildren had their origins in the 2004 codicil and the short discussion between Michael and Lord Templeman in November 2008. The May 2009 gifts demonstrate that, nine months after making his 2008 will, Lord Templeman had clearly in mind the effect of his previous and current testamentary dispositions and the obligations that he felt towards his own extended family, as well as Sheila's family. The gift to the grandchildren was "putting right" the change in his 2008 will, which omitted any gift to them. The argument that it was not putting matters right because he was making the gift with his money rather than with Sheila's money is a false dichotomy: all the money and assets belonged to Lord Templeman from the date of Sheila's death, and Lord Templeman had been made free to dispose of Mellowstone. From the gifts that he made in 2009, 2010 (as explained at the time to John) and 2011, it is clear that Lord Templeman was minded to deal with his estate as he pleased.

125. What happened in the years following the 2008 will is inconsistent, in my judgment, with the case of the Defendants that by August 2008 Lord Templeman was incapable of comprehending and appreciating the calls that various family members and others had on his testamentary bounty. It is not that the later gifts retrospectively validate

the 2008 will, which of course they cannot do; but, rather, they constitute strong evidence that, at the relevant time and afterwards, Lord Templeman was well able to appreciate and weigh those who had a legitimate claim on his estate and those who did not.

126. The Defendants' argument is that Lord Templeman misjudged the claim of Sarah and Jane, whose needs had already been provided by Sheila and who therefore did not need further substantial provision under his will. But the test of testamentary capacity does not depend on a testator's ability to judge to a nicety the relative merits of the rival claimants, or judge correctly to what extent their needs have already been met from some other source. It depends on having capacity to appreciate those persons who have a claim and to decide fairly between competing beneficiaries, making provision for some and not for others.

127. In their closing submissions, the Defendants characterised the central question for me as being "what changed between 3 December 2004 and 22 August 2008 to cause the deceased to leave Mellowstone to Jane and Sarah?". That is not the central question, though in fact, as I have sought to explain, things had changed so far as Lord Templeman was concerned. The central question is whether on 22 August 2008 Lord Templeman had testamentary capacity, in particular whether he was capable of comprehending and appreciating the rival claims on his estate, or whether he was then acting under a delusion that perverted his sense of relative entitlement.

128. Lord Templeman was suffering at the time from a serious problem with his episodic memory, but otherwise suffered no significant mental impairment. He was unable to remember some things (but not everything) that had happened to him in the recent past. I have already found that he had not at the relevant time forgotten his 2001 will and 2004 codicil. Given his ability to read and understand those documents, it is improbable that, when considering the terms of his 2008 will, he was unable to remember that Jane and Sarah owned Rock Bottom. Rock Bottom remained a significant part of the family's life.

129. In any event, I find that Lord Templeman did not leave Mellowstone to Jane and Sarah in his 2008 will because he felt that they were hard done by, or because he believed that he had not made provision for Mellowstone: he left it to them because he felt, emotionally, that that was where Mellowstone belonged. He wanted to pass it back to Sheila's family because he felt that it properly belonged there. He may have misjudged the degree of attachment of Jane and Sarah to the bricks and mortar of Mellowstone: in the event they decided to sell it rather than keep it; but he was not acting under a false belief that his 2004 codicil did not deal with all the assets in his estate. He was not deluded in thinking that some wrong had been done to Jane and Sarah. He wanted to ensure that Mellowstone went to Jane and Sarah after his death because he felt that it properly belonged to them, and because he was very attached to them.

130. It follows that I reject the factual case that in August 2008 Lord Templeman had forgotten his 2004 codicil and was suffering from an illusory belief that a wrong had been done to Jane and Sarah. On a balance of probabilities, he wanted to ensure that Mellowstone could remain in Sheila's family after his death, and not be sold and shared out, as was the effect of his will and 2004 codicil. His reason for doing so was the love and affection that he felt in August 2008 for Jane and Sarah.

131. I conclude that Lord Templeman was able to comprehend and appreciate those who had a call on his estate and was not suffering from a delusion (or illusory belief) that poisoned his mind, and so he had testamentary capacity in August 2008 when he made the 2008 will.

The position in law if Lord Templeman had forgotten his former will and codicil

132. Even if I had concluded that Lord Templeman had forgotten the terms of his 2004 codicil and/or the gift of Rock Bottom by Sheila when making his new will and was acting in the belief that a wrong had been done to Jane and Sarah that needed to be put right, I would still have held that he had testamentary capacity. The argument of the Defendants was put in two different but complementary ways. First, that because Lord Templeman could not recall the arrangement that had been deliberately made and the reasons for it, he could not sufficiently comprehend and appreciate the nature and extent of the claims on his estate: he could not appreciate that Jane and Sarah did not have a legitimate and substantial claim for provision under his will, whereas his own family did have. Second, that his mind was so prejudiced by an illusory belief that a wrong had been done to Jane and Sarah that had to be put right that he lacked a just appreciation of those claims.

133. Comprehension and appreciation of the calls on a testator's bounty does not require actual knowledge of other gifts that have been made to, or the financial circumstances of, a potential object. A testator does not have to have all the facts with which to make a correct or justifiable decision; he has to have the capacity to decide for himself between competing claims. That means that he must have the ability to inform himself about those claims, to the extent that he wishes to do so, but not that he must remember the relevant facts about each of the potential objects or have correctly understood their financial circumstances. Whether Jane and Sarah had a legitimate claim on him and if so to what extent, compared with his blood relations, was a matter for Lord Templeman, as long as he had the capacity to weigh the rival claims.

134. The Defendants however contend that, unlike the criteria (in Banks v Goodfellow) of understanding the nature of the act of making a will and its effect and the extent of the estate to be disposed of, the criterion of comprehending and appreciating the claims upon a testator requires actual comprehension, not merely the capacity to understand. Mr Templeman sought to persuade me that the language of the Court of Queen's Bench in Banks v Goodfellow and the modern reformulation approved in Burns v Burns draws a deliberate distinction between what is required to establish an "understanding" of the first two criteria and an "appreciation" of the third criterion.

135. I do not accept that there is a relevant distinction, for the following reasons.

i) First, although three separate criteria are described, they are all aspects of a single test of *capacity* to make a will, not of knowledge. In *Stevens v Vancleve* (4 Washington at p.267), an American case followed by the Court of Queen's Bench in Banks v Goodfellow, the test is posited as follows:

> "The question is not so much what was the degree of memory possessed by the testator? as this: Had he a disposing memory? was he capable of recollecting the property he was about to

> bequeath; the manner of distributing it; and the objects of his bounty? To sum up the whole in the most simple and intelligible form, were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time that he executed his will?"

No distinction is drawn there between the different matters that the testator must be capable of recollecting: one of them is the objects of his bounty and another is the property that he is disposing of. In Cattermole v Prisk [2006] 1 FLR 693, Judge Norris QC considered that the words cited from *Stevens v Vancleve* warn the probate judge against treating deficiencies of memory as the equivalent of incapacity, while underlining the role that memory has to play in deliberately forming an intelligent purpose of disposing of property in a particular way. More recent Court of Appeal authorities to which I have already referred have further underlined that testamentary capacity is not a test of memory.

ii) Second, other authorities do not draw a distinction. In Hawes v Burgess, Mummery LJ said at [55]:

> "…the deceased knew she was making a new will and knew the extent of the property available for disposal. It is reasonable to expect that a testatrix, who is capable of understanding that much, would normally be capable of understanding the claims arising to which she ought to give effect in her family situation."

In Harwood v Baker (1840) 3 Moo P.C. 282, cited in Banks, Erskine J delivered the opinion of the Privy Council in a case where a testator had excluded his family and left all his property to his second wife:

> "… in order to constitute a sound disposing mind, a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard, but he must also have the capacity to comprehend the extent of his property, and the nature of the claims of others, whom by his will he is excluding from all participation in that property …"

In Greenwood v Greenwood (1776) 3 Curt App xxx, Lord Kenyon addressed the jury in the following terms:

> "I take it a mind and memory competent to dispose of property, when it is a little explained, perhaps may stand thus: - having that degree of recollection about him that would enable him to look about the property he had to dispose of, and the persons to whom he wished to dispose of it. If he had a power of summoning up his mind, so as to know what his property was, and who those persons were that then were the objects of his bounty, then he was competent to make his will."

iii) The case of Hoff v Atherton does not stand contrary to such authority. When faced with an argument that actual understanding had to be proved, Peter Gibson LJ drew attention to the words of Banks v Goodfellow "shall be able to comprehend and appreciate", which follow the use of the words "shall understand". He did so to emphasise that the latter words are not positing a test of actual understanding but one of capacity to understand. The point being made would be unsound if the former words required actual understanding. If Chadwick LJ, by referring to what the testatrix had been capable of understanding and her ability to comprehend and appreciate the claims on her bounty, had been drawing a distinction between the requirements of the first two criteria and the third, he would undoubtedly have done so in clear language. On the contrary, what is said in para [60] of his judgment is all governed by its first sentence: "The judge was satisfied … that Mrs Krol was capable of understanding what she was doing without the need for further explanation."

iv) Fourth, if there were a distinction, the test of capacity would, at least in part, be a test of the memory of the testator. It would be a test of the testator's memory of circumstances relating to the individual affairs of those with claims on him and possibly of others (such as Sheila, on the facts of this case), who may already have conferred benefits which would have to be first remembered and then evaluated to enable a testator to choose justly between them. That would be directly contrary to the judgment of Lewison LJ in Simon v Byford.

v) Fifth, the modern reformulation of the Banks v Goodfellow test uses the word "understand" for all three criteria without distinction, which must – in the light of previous authority – have been understood as referring to capacity to understand, not actual knowledge.

136. I also reject the notion that a will cannot be valid unless the testator is aware of the terms of his existing or previous wills, or has to mind the reasons underlying the gifts in them. A testator does not have to be able to justify to himself a difference between a previous will and the new will, even if there were particular reasons for the terms of the previous will. I therefore do not accept that if Lord Templeman had forgotten the 2004 codicil and the reason for its terms he lacked testamentary capacity. Such an argument is contrary to the concession made by experienced Counsel (Ms Penelope Reed QC) and the reasoning of Lewison LJ in Simon v Byford:

> "Ms Reed disclaimed any reliance on equating testamentary capacity with an ability to remember the terms of and reasons for the dispositions in the previous will. But she said that Mrs Simon was incapable of going through the thought processes that had led her to leave the Westcliff flat and the shares to Robert. However, in order to go through those thought processes, Mrs Simon would have had to have remembered the reasons for those dispositions; so in my judgment her submission does amount to a requirement of actual memory. I do not consider that the judge made any error in his evaluation of requirement (c)."

137. As for Lord Templeman's being subject to a delusion, or illusory belief, which undermined his ability justly to decide, there was no evidence that Lord Templeman was subject to any delusion, even if (contrary to my findings) he had forgotten the 2004 codicil when making his 2008 will. Professor Howard explained that a delusion only exists where a patient will not accept the truth when it is explained to him. The evidence was that Lord Templeman was greatly comforted by the truth (e.g. as to his tax affairs) when he was told it; it was just that at a later time he would have forgotten it again. On the hypothesis that he had forgotten the 2004 codicil, he was unaware that he had already made provision for what was to happen with Mellowstone and unaware that it had previously been decided not to leave Mellowstone to Jane and Sarah. He was therefore mistaken in thinking (if he did) that no provision had been made, or that some provision was essential, but he was not mistaken in thinking that he wanted to leave Mellowstone to Jane and Sarah.

138. The Defendants seek to establish an illusory belief that a wrong needed to be put right, based on the words "This is not right" that Lord Templeman spoke to Sarah in August 2008. It is notable, however, that Lord Templeman did not seek to vary Sheila's will so that Mellowstone did not come to him: he only took steps to ensure that after his death it would revert to Sheila's family. That is consistent with Sarah's evidence that Lord Templeman said that it was not right that he was the sole owner of Mellowstone. What was not right, so far as he was concerned, was that he should have any more than a life interest in the house. What he wanted was for the house to go to Sheila's family after his death.

139. I find it difficult to accept that Lord Templeman's thinking in August 2008 involved an illusory belief: his focus was on where he felt, at that time, that Mellowstone should go after his death. He had forgotten (on this hypothesis) that he and Sheila had previously agreed that it should be divided. But even if this amounted to or involved an illusory belief, it falls far short of the kind of "delusion" needed to negative testamentary capacity. It was merely a failure of memory about previous intentions, or about circumstances relating to potential testamentary objects.

140. The Defendants rely heavily on a case called Re Belliss (Polson v Parrott) [1929] TLR 452 for the proposition that an illusory belief is equivalent to a delusion for these purposes. In that case, an elderly testatrix made a last will in secret, in which she departed for the first time from equal provision for her two daughters that she and her husband had made in previous wills and in lifetime gifts. The last will professed to provide equality in her dealings with her daughters; in fact it did not, because the testatrix was subject to a mistaken impression, amounting to a delusion, that for years she had given more financial assistance to one daughter than to the other. The Judge, Lord Merrivale, the President of the Probate, Divorce and Admiralty Division, found that the testatrix was a high-minded and conscientious woman, who sincerely believed that she was doing the right thing to equalise benefits. He held:

> "The question again is not whether the will was avoided by a mistake of fact. Mere mistakes of fact as to previous persons or property would not stand in the way of probate. Even in the jurisdiction of the Court in equity mistakes of fact can only be depended on to a limited extent as ground for rectification or modification of acts intentionally and definitely done. The crucial subjects of inquiry in the case are these. Did Mrs Belliss

> make her will of 1927 revoking her will of 1922 under a supposition that the re-apportionment made by the later will was required to restore equality, and was this supposition an insane delusion upon which her testamentary action of 1927 proceeded or an illusory belief of such a character as must be held to displace the *prima facie* proof of testamentary capacity?"

141. His Lordship then referred to several authorities, including Harwood v Baker and Banks v Goodfellow, and emphasised that the facts showed that Mrs Belliss was acting inexplicably in other respects at the time. He concluded:

> "Looking at the facts as a whole, it appears to me to be clear that in the summer of 1927 there sprang up in Mrs Belliss' mind an entirely illusory belief to the effect of the statement she made to the woman witness, and that this illusory belief supplied the main motive for her decision to call in Mr Gocher and with his help to make the new will. Further, I am satisfied that her memory had so failed by this time that she could no longer call to mind the facts of her past relations towards her daughters so as to displace illusory notions and beliefs. I must find, then, that Mrs Belliss had not in or after July 1927, the sound memory which in testamentary matters is essential to a disposing mind and understanding."

142. What is clear from this decision is that the President found that Mrs Belliss was subject to - if not an insane delusion (in that she was not insane) – then an illusory belief of such a character as to negative testamentary capacity. She did not have the mental powers to enable her to recall and understand the true dealings between her and her daughters. This was not a case a mistaken belief that was capable of being corrected. It was a case of an illusory belief from which Mrs Belliss could not be shaken and which deprived her of reason. I therefore reject the suggestion that Re Belliss stands as authority for the proposition that a mere mistaken belief, which is the product of forgetfulness, is inimical to testamentary capacity. In my judgment, the President was not using the phrase "illusory belief" as meaning "mistaken belief", but as denoting a kind of fixed belief, similar in character as an insane delusion, which the testator does not have the mental powers to overcome. The decision has, so far as Counsel's and Mr Templeman's researches have established, never been followed for any wider proposition of law.

143. For the reasons that I have already given, Lord Templeman was not subject to a delusion or fixed belief from which he could not be shaken to the effect that a wrong had been done to Jane and Sarah. He had (on this hypothesis) forgotten either the 2004 testamentary documents or the reasons for their terms, and so he mistakenly thought that he had not addressed what was to be done with Mellowstone. That was a simple mistake, which was attributable to his poor memory and not to any mental illness or fixed belief, which he had not the capacity to sort out in his mind. This therefore, on any view, is not a case in which, in the language of Banks v Goodfellow, Lord Templeman had a disorder of the mind that poisoned his affections, perverted

his sense of right or prevented the exercise of his natural faculties. He was able to comprehend and appreciate the claims to which he ought to give effect.

144. I will therefore admit the 2008 will to probate in solemn form.