Neutral Citation Number: [2021] EWHC 563 (Ch)

Case No: PT-2019-000448

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

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

Date: 15/03/2021

Before :

THE HON. MR JUSTICE FANCOURT

- -

Between :

MARY-ANN GARDINER	**Claimant**
- and -	
(1) MARK TABET	**Defendants**
(2) MAIA TABET	

- -
- -

Mr Paul Burton (instructed by **Keystone Law**) for the **Claimant**
Mr Aidan Briggs (instructed by **L E Law Solicitors**) for the **Defendants**

Hearing dates: 25-29 January 2021

- -

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. The issues in this trial are whether a document dated 29 May 2017 appearing to be the last will of Eric Tabet was duly executed and, if so, whether Eric Tabet had testamentary capacity and knew and approved of its contents when he signed it. He died on 21 July 2017.

2. The Claimant, who lives in the United States of America, is a longstanding friend and confidante of the deceased, and used to visit him in Islington occasionally and stay with him when she was in England. She did so for a longer time between 2004 and 2008 and then from time to time until 2011. She is the sole beneficiary of the will, the terms of which are set out in paragraph 37 below. I shall refer to her as "Dr Gardiner", but she was known to the deceased and his friends by the nickname "Mitzi".

3. The Defendants are the brother and sister of the deceased, from whom he had been estranged for almost 20 years until April 2017, when his brother, Mark, answered the deceased's call to visit him in hospital. His sister, Maia, saw him again on 31 May 2017. Maia lives in the United States of America but returned to visit for 3 weeks or so in June, shortly before the death. For convenience, and intending no disrespect, I shall refer to the Tabets by their first names.

4. The evidence is clear that Eric was a complex and difficult but vibrant personality, with mental health issues that made friendships or family relationships with him very challenging. He craved attention and physical affection. His mental instability made him unsuited to paid work and from the 1990s he lived on benefits and rental income, though he did significant good works for charities and his local church in Islington. He was exceptionally intelligent and spoke English, French and Arabic fluently. He was indeed very eloquent and talkative and loved long conversations on cultural, political, sociological and geopolitical subjects in particular, whether face to face or on the telephone.

5. The demands that Eric made of his siblings were ultimately too much for them, hence the estrangement, even though Mark and his family lived about an hour's drive from Eric's home.

A summary of the material facts and events

6. Eric's world was centred on his flat in Upper Street, Islington, in a building called Waterloo House, and he shared the flat with lodgers. The lodgers often became his close friends. Dr Gardiner had first lodged in Waterloo House in 2003. Eric had evidently bought a lease of the second and third floors of the building in better times, when he worked as a translator and an economist in the City. The property was subject to a mortgage, and Eric subsequently sold off the third floor to his then lodger, Guy Barrett,

who still lives on the third floor with his own family. That sale reduced but did not clear the mortgage debt.

7. Eric regularly entertained non-resident friends there and they came to visit him on occasions. Close friends and lodgers were Eric's "family" for the last 15 years of his life. He referred to them as his Waterloo House family and to his male friends as his "brothers". Christmas was an occasion of real importance to Eric and he made it a special event every year, which he shared with many of his friends.

8. Eric's wider family also owned property in Lebanon, of which it was assumed that Eric had a share, though the complexities of the family ownership were not investigated at trial.

9. Eric's closest, long standing friend other than Dr Gardiner is Jamal Hammoud, who had known him well for more than 25 years. Mr Hammoud, who is a chartered certified accountant, is one of the witnesses who signed the will. The other witness is Mohsin Lahkim, a partnership executive with the City of Westminster Council. He is a generation younger than Eric and Mr Hammoud and first met Eric in 2014. A year later, Mr Lahkim met Mr Hammoud and they too became friends.

10. Both Mr Hammoud and Mr Lahkim were at some pains to explain that they were not close friends of Dr Gardiner, though they both knew her and had shared various events in Waterloo House with her.

11. In 2009, Eric wrote (as an email to Dr Gardiner) and then printed out and signed a short memorandum in the following terms:

> "To whom it may concern:
>
> This is to verify that in the case of accident or death my belongings and my property including Waterloo House are to go to Mary-Ann Gardiner.
>
> Eric Tabet"

The signed document included Eric's landline number.

12. There was no dispute that this document ("the 2009 Memorandum") was created by Eric and that at least an electronic copy of it was retained by Dr Gardiner. When she was informed of Eric's diagnosis (an aggressive and inoperable brain tumour) in May 2017, she printed out a copy of the 2009 Memorandum on 22 May and took a photograph of it. She brought a copy with her to London.

13. On 10 October 2011, Dr Gardiner and Eric had signed an agreement in writing concerning ownership of Eric's flat ("the 2011 Agreement"). The 2011 Agreement is complex and certainly not drawn by a lawyer, but, essentially, Eric purported to gift one half of the flat on terms that Dr Gardiner would discharge the (by then) two mortgages on the flat (securing debt of about £124,000 in aggregate), with all the income and expenditure of the flat being for Eric's account. For each year that went by after 2015, Dr Gardiner would acquire a further 3% share in the flat. Dr Gardiner said that Eric prepared the 2011 Agreement and that she signed it as a "business agreement";

that she only had to retain the money with which to discharge the mortgages, should Eric so wish, but not otherwise actually discharge them.

14. The 2011 Agreement is a very curious agreement and Dr Gardiner was not able fully to explain it, nor to explain why £124,000 was retained by her without earning interest rather than being used to repay the mortgage debts. It was not even clear who paid the mortgage interest thereafter. I accept that the 2011 Agreement was prepared in the first instance by Eric and its authenticity is not challenged. Having seen Dr Gardiner give evidence, I do not consider that this is the kind of document that she could or would have produced alone, though she may have suggested changes to Eric's draft. The 2011 Agreement demonstrates that Eric was willing at that time to share ownership of the flat with Dr Gardiner in return for her taking responsibility for the outstanding mortgage, with on any view a substantial element of gift involved. Dr Gardiner brought a copy of the 2011 Agreement with her to London in 2017.

15. The next event of any significance was in 2016, when - according to Mr Hammoud - he was invited to discuss Eric's testamentary wishes. Mr Hammoud said that Eric asked him to visit in October or November 2016 for that purpose and told him that he wanted Dr Gardiner to receive the entirety of his estate, including his property in Lebanon. He said that she already had an interest in Waterloo House. Mr Hammoud said that he asked Eric on that occasion whether he wanted to leave anything to Mark or Maia but that Eric did not respond to the question. Mr Hammoud suggested that Eric should instruct a solicitor to prepare his will and Eric said that he would use the firm that he had instructed on the sale of the third floor of Waterloo House in 2005. At that time, there was no hint of Eric's impending serious illness and so no feeling of urgency about the will.

16. Mr Hammoud was not seriously challenged on any of this evidence, which I accept.

17. Shortly before the onset of illness in early 2017, Eric had therefore made clear – and he had been consistent over the years - that his wish was that Dr Gardiner should inherit all his property on his death. At that time, he had been estranged from his brother and sister for many years. In the circumstances, a gift of his estate to his closest friend and confidante is understandable and not such as to excite any suspicion.

18. By April 2017, Eric was suffering from serious mental and physical symptoms and unable to cope with living in the flat. Mr Hammoud considered that Eric needed medical attention. Eric called Guy Barrett one evening asking for help and an ambulance was called and took him to Highgate Mental Health Centre, on account of manic manifestations of illness. Though visited there by his friends, Eric expressed the wish that Mark should be contacted, as his closest relative. This occurred on 14 April 2017.

19. In the narrative that follows, all dates are in 2017, unless otherwise stated.

20. Mark was told that Eric was completely disorientated (though evidently he was able to recall that Mark was his closest relative and express the wish that he be contacted) and that his mental health had deteriorated. From that time, Mark visited every two or three days and a relationship between them was rebuilt. Mark's evidence was that it was as if the estrangement had never happened and that they were very close. I consider that that is overstating what happened, though there was certainly a rapprochement (with

Mark and Maia) and Mark was very attentive to Eric during his last 3 months of life, except when he went to Mexico on a family holiday. Mark observed that Eric had lost his short-term memory and that he had physical co-ordination problems. He had some difficulty eating, washing and using a bathroom. Mark said that Eric described his friends, Mr Hammoud and Dr Gardiner, though not in very flattering terms.

21. Mr Hammoud also visited Eric regularly and said that he was sometimes confused about where he was and what day it was, but not always, and that he shouted and screamed on occasions but tended to calm down when people he recognised came to visit him. He said that he did not see any problems with co-ordination of Eric's limbs at that time.

22. At this stage, Eric's condition had not been diagnosed and on 5 May he was "sectioned" in order to keep him from voluntarily discharging himself. At that stage, Mark described him as having no recollection of what had happened to him or of what he had been told by doctors, or where he was. That is consistent with Eric's medical notes and I accept that at that stage his condition was as described by Mark.

23. On 8 May, Eric was moved to the accident and emergency department at the Whittington Hospital. As a result of Mark pressing for CT and MRI scans, the tumour on Eric's brain was discovered on 10 May. There was significant swelling causing abnormalities in the brain. Eric was prescribed steroids, to reduce the swelling while further scans and assessments were made. Medical records show that the steroid treatment started on 12 May and continued thereafter, though after a few weeks the dose was reduced to avoid serious potential side effects.

24. Mark's evidence is that when he saw Eric on 10 May and on subsequent days he was unable to write or read. Mark had tried to get Eric to write down his diagnosis, so that he remembered it – which he was having difficulty doing – but Eric could not get beyond a squiggle on the page. The medical notes at this time support the evidence of Mark that Eric's condition was poor. On 12 May, Dr Pigott concluded that Eric did not have capacity to make decisions about the circumstances in which he should be treated in future. By mid-May it had been concluded that the tumour (glioblastoma multiforme) was not able to be treated, other than by alleviating the symptoms caused by the swelling and by palliative care. Mark had to decide in Eric's place on a DNR ("do not resuscitate") status for Eric as a patient.

25. However, it is material that Eric had been treated from 14 April to 10 May on the wrong assumption about the cause of his symptoms – he had been diagnosed as suffering from depression and anxiety. The swelling and pressure on Eric's brain caused by the tumour had not been alleviated. The course of steroids was intended to do that and would be expected to give temporary relief as regards that part of the mental and physical impairment that was caused by pressure on the brain. Mr Hammoud explained that he had been told by Dr Burns that as a result of the treatment there would be a time during which the condition of Eric would improve, such that it would give the appearance of having "the old Eric back" for a while, but that nevertheless the prognosis was that Eric only had months to live. The impairment caused by the swelling was not the sole cause of Eric's impairment – there was also degradation of brain tissue caused by the cancerous growth – but it was a significant cause of the mental and physical difficulties that Eric experienced before his diagnosis and treatment.

26. Mark and Mr Hammoud both visited Eric regularly during May 2017. On 26 May, Dr Gardiner landed in London. She brought with her a copy of the 2009 email and 2009 Memorandum and the 2011 Agreement. Prior to travelling, Dr Gardiner had consulted a London firm of solicitors, Bolt Burdon, about the status of the 2009 email, and had been told (she said) that it "might not hold up in court" as a will, and that the solicitor would be happy to meet Eric, perform a capacity test and draft a new will.

27. Mr Hammoud collected Dr Gardiner from Waterloo House late in the afternoon on 26 May and they both went to visit Eric in hospital. Dr Gardiner said that Eric was so happy to see her and she felt that he was not cognitively impaired. She said she took out the 2009 email and asked Eric if she could share it with Mr Hammoud. Eric's comments on the documents, according to Dr Gardiner, were "nothing sentimental" and "keep it simple" and "yeah yeah". Dr Gardiner said she told Eric that Bolt Burdon had indicated that they could visit and help to prepare a new will, but Eric "frowned and growled and said that he was tired so we stopped talking about his Will", and the matter was not spoken about again, as far as she was concerned. She said that she gave the documents to Mr Hammoud in the taxi home after the visit.

28. On the following day, 27 May, Dr Gardiner and Mr Hammoud both visited Eric. Curiously, neither said that the other was present during the visit, but Mr Hammoud did confirm that he put "Jamal" (his first name) and "Mitzi" into the visiting book or diary that was kept at Eric's bedside, so their attendances evidently did overlap. Mr Hammoud's evidence is that he discussed with Eric what Eric wanted, by reference to the 2009 Memorandum, and that Eric instructed him to type up a will with the same content as the 2009 Memorandum, leaving the entirety of his estate to Dr Gardiner. Eric said that he would sign it and wanted Mr Hammoud and Mr Lahkim to be the witnesses. Mr Hammoud said that Eric was insistent that the will should be "registered".

29. The implication of Mr Hammoud's evidence is that Dr Gardiner was not present while this happened on 27 May. Dr Gardiner said that after giving Mr Hammoud her documents on the previous day she never saw them again and never spoke to Eric again about a will. Neither Mr Hammoud nor Dr Gardiner say that they discussed the matter with each other, until after the events of 29 May. I find that surprising and will revert to it later in the judgment when I express my conclusions about what happened.

30. Mr Hammoud and Mr Lahkim then attended on Eric on the Bank Holiday Monday, 29 May. Mr Hammoud had prior to this drafted and printed out a will for Eric, at about 1.20pm. Their evidence is that Mr Hammoud read the will to Eric and handed it to him; that Eric read the will and then signed it, following which each of them witnessed the signature. Mr Hammoud then took back the executed will when Mark arrived shortly afterwards to visit Eric. Dr Gardiner was not present when the will was executed.

31. This evidence of Mr Hammoud and Mr Lahkim is hotly disputed by the Defendants. They maintain that Eric was not physically capable of signing anything; that he did not have the capacity at that time to understand what he was doing or what the will contained, and in any event and crucially that Mark had arrived at Eric's bedside first that afternoon and did not leave it until he, Dr Gardiner and Mr Hammoud left the hospital together and drove to Waterloo House at about 7pm. It is their case, therefore, that Eric could not have signed the document purporting to be his will on 29 May and

that Mr Hammoud and Mr Lakhim could not have witnessed his signature, and that accordingly the will was not duly executed by Eric on that day.

32. I will address in due course the conflicting evidence relating to the questions of whether the will was executed on 29 May and whether Eric had capacity to make a will and was aware of its contents. I will continue to refer to the document in issue as "the will" without prejudice to those questions.

33. The will was not shared with or mentioned to Mark while Eric was alive. Although it appears that an allusion was made by Mr Hammoud at a care meeting on 4 July to Eric's having made provision for what was to happen after his death, the will was not disclosed by Mr Hammoud or Dr Gardiner to Mark until after Eric's death. Mr Hammoud said that Eric wanted it registered but kept secret from the Defendants, "in order to avoid a fuss".

34. Mr Hammoud said that he gave the executed will to Dr Gardiner after Mark had left Waterloo House on 29 May. Dr Gardiner said that he did so either then or on the following day; she could not now be sure which it was. They both said that they sought advice from a direct access barrister, Mr Nazar Mohammad, on 2 June in relation to the validity of the will and a power of attorney that Eric wanted to grant Mr Hammoud so that Mr Hammoud could look after the practicalities of Eric's affairs while he was alive. A power of attorney was prepared by Mr Mohammad's assistant and was signed by Eric in hospital on 3 June. A tenancy agreement of Eric's room in Waterloo House in favour of Dr Gardiner at a rent of US$100 per month was prepared by Mr Hammoud, based on a draft supplied by Deepak Rughani, another friend of Eric, and was signed by Eric on 7 June but dated 4 June.

35. There was ultimately no sustained challenge by the Defendants to the execution of the power of attorney, which was certified by Dr Gardiner and witnessed by Mr Rughani. (Mr Rughani was visiting Eric in hospital on 3 June.) Nor was it disputed that Eric had signed the tenancy agreement dated 4 June on 7 June.

36. The Defendants' reaction to the will was to challenge its validity. Their evidence was that they believed and had previously been advised that Eric was not in a condition in which he had testamentary capacity. They believed that Eric did not have a will and that they would therefore inherit his estate jointly under the intestacy rules. Mark gave evidence that on 10 May Eric had told him that he had no will and wanted Waterloo House to go to Mark. Mark said that later in May Eric initiated a discussion about his estate and mentioned leaving £30,000 to various charities, £500 to Mr Hammoud and the flat to Mark, and that he trusted Mark to sort out his estate for him. Eric had told him several times, Mark said, that no one had an interest in the flat and agreed to Mark getting legal advice. Mark said that he asked Dr Gardiner on 29 May, at Waterloo House, whether Eric had a will or power of attorney and that she confirmed that he did not, and that Eric confirmed the following day that he had no will but wanted Mark to have the flat. Mark said that Mr Hammoud said on 20 June 2017 that Eric's flat was "all taken care of" and that he had no will.

37. The will dated 29 May 2017 states as follows:

> "I, Eric Tabet of Waterloo House 155 Upper Street, Islington, London would like to confirm that in the event of my death, all

> of my belongings and property including Waterloo House 155 Upper Street, Islington, London N1 1RA are to go to Dr Mary-Ann Gardiner of 191 Paradise Peninsula Road, Mooresville, North Carolina, USA 28117 Tel: 00 1 704 608 4020."

It is then signed and dated, apparently by Eric, and witnessed and dated by Mr Hammoud and Mr Lahkim in the following format:

> "Witness 1:
>
> Jamal Hammoud …. [signature]
>
> [Address]
>
> Date: 29/5/2017
>
> Witness 2:
>
> Name: MOHSIN LAHKIM
>
> Signed: … [signature]
>
> [Address]
>
> Date: 29/05/17"

The pleaded issues

38. Dr Gardiner's pleaded case contains the following material averments, at paragraph 6:

> "a. Mr Hammoud read the Will to the Deceased, twice.
>
> b. The Deceased read through the Will at least once.
>
> c. Mr Hammoud checked whether there was anything the Deceased wished to add to the Will.
>
> d. The Deceased confirmed that he approved the content of the Will and said, in answer to Mr Hammoud's question 'No, it covers everything'.
>
> e. Mr Lahkim was present when the Will was read to the Deceased, when the Deceased read through and checked the content of the Will and when he stated that he approved of it.
>
> f. The Deceased signed the Will in the presence of Mr Hammoud and Mr Lahkim both of whom witnessed the deceased's signature.

> g. Mr Hammoud and Mr Lahkim then signed the will, for the purposes of attesting it, in the presence of the deceased and each other.
>
> h. After the Will had been witnessed and attested by Mr Hammoud and Mr Lahkim Mr Hammoud handed the Will back to the Deceased, who re-read it at least once."

39. The Defence pleads that on 8 May 2017 Eric underwent a mini-mental state examination, in which he scored only 16/30, and that visual impairment and grossly impaired coordination of the upper limbs was noted; on 15 May 2017 he was diagnosed with cortical blindness, and on 18 May 2017 considered to be lacking capacity to make decisions regarding his resuscitation status. (That is a reference to Dr Sinha's conclusion on that day that on balance Eric did not have capacity to make decisions regarding his CPR status.) The Claimant was expressly put to proof that Eric gave instructions on 27 May 2017 about his testamentary intentions, and each of the sub-paragraphs set out in the immediately preceding paragraph is then denied. Further particulars are given, including a denial that the signature on the will is that of Eric; an assertion that on 29 May 2017 Eric was incapable of holding a pen and writing his signature and unable to read; then, by way of amendment after disclosure and after provision of the Defendants' forensic handwriting expert report, the following particulars:

> "g. On 29 May 2017 the First Defendant was present with the Deceased from around 3:00pm until the close of visiting hours. The draft of the purported will was not printed until 1:20pm. No document was executed whilst the First Defendant was present on that day.
>
> h. Someone repeatedly practiced the Deceased's signature on a page or pages resting on top of the purported will before the signature on that document was added."

40. The Defence then pleads particulars of lack of testamentary capacity and lack of knowledge and approval of the contents of the will. I will revert to those matters later in this judgment.

41. The Defendants therefore put in issue all aspects of the alleged execution and witnessing of the will on 29 May 2017 and allege that someone signed Eric's name on the document, by implication on an occasion other than the afternoon of 29 May 2017, having previously practised Eric's signature on another piece or pieces of paper lying on top of the intended will. No case is pleaded that the Claimant or the witnesses or any other person forged the will or agreed or conspired to do so, nor was any such allegation put to Dr Gardiner, as I made clear that it could not be in the absence of a pleaded case of involvement in a forgery. To be fair to Mr Aidan Briggs, who appeared for the Defendants, I think he was well aware that he could not do so, but was entitled to assert that someone else practised Eric's signature and then signed the document because Eric could not have done so. The case put to Mr Hammoud and Mr Lahkim in cross-examination was that the will with a signature on it did not exist on 29 May 2017 or on 2 June 2017, and that their evidence that the will was executed on 29 May 2017 was untrue.

42. The issue that I have to decide in this regard is whether Eric did sign his name on the will in his hospital bed on 29 May 2017 in the presence of Mr Hammoud and Mr Lahkim. It is not necessary or appropriate to go further than that and reach conclusions about other circumstances in which the document was signed, if it was not signed by Eric. However, if the document was not signed by Eric, it must follow that there has been a deception practised by whomever did sign it using Eric's name.

The events of 29 May 2017

43. What is not in dispute is that the document that was eventually signed was drafted by Mr Hammoud on his computer at around 1pm on 29 May 2017 and printed out at about 1.20pm. I was told by Mr Briggs that disclosure established that the document on Mr Hammoud's computer was saved at about 2.20pm. The drafting was therefore done by Mr Hammoud shortly after he had contacted and spoken to Mr Lahkim. Mr Hammoud had the 2009 documents that Dr Gardiner had brought with her from the USA and further details (her address and telephone number there) that she must have supplied subsequently. It is not disputed that Mr Hammoud did indeed attend the Whittington Hospital to visit Eric later that day and that Mr Lahkim, Dr Gardiner and Mark were also present that afternoon. It is no longer in dispute that Eric was able to sign his name on the power of attorney on 3 June 2017, and if it were I would in any event have accepted the evidence of Mr Rughani to that effect, who struck me as a careful and honest witness.

44. The most significant matter directly in dispute on the evidence of the witnesses is in what order the four visitors arrived on 29 May. There are the following differing accounts.

45. Dr Gardiner said that she arrived first, at about 2.30 pm, and Mr Lahkim arrived next, at about 3 pm, followed by Mr Hammoud about 35 to 45 minutes later. When Mr Hammoud arrived, she said that she gave way and left the bedside for a time, for a rest, and went into another ward to speak to another patient, then went to the nurses' station in Eric's ward. Why she did either of these things was not explained. Thereafter, at about 4.15 pm, she noticed a man whom she believed to be Mark, walking down a corridor towards the ward. She peeked around the curtains round Eric's bed, saw what appeared to be Eric signing a document, and then went to greet Mark and spoke to him "for a time" which she could not accurately estimate. Mark then brushed past her and went to Eric's bedside.

46. Mr Hammoud's account is that he arrived at 3.45 pm, which he could estimate fairly accurately because he knew he spent about an hour doing something else at home after printing the draft will and then left for the hospital, which journey from home takes him a predictable time. When he arrived, only Mr Lahkim was present. They then proceeded to deal with the will. Eric was still holding it, some 20 or so minutes later, when Mark arrived. Eric hurriedly handed the will to Mr Hammoud, who placed it in a document wallet. Dr Gardiner, he said, arrived at about that time too. Mr Lahkim's account is broadly the same as Mr Hammoud's: he thought that he had arrived at about 3 pm, but agreed that that was not precise; it was about the middle of the afternoon.

47. Mark's account in his witness statement was that he arrived at 3pm and was later joined by Dr Gardiner, Mr Hammoud and Mr Lahkim. He identified his arrival time by reference to entries in Eric's bedside diary: he had signed his name at the line that had "3 pm" printed in the left hand margin. The other three had signed their names after him, in spaces aligned with, just above and just below a printed "4 pm". Mark accepted that he said "3 pm" in his witness statement because of the entry in the diary. He also said that he had recently checked his arrival time by reference to his phone records, including GPS data, and believed that in fact he arrived in the car outside the hospital between 3.15 pm and 3.20 pm. His recollection was that the other three arrived together. Since, he said, he did not leave Eric's bedside (except, perhaps, to go to the water fountain or the nurses' station briefly) until the remaining three of them all left together at about 7pm, there was no opportunity for Eric to have a will read and explained to him and for him and the witnesses to sign it without Mark's knowing about it.

48. I do not consider that the entries in the diary are reliable records of the times at which or even the order in which visitors arrived on a given day. Mark accepted (and it was the evidence of others) that visitors did not always enter their names when they arrived, or at all sometimes, and that it was not always possible to place one's name against the correct time printed in the diary, even if one were inclined to do so. The entries for 29 May therefore do not mean that Mark must have arrived first at 3pm and the others afterwards. It is notable that the entry of Dr Gardiner's and Mr Hammoud's names are both written in Mr Hammoud's hand, starting on a line between those marked 3 pm and 4 pm and immediately underneath Mark's name. Mr Lahkim's name, in an unidentified hand, comes next, on a line between 4pm and 5pm. I consider that this documentary evidence shows only that Mark wrote his name in the book first and that, at that time, he chose to write his name against the 3pm line.

49. What is far from clear is who is mistaken about the order in which the four visitors arrived on 29 May. If Mr Hammoud and Mr Lakhim are right about their being the only visitors until after the will had been signed, both Dr Gardiner (who said that she was unaware on that day that a will had been signed until after Mark had left Waterloo House) and Mark are wrong in believing that they were the first to arrive. I will consider the reliability of these witnesses' evidence at a later stage in this judgment.

Eric's ability to sign his name

50. It is the Defendants' case in any event that Eric was physically incapable of holding a pen and signing his name on 29 May (as well as being unable to read a will) and so he could not have done so. I have no difficulty in rejecting that part of their case. There is clear medical evidence, as well as the evidence of Mark, that from mid-April until about the time of the tumour diagnosis and for a time afterwards Eric was physically as well as mentally incapable, apparently suffering from partial blindness and unable properly to control his limbs. However, as expected by the doctors, the steroid treatment made a temporary improvement in Eric's condition, both physical and mental. There is reliable evidence from around 26 May to 11 June that Eric was in a less confused and more alert state when visited by those whom he loved, who provided a willing audience for his need to talk about everything that concerned him, and that he was indeed capable of feeding himself and signing his name. He did sign his name on

the power of attorney and a tenancy agreement on separate occasions on 3 June and 7 June, albeit his signatures on those dates look rather different and are different again from his normal, pre-illness signature.

51. Reliable independent evidence from Guy Barrett confirms that Eric's condition "improved a lot compared with when he was first admitted" over a period of 6 weeks running from the time of his first admission (14 April). He said in cross-examination: "in the first six weeks he was not capable of doing many things, but after that he did rapidly improve and become himself – he was able to grasp things in his hand".

52. Mr Barrett took a short video of Eric on a mobile phone on 11 June 2017, which shows Eric capably if somewhat inelegantly eating a sandwich from a packet, using each hand independently of the other to do so. Mr Barrett did however confirm that Eric was suffering from poor eyesight while at the Whittington Hospital.

53. It seems to me likely that Eric's condition started to improve once the steroids began to have an effect, and thereafter continued to improve as the swelling on his brain reduced. This would mean, in accordance with Dr Burns's expressed opinion, that a significant improvement might be expected by the time (about 26 May) that Eric had had two weeks of steroid treatment. The medical records indicate that Eric remained confused and distressed when alone in hospital and do not themselves record a general improvement in his mental acuity; but it is inherently likely that his alertness and ability to focus and respond was better when he had friends and family around him – when his immediate surroundings were familiar rather than strange. Although Eric might have had some difficulty reading and exerting full control over a pen, I am satisfied that he was capable of holding a pen and signing his name on 29 May. Further, the difficulties caused by his illness, his poor vision and his posture, sitting in a hospital bed, would explain a relative lack of control over the shape of the signature.

The evidence relating to due execution of the will

54. Two expert witnesses examined the will: Elisabeth Briggs, who is a self-employed forensic document examiner, and Ellen Radley of the Radley Forensic Document Laboratory, a forensic handwriting and document examiner. Both experts concluded that, given the paucity of examples of Eric's signature from around the time of the will, the evidence was inconclusive as to whether Eric signed the will and that a reliable determination could not be made. Both experts noted that the signature on the will bears a vague pictorial similarity to known signatures of Eric before his illness, but that there is a lack of fluency in the execution.

55. Both experts carried out ESDA (electrostatic detection apparatus) analysis on the original will document, to identify any indented impressions on the document caused by someone writing on another document on top of the document in issue. This revealed striking markings, which Ms Radley's report in particular was of assistance in identifying as component parts of versions of Eric's signature, with individual parts of the signature appearing to be written in isolation and not as partial reproductions of full signatures:

> "In my experience, the repeated writing of individual elements of a signature, as found in the ESDA prints, is often found when an individual practices simulating a master signature on another piece of paper whilst resting on the document to which the simulated signature is to be appended. Alternatively, these impressions were caused by writings on other documents whilst resting on the Will. I'm confident that the "b" structures, "2" and heavy horizontal lines are individual elements written in isolation and not partial reproductions or full signatures. Consequently, the apparent repeated writing of "b"s and the isolated, heavy impression of "bet" might not be expected from the genuine writings of a signature on another document.
>
> There is also an impression of a structure pictorially appearing as a backward leaning "2". I notice a structure similar to a "2" appears at the end of the signature on the Will, referred to previously in this report."

56. Ms Radley also draws attention to an impression of a date - written as "29/5/2017" - which she says bears significant, subtle similarities to the writing of the date below Eric's signature on the will. She concludes that the same individual wrote that date on the unknown document and below Eric's signature on the will, and that the hand is the same as the hand that wrote "29-5-2017" beneath Mr Hammoud's signature on the will.

57. Ms Radley also noted that the signature in dispute on the will was appended with light pen pressure, as compared with the writing of the date beneath the signature, where superior pen control is evident. She stated that variation from normal signature or between signatures might well be explained by illness or by posture in a hospital bed.

58. In view of their inconclusive opinions, neither expert was called to give oral evidence at trial.

59. Mr Hammoud and Mr Lahkim gave evidence about the way in which Eric signed his will. In his first witness statement, made before the claim form was issued and dated just less than 18 months after 29 May 2017, Mr Hammoud said:

> "I read the unsigned and typed Will out to Eric twice. I then handed it to Eric. He put on his glasses and read over the Will himself." I asked Eric whether there was anything else he wanted to add to the Will. Eric said "No, it covers everything". Eric then signed the Will first. We gave Eric a cardboard wallet to put the Will on when he was signing. Eric then handed the Will to me and said, "Here it is, I trust you". I then signed the Will and Mohsin signed it after me. Eric read it again and looked at it, holding onto it for a while. He repeated his previous instruction to me to ensure the Will was "registered". Over the course of the next couple of days, Eric repeated that I should ensure that the Will was "registered"…
>
> After the Will was executed, we continued to discuss general matters for around 20 minutes or so before Mark arrived on the

> ward. I recall Mark's arrival as Eric jumped in surprise and quickly passed the will to me. I place the will back in the cardboard wallet and took it with me when I left."

60. In his first witness statement, signed on 28 February 2019, Mr Lahkim said that he felt honoured to be entrusted by Eric to be a witness to his will and that he arranged to meet Mr Hammoud and Eric at the hospital on 29 May. He arrived before Mr Hammoud and found Eric to be on good form, then continued:

> "Shortly after Jamal arrived, Jamal took out the will and read it out to Eric a couple of times. Eric nodded as Jamal read out the will. Jamal then gave the will to Eric to read. I recall Jamal asking Eric to confirm whether he understood the will and was happy with its contents but I cannot recall the precise words he used. After Eric read the will, he signed it in the presence of me and Jamal. We gave Eric something hard to lean on so that he could sign the will. After Eric had signed the will, Jamal and I both signed and witnessed the will in the presence of Eric. I'm fairly sure that Jamal signed the Will first and that I signed second."

61. In those statements, neither witness records there being more than one copy of the will or Eric having difficulty or taking more than one attempt to write his signature to his satisfaction.

62. Following disclosure and Ms Radley's expert, Mr Hammoud and Mr Lakhim made further witness statements, each dated 29 November 2020 and therefore exactly 3½ years after 29 May 2017. Neither witness suggested in either of their witness statements that they had any difficulty recalling events of that day.

63. Mr Hammoud's 2020 witness statement contains the following evidence:

> "Eric concentrated his attention on me as I read his will to him a couple of times. The will is a simple and straightforward one sentence. I noted that he was alert, clearly aware and deliberately focused on the matter of ensuring that the contents of his will were proper including that the sole beneficiary was Mary-Ann Gardiner and that all of his property was included and was to be distributed to her at his death just as we had talked about and which he had reconfirmed two days earlier. He did not ask any questions or express any concerns. He was calm, alert, focused and lucid. He was attending to business as I have known him to do in the past, such as when he was preparing a tenancy agreement for a new tenant.
>
> I handed Eric several copies of the will together. Either Mohsin or I handed Eric his glasses, which he put on. Eric gave no indication that he was unable to read his will. He took his time to read the will and to be sure of the contents. He said it looks good. I asked him if his will is as he wanted and he nodded and I think he said "yeah, yeah".

> I asked Eric whether there was anything else he wanted to add to his will. Eric said "No, it covers everything." Eric was intent on getting on with signing. I believe he may not have wanted to discuss his wishes in detail in front of Mohsin. Eric was a private person when it came to his business. There was no doubt that Eric was fully aware that he was executing his will and that the changes that had been made were as he requested. Otherwise, if I did not believe so I would not have continued.
>
> Eric was eager to sign so I put the documents on a cardboard wallet and I handed him my pen and he took it. It did not appear that he had any problem holding the pen. Eric was not happy with his first signature, so I put it aside, or maybe I put it underneath the others and he then signed the next one. Eric said he wanted to be sure his signature was right. That was important to him. He was satisfied with the last signature. When handing it back he said, "here it is, I trust you." Later I discarded the others.
>
> I have been shown and have read the expert witness reports of Elisabeth Briggs and Ellen Radley, the parties forensic document examiners. I note that both experts state that examination of the will by electrostatic detection apparatus reveals the presence of impressions. That seems to me to be correct. I can also confirm that the date on the will is in my handwriting.
>
> Mohsin and I signed the will. We gave it back to Eric as he wanted to read over the finalised will as executed. He commented that it was just as he wanted, everything was set. He was at peace, smiling, and calm. We then chatted for about 20 minutes. He was holding his signed will when Mark walked in around the curtains. Eric was startled, he looked at me and in a knee-jerk reaction swung his arm with his executed will towards me. I quickly put it in my bag and left. It appeared that Eric did not want Mark to see his will."

64. The considered evidence of Mr Hammoud was therefore that Eric signed more than one version of the will, having been handed several copies of it in a pile together, and that when he was content with his signature he handed the documents back to Mr Hammoud, who then signed the will, followed by Mr Lahkim. Eric then held the executed will until Mark arrived, when it was handed hurriedly to Mr Hammoud for safekeeping. Having referred to the forensic document examiners' reports, Mr Hammoud states that their conclusions about impressions on the document appear to be correct and confirmed that the dates written on the will were in his hand.

65. Mr Lahkim's third witness statement does not revisit the circumstances in which the will was signed. It records that he was asked by Dr Gardiner's solicitors to answer particular questions about Eric's capacity.

66. In cross-examination, Mr Hammoud was challenged about the extent to which his later witness statement conflicted with and gave details absent from the first witness statement. Mr Hammoud accepted that his first statement was intended to give a "full

and transparent" account of the circumstances in which the will was executed, though he did point out that the first statement in terms reserved the right to address "all additional relevant matters" in the event that Dr Gardiner issued proceedings. When under pressure to explain the different content relating to the events of 27 and 29 May 2017, he then said that the first statement was "broad brush" and the second statement was providing more detail, which he suggested was appropriate. He did not accept that he had forgotten the detail when he wrote his first statement. Accepting that some facts asserted in the later statement were "highly relevant", he said that he had not forgotten them when preparing the first statement but did not include them "as it just reaffirmed what I always knew" about Eric's testamentary wishes. His later statement was given to "flesh out" the first, and he disputed that his first statement was not a full and transparent account.

67. As regards the events of 29 May, Mr Hammoud reaffirmed that he would have arrived at 3.45pm – he was supposed to get there at 3 pm but was a little late because he had spent about an hour on other matters at home before leaving for the hospital. What he said about the signing, according to my note, was:

> "I had several copies of the will. I gave the entire bunch to him. I gave the whole pack, all I had, to him. Eric signed – he didn't like it and went on to the next one, until he was satisfied. He had no difficulty signing but the position was wrong, the bed was soft and so on. I think I gave him the cardboard wallet at that stage. *I added my signature and the date after Eric signed, then Mohsin signed*." (*emphasis added*)

68. Mr Hammoud suggested that the imprints revealed by the ESDA analysis were caused by Eric signing his will a number of times, practising. When asked about the two pairs of parallel lines that had been revealed by ESDA process, which were not part of Eric's normal signature, Mr Hammoud commented "That is why he wasn't happy with his signature". He was unable to explain how an impression of the date "29/05/2017" appeared on the executed will but accepted that it was his handwriting, as was the date written under Eric's signature. He said: "perhaps I dated a previous one and then Eric was dissatisfied and said 'give me another one', and then signed another one", but this was said more as a possible explanation than as his recollection and was inconsistent with his earlier explanation in cross-examination of the sequence of signatures. Asked why the date under Eric's signature (and as revealed by the ESDA analysis) was in the form "29/05/2017" when the date under his signature was in the form "29-05-2017", Mr Hammoud said that he did that sometimes, that he preferred dashes but obliques were conventionally used. Other documentary evidence showed that Mr Hammoud does indeed use dashes rather than obliques.

69. Mr Hammoud denied that he changed his evidence in his 2020 statement to try to take account of the expert evidence and said that he just added extra detail. He insisted that Mark was not present in the ward when he arrived and that Mark arrived "much later". When challenged to the effect that the will had not been signed on 29 May, Mr Hammoud said that it had been and that he remembered perfectly well what happened.

70. Throughout his evidence, Mr Hammoud was calm, impassive and rather inscrutable. He tended to look down at his papers or at another screen and rarely at the camera, though it may be that he had Microsoft Teams displayed on another adjacent screen and

therefore would not have been looking directly at the screen with the camera. In any event, with a fully remote hearing it is extremely difficult to assess demeanour or subtle facial inflexions as a reaction to questions asked and I place no reliance on such matters in reaching my decision.

71. Mr Lahkim was a very different personality from Mr Hammoud: a generation younger and rather offhand and jovial. He treated his virtual appearance at the trial inappropriately lightly, in my judgment, given what he must have understood about the issues that he was going to be raised and the importance of the matter to the parties involved. It may be that he was more nervous than he appeared to be and that being light-hearted was his way of coping with or concealing that.

72. Mr Lahkim accepted that his first statement was intended to be a "full and transparent" account of the events surrounding the alleged signing of the will on 29 May 2017. He said in cross-examination that he was not sure whether he was aware that Eric's diagnosis was a brain tumour but that he knew that Mr Hammoud had told him that it was very bad. He did not now know whether the visit on 29 May was the first time that he had been to see Eric. He was unable to help with greater precision about when he arrived at the hospital but restated that it was 30-40 minutes before Mr Hammoud arrived and that the will was read a short time after that. It took a few minutes to read the will and then Eric signed it. Mr Lahkim did not initially volunteer anything about multiple copies or several attempts being made by Eric to sign, but in response to open questions from the bench to say what he could remember of how the process happened, he said that Eric had several goes at signing and "he landed and was happy on a particular version", once he had placed the will on something to lean on. When it was put to him that Mark had been there all afternoon and that no will was executed, Mr Lahkim said that he did not know what Mr Briggs was referring to.

73. Mr Lahkim was referred to entries in Eric's diary and confirmed, rather theatrically, that the words "MOHSIN 'AZHAR'" were written in his hand on the 26 May page (so presumably indicating that he had indeed visited Eric on a previous occasion, three days before the will signing visit) but that the words "Mohsin Moss" on the 29 May page were not in his hand.

Consideration of other evidence

74. I have focused so far on the events of 29 May but there were other aspects of Mr Hammoud's and Dr Gardiner's evidence that were challenged by the Defendants. These included inconsistencies between Mr Hammoud's two witness statements and between his evidence and that of Dr Gardiner relating to the events of 26 and 27 May, then a visit by them both to see Mr Nazar Mohammad of Counsel at Legis Chambers on 2 June.

75. In Mr Hammoud's first witness statement he said that Dr Gardiner gave him the 2009 email and 2009 Memorandum on 26 May, the day of her arrival, and told him that Eric was happy for her to give them to him. He said that on the following day, when visiting Eric in hospital, he handed Eric the signed email and asked him what he should do with it. He said that Eric instructed him to type up a fresh document with the same content as the email, leaving the entirety of his estate to Dr Gardiner; that he would sign it and

wanted it witnessed by Mr Hammoud and Mr Lahkim; and that Mr Hammoud should then get the will registered.

76. In Mr Hammoud's 2020 witness statement, which was signed off on the same day as Dr Gardiner's statement, he said that on 26 May Dr Gardiner showed Eric the documents that she had brought with her, but at that stage he did not know that these included the 2009 Memorandum. Dr Gardiner then put the documents away and only gave them to Mr Hammoud that evening, saying "Eric wanted me to give these to you". This second version of events precisely coincides with Dr Gardiner's evidence in her witness statement. Remarkably, in those circumstances, both Dr Gardiner and Mr Hammoud say that the documents were not discussed. Indeed, it is something of a feature of Dr Gardiner's and Mr Hammoud's evidence that, despite Mr Hammoud having asked Dr Gardiner to bring with her from the USA any documents she had relating to Eric's testamentary intentions, those documents appear never to have been discussed between them; and further that the draft will prepared by Mr Hammoud was never discussed, before or after the signature of it, until Mr Mohammad's views about it were sought on 2 June 2017.

77. According to Mr Hammoud's 2020 statement, there was however greater discussion between Eric and Mr Hammoud about the 2009 Memorandum on 27 May. When asked what should be done with that document, Eric had said "Let me see" and then, after reading it, "This is it really". Eric said that after it was typed up by Mr Hammoud he wanted to review the will, and that he took his time as he thought through the email he had previously written. Mr Hammoud's 2020 statement adds:

> "I was reading Eric's will aloud as he followed along while we viewed the document together. He interrupted and said something like, "This is not an accident." Eric expressed his concern for the wording and told me to change it to "in the event of my death" rather than "in the case of accident or death". He further expressed that "Mitzi is to receive everything." Eric considered the wording and after pondering a moment, he asked me to include the word "all" and that would make it clear that all of his property, including that in Lebanon and the flat, was included in his will. He did not want anything out of order. He understood that he was conveying his testamentary wishes as he finished evaluating the content of his will. He gave further instructions for me to type up his will in a proper format. This I understood meant adding addresses and other relevant information. Eric told me that he wanted Mohsin to be a witness to his will."

78. Mr Hammoud was asked to explain why these precise words, particular requirements and such a potentially important statement as "Mitzi is to receive everything" were not included in his first "full and transparent" statement. His answer was that he did remember them when he made his first witness statement but did not leave them out or include them, since the first statement was an overview, just trying to get the key points across, whereas the later statement honed in on the detail. He accepted the potential importance of "Mitzi is to receive everything" but said that it just reaffirmed what he already knew and he thought it was taken for granted, given what he had discussed with Eric previously.

79. Before Dr Gardiner and Mr Hammoud conferred with Mr Mohammad at 4pm on 2 June, Mr Hammoud said that he asked Dr Gardiner to email to him the 2009 email and 2009 Memorandum, as he had returned them to her along with the executed will earlier that week. There is an email from Dr Gardiner to Mr Hammoud at 13:36 on 2 June, which contains no text other than the subject "Agreement" but which attaches four separate .jpg files: the first page of the 2011 Agreement; its second page; a copy of the 2009 email and a copy of the 2009 Memorandum. These are separate photographs, taken on Dr Gardiner's mobile phone. What was not included was a photograph of the will that Eric had just signed, which both Dr Gardiner and Mr Hammoud said had been given by him to her after it was signed. Mr Hammoud accepted that the purpose of his request and of the email from Dr Gardiner was so that Mr Mohammad could see the documents in advance of the conference at 4pm. Mr Hammoud said in his 2020 witness statement that he forwarded the email to Mr Mohammad, but then in cross-examination volunteered that he had not in fact done so because he had been too busy with other clients' affairs.

80. Both Dr Gardiner and Mr Hammoud were asked why a copy of the will had not been sent. Mr Hammoud said that he asked Dr Gardiner to send him the documents so that Mr Mohammad could see them in advance and confirmed that Dr Gardiner had the executed will, but that they had not had it scanned and he relied on Dr Gardiner to send it. He did not reply to Dr Gardiner's email, asking for the will too, because he was too busy. At the conference Dr Gardiner gave Mr Mohammad print outs of the will and the other documents. Mr Mohammad looked at the will and said it had not been prepared by a legal person but he had seen far worse. In his witness statement, Mr Hammoud said that Mr Mohammad said, after reviewing the will, that it had been executed properly.

81. Dr Gardiner said in her witness statement that she emailed the 2009 documents and 2011 Agreement to Mr Hammoud so that Mr Mohammad could review them before the meeting. She also said that she had dropped into Bolt Burdon one day that week for them to review the will and a solicitor there said that it was executed correctly. Dr Gardiner confirmed that she took the photos of the documents "there and then" on her mobile phone but could not say why she did not photograph the will and that she did not recall if the will was shown to Mr Mohammad. She said that she had no knowledge of what was decided at the conference about the power of attorney for Mr Hammoud to manage Eric's affairs.

82. The power of attorney as executed the following day provided for Mr Hammoud to be Eric's sole attorney for property and financial affairs, with immediate effect upon registration, with no replacement attorneys and no one to be notified of registration. Dr Gardiner certified that Eric understood the purpose of the power and the scope of authority conferred; Mr Hammoud signed as attorney, and Mr Rughani signed as witness to Eric's signature.

83. Mr Rughani found a precedent for an owner-occupier tenancy agreement and emailed it to Dr Gardiner, who forwarded it to Mr Hammoud. Mr Hammoud then typed up what he thought was necessary and discussed the rent and the question of a deposit with Eric. He said that Eric thought that a rent of $100 was appropriate, because the purpose was to protect his property, and that after discussion the provision for a deposit was removed. Asked why the tenancy agreement in favour of Dr Gardiner was executed on 7 June but backdated to 4 June, Mr Hammoud said that Eric wanted the tenancy to begin

on a Sunday. In his 2020 witness statement, Mr Hammoud had said that he visited Eric with the typed up tenancy agreement on 7 June and that Eric "was agreeable to the terms of the agreement as written".

84. Mark and Maia were of course unable to give any direct evidence about these matters, which happened in their absence. Mark said that Eric had confirmed several times that he had never written a will and that no-one had an interest in the flat; and that he asked Dr Gardiner directly on 29 May in the flat whether Eric had a will or power of attorney and that she confirmed that there was none. Mr Hammoud also confirmed this. Mark said that at a meeting arranged at North Middlesex Hospital (where Eric had been transferred when he caught shingles) on 20 June, Mr Hammoud said that the flat and Eric's finances were all taken care of; that Eric had not signed a tenancy agreement in favour of Dr Gardiner, and that he was in the process of drawing up a power of attorney. Mark said that at that meeting, Mr Hammoud was asked whether Eric had a will and that he said "No". Mr Hammoud denied that and said that Mark had only once asked about a will, in early days in April.

85. Mark said that at a care meeting held on his birthday, 4 July, a woman from Islington Social Services asked Mr Hammoud whether Eric had made a will and that he replied "no, but we know his wishes", and that he also denied that he had a power of attorney from Eric. Mr Hammoud disputed this, and said that he did refer to a will. In cross-examination, Mark said that on that occasion Mr Hammoud handed round his phone to everyone in the meeting except him to show them something – perhaps an image of the will – but that he did not see it. This is supported by the terms of his Whatsapp to Maia that evening, in the form of a report on the day, which does not say that a will was mentioned, as it surely would have done if Mr Hammoud had said that there was a will.

The Relevant Law

86. The requirements for a valid will are contained in section 9 of the Wills Act 1837, as amended:

> "No will shall be valid unless –
>
> (a) it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and
>
> (b) it appears that the testator intended by his signature to give effect to the will; and
>
> (c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
>
> (d) each witness either –
>
> (i) tests and signs the will; or
>
> (ii) acknowledges his signature,

> in the presence of the testator (but not necessarily in the presence of any other witness), but no form of attestation shall be necessary."

87. There is a presumption (rebuttable) that an apparently duly executed document was in fact executed in accordance with these provisions. The law was reviewed in Sherrington v Sherrington [2005] EWCA Civ 326. Peter Gibson LJ referred to the 19th Century cases, Wright v Rogers (1869) LR 1 PD 678 and Wright v Sanderson (1884) 9 PD 149, in which the strength of the presumption of due execution where the will contains a perfect attestation clause was described. He said:

> "It is not in dispute that if the witnesses are dead, the presumption of due execution will prevail. Evidence that the witnesses have no recollection of having witnessed the deceased sign will not be enough to rebut the presumption. Positive evidence that the witnesses did not see the testator sign may not be enough to rebut the presumption unless the court is satisfied that it has 'the strongest evidence,' in Lord Penzance's words. The same approach should, in our judgment, be adopted towards evidence that the witness did not intend to attest that he saw the deceased sign when the will contains the signatures of the deceased and the witness and an attestation clause. That is because of the same policy reason, that otherwise the greatest uncertainty would arise in the proving of wills. In general, if a witness has the capacity to understand, he should be taken to have done what the attestation clause and the signatures of the testator and the witnesses indicated, viz. that the testator has signed in their presence and they have signed in his presence. In the absence of the strongest evidence, the intention of the witness to attest is inferred from the presence of the testator's signature on the will (particularly where, as in the present case, it is expressly stated that in witness of the will, the testator has signed), the attestation clause and, underneath that clause, the signature of witness. "

88. It is evident from that passage that a strong presumption will only arise where the will contains a full attestation clause. However, as section 9(d) provides, no formal attestation is necessary and a weaker presumption will still arise where there is none, even with an informal will. This is established by a series of 19th Century and early 20th Century cases cited in Williams, Mortimer & Sunnucks: *Executors, Administrators and Probate* (21st ed) at [9-32].

89. There are many cases where the presumption is of practical importance, for example if one or both witnesses have died or the will was made many years before the trial. In this case, by way of contrast, the first witness statements of the witnesses were made less than two years after the date that the will bears and I heard their oral evidence less than four years after that date. Neither witness protested difficulty in remembering what happened. It was not suggested that any relevant evidence was missing. In those circumstances, although the legal burden rests on the Claimant, I will decide whether the will was duly executed on 29 May 2017 on the strength of all the evidence that I have heard and read, on a balance of probability, making all appropriate allowances for

the usual fallibility of witnesses' recollection even over a relatively short time interval. Given the implications of concluding that the will was not signed by Eric on 29 May 2017, namely that someone has carried out a deception of a serious nature, I consider that I should be satisfied that there is cogent evidence justifying such a conclusion before reaching it.

90. In comparison with due execution, the requirements of testamentary capacity and knowledge and approval are constructs of the common law. The *locus classicus* of testamentary capacity is the judgment of the Court of Queen's Bench, given by Cockburn CJ, in Banks v Goodfellow (1870) LR 5 QB 549. The central part of that judgment is almost too well known to probate lawyers to merit repetition, but in this case a more extensive part of the judgment is material:

> "It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties -- that no insane delusion shall influence his will in disposing of his property and bring about a disposal of which, if the mind had been sound, would not have been made.
>
> Here, then, we have the measure of the degree of mental power which should be insisted on. If the human instincts and affections, or the moral sense, become perverted by mental disease; if insane suspicion, or aversion, take the place of natural affection; if reason and judgment are lost, the mind becomes a prey to insane delusion calculated to interfere with and disturb its functions, and to lead to a testamentary disposition, due only to their baneful influence -- in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand. *But what if the mind, though possessing sufficient power, undisturbed by frenzy or delusion, to take into account all the considerations necessary to the making of a will, should be subject to some delusion, but such delusion neither exercises nor is calculated to exercise any influence on the particular disposition, and a rational and proper will is the result;* ought we, in such a case, to deny to the testator the capacity to dispose of his property by will?
>
> It must be borne in mind that the absolute and uncontrolled power of testamentary disposition conceded by the law is founded on the assumption that a rational will is a better disposition than any that can be made by the law itself. If therefore, though mental disease may exist, it presents itself in such a degree and form as not to interfere with the capacity to make a rational disposal of property, why, it may be asked, should it be held to take away the right? It cannot be the object of the legislator to aggravate an affliction in itself so great by the

> deprivation of a right the value of which is universally felt and acknowledged. If it be conceded, as we think it must be, that the only legitimate or rational ground for denying testamentary capacity to persons of unsound mind is the inability to take into account and give effect to the considerations which ought to be present to the mind of a testator in making his will, and to influence his decision as to the disposal of his property, it follows that a degree of unsoundness which neither disturbs the exercise of the faculties necessary for such an act, nor is capable of influencing results, ought not to take away the power of making a will, or place a person so circumstanced in a less advantageous position than others with regard to this right." [*emphasis added*]

91. This longer citation serves to emphasise that it is not the law that a person of disturbed mind, or suffering from some delusion as a result of mental illness, has no testamentary capacity. The enquiry is whether, in a particular case, the mind is so unsound or the delusion so severe that the testator cannot understand what he is about, in exercising a valuable right, or his ability to make a rational decision is absent. There is no requirement that the testator be able to remember or recall the extent of his property or those who might have a moral call upon him: the test is whether he is capable of understanding such matters when they are present to his mind: Simon v Byford [2014] EWCA Civ 280 at [40]–[42], *per* Lewison LJ. The onus of proving testamentary capacity lies on the propounder of the will.

92. On the facts of this case these principles are important because it is common ground that Eric suffered from a disorder of the mind in late May 2017: rapidly progressive brain damage due to the glioblastoma multiforme and manic mental state phenomena owing to either bipolar disorder or delirium. I will refer to the medical evidence in due course, though in this case that evidence is not determinative of testamentary capacity.

93. Finally, the requirement of knowledge and approval of the will is a requirement that the particular will truly represent, on the balance of probability, the testator's testamentary intentions: Fuller v Strum [2001] EWCA Civ 1879 at [59], [70]. Again, the onus lies on the propounder of the will. Where there is nothing to excite the suspicion of the court, knowledge and approval will be inferred from proof of due execution and testamentary capacity. Where the circumstances are suspicious, the propounder must affirmatively prove knowledge and approval so that the court is satisfied that the will represents the wishes of the testator: *ibid.* at [33]. It is however a matter to be approached objectively; it does not involve a value judgment about the justice of the testamentary disposition or the circumstances in which the will was prepared and signed: *ibid.* at [34].

94. In this case, the will was as straightforward as a will can be and Mr Hammoud and Mr Lahkim gave evidence that the will was read twice to Eric and that he then read it, before pronouncing himself satisfied with it and signing it (after several attempts to do so). If that evidence is accepted and Eric had testamentary capacity on that day, there can be no real doubt about knowledge and approval. Nor, despite the belated reconciliation with Mark, is there any reason for the court to be suspicious of a gift of the entire estate to Eric's longstanding closest friend and confidante. If on the other hand the will was probably not signed by Eric, or he lacked capacity to make a will, knowledge and approval is irrelevant.

Conclusions on due execution

95. Against that summary of the relevant law, I turn to my conclusions on whether the will was, as Mr Hammoud and Mr Lahkim have testified, signed by Eric on the afternoon of 29 May 2017.

96. Apart from the suggestion that Eric was physically or mentally unable to sign a will and the differences between the signature and Eric's normal signature, which I have already addressed, the evidence relied on to support a conclusion that the will was not signed on 29 May 2017 is the following:

    i) Mark's evidence that there was no opportunity that afternoon for the will to be signed.

    ii) Mark's evidence that Dr Gardiner and Mr Hammoud both told him in the flat in the evening of 29 May 2017 that Eric had no will.

    iii) The evidence of Ms Radley, the expert handwriting and document examination witness, that someone appears to have practised Eric's signature and also parts of it on another document that overlay the will, and Mr Hammoud's evidence that the date that had been written on that overlay document was written by him. If that did not result from an earlier attempt by Eric to sign another copy of the will, which Mr Hammoud then dated, the practising of Eric's signature amounts to evidence that someone else wrote Eric's name on the will.

    iv) The circumstantial evidence that on 2 June 2017, when sending to Mr Hammoud the documents that would be relevant for Mr Mohammad's advice on Eric's testamentary dispositions, Dr Gardiner did not send a copy of the will, only copies of the 2009 email, the 2009 Memorandum and the 2011 Agreement. Possible explanations are that Dr Gardiner overlooked sending or was not asked to send it, or did not herself have the will, or there was no signed will at that time. Only the last of these possible reasons will support the Defendants' case that the will was not duly executed.

    Set against that evidence and supporting a case of due execution is the written and oral evidence of Mr Hammoud and Mr Lahkim, who give first-hand evidence of execution, and the evidence of Dr Gardiner about the events of 26 and 27 May 2017, about Mr Hammoud giving her the signed will on the evening of 29 May 2017 or on 30 May 2017 and Mr Mohammad advising on the executed will on 2 June 2017.

97. I will now deal in turn with the above four different categories of evidence that potentially support the Defendants' case.

98. *(1) No opportunity to* sign.

    I have already identified the different factual accounts given of the sequence of arrivals at the Whittington Hospital on 29 May 2017. I must decide whether I accept that Mark was a reliable witness and, if so, whether he is probably correct in his recollection that he arrived first on that afternoon and that Dr Gardiner, Mr Hammoud and Mr Lahkim

all arrived at a later time, and that he did not leave Eric's bedside except for a time that was too short to enable the will to be signed.

99. Mark and Maia both have an interest in the outcome of this litigation. If the will is invalid, each will inherit a half share in Eric's estate. The value of Eric's estate was not proved in evidence and is complicated by the possible effect of the 2011 Agreement (about which I express no view) and uncertainty about the extent of his interest in the Lebanese property. There is however clearly significant value in the estate. In April 2017, Mark was interested to discover whether Eric had made a will and if not whether one could be made, and was concerned to establish that Eric's estate would devolve on him and his sister. He was aware that Eric owned a potentially valuable flat in Islington and unaware of the 2011 Agreement. He says that he repeatedly questioned Eric about whether he had made a will.

100. I also find that Mark and Maia are both, understandably, emotionally caught up in the question of whether their older brother could have left all his property, including a share in family property in Lebanon, to persons other than his family. There was at the time in 2017 and there remains a degree of bad feeling between Mark and Maia and the Waterloo House family. I was not convinced by Mark's assertion that his only concern was with fulfilling Eric's wishes and that in 2017 he was as concerned to look after Mr Hammoud's interest as a close personal friend as he was to look after his and Maia's interests. In those circumstances, the question arises whether I can be satisfied that Mark's evidence has not been adversely affected by his understandable wish to see the will defeated.

101. Mark made a witness statement on 27 November 2020. He set out in considerable detail the events of April to July 2017. His account of events was doubtless assisted by the detail of the medical records and many contemporaneous Whatsapp messages exchanged with Maia over that period. However, some evidence given was not aided by any disclosed document: the assertions that on 10 May, the day on which the cancer was diagnosed, Eric told Mark that he had never written a will and that he wanted Mark to have his flat; and the assertion that on 29 May in the flat he asked Dr Gardiner, and on 20 June and 4 July in meetings he asked Mr Hammoud, whether Eric had made a will, and that on each occasion the answer was "No". Mark's recollection in his oral evidence that on 4 July Mr Hammoud did not disclose the fact of a will was however supported by a Whatsapp of 5 July.

102. Mark's oral evidence was calmly and cogently given, with no indication that anything other than his genuine recollection was being put forward. When challenged about his account of Eric's condition on 10 May, and in particular Eric's inability then to write his name, Mark gave a detailed and clear answer explaining the circumstances in which it had come about on that day. On the other hand, Mark asserted that at no point in all his visits did he see Eric read or write, which I consider to be mistaken at least as far as reading was concerned. If Eric could not read anything, what was the point in keeping the diary of his visitors to remind him who had come to see him? Mark's evidence in general did not allow for any improvement in Eric's condition that resulted from the correct diagnosis and appropriate treatment. He first insisted that Eric was not able to sign his name at all, based on evidence of what happened in April or early May but which was inconsistent with what is now accepted to have happened on 3 and 4 June. Then later he more realistically accepted that Eric might have found it difficult to hold a pen, which would be likely to make his signature look different. I accept, however,

Mark's evidence that from mid-April until the correct diagnosis was made, Eric's physical abilities and eyesight were very poor.

103. I find that Mark was a truthful witness, albeit some of the assertions in his witness statement were inaccurate and, further, he has not accounted sufficiently for the changes in Eric's condition over the period from mid-April to his death in July. I do not find that Mark was lying when he described in his witness statement or orally the time at which he arrived at the hospital on 29 May or that he was first to arrive. As he honestly accepted, his witness statement was influenced by the content of the diary; his oral evidence followed further investigation and consideration. In correspondence in August 2017, Mr Mohammad informed the Defendants' solicitors, in response to their particular questions, that the process of signing the will took about 30 minutes, that the time was late in the afternoon on 29 May 2017 and that:

> "At about or just after the will had been executed, Mr Mark Tabet, the Deceased's sibling, came into the Deceased's hospital room. He made the comment 'You came all the way from America to see Eric!'"

There was no response to this information until a letter dated 1 March 2018, in which the Defendants referred to the contents of the expert report of Professor Jacoby, said that Eric did not have testamentary capacity and in any event was incapable of signing his name or reading, and that Mark was present at the hospital on 29 May 2017 and arrived before Dr Gardiner and the will witnesses, who at no time were alone with Eric.

104. The assertion by Mr Mohammad that Mark came into the hospital room just after the will was executed by Eric and the witnesses was made only 3 months after the events of 27 May 2017. Had that been untrue to Mark's knowledge, in that Mark had arrived first and never left Eric's bedside, it is hard to believe that an immediate response would have been overlooked by the Defendants and their solicitors. The detail about the comment made by Mark on first meeting Dr Gardiner would have reminded him of the first occasion on which he met her, which it is common ground was that day. Mark's presence when Dr Gardiner, Mr Hammoud and Mr Lahkim arrived and throughout their visit would have been an obvious and a strong retort to the letter from Mr Mohammad. There was no response to that information for over 6 months, and when it came it was part of a series of challenges to the validity of the will. That suggests that Mark was not able to say in around August 2017 that he was the first to arrive in hospital on 29 May 2017.

105. I have already held that the entries in Eric's bedside diary do not answer the question of who arrived first that day, but they are nevertheless material. Mark's recollection now (and in March 2018) is that he was the first, but he may be mistaken about that. His recollection could well have been influenced by the fact that the diary – on which he initially relied for the time of his arrival – can be read as indicating that he was also the first to arrive. Mr Hammoud believed that his arrival time was about 3.45pm. That is therefore consistent with the possibility that he arrived sufficiently before Mark to give time for the will to be signed. I consider on balance that Mark is mistaken in saying that he arrived first; that Mr Hammoud, Dr Gardiner and Mr Lahkim all arrived before him, at about the same time, and that Dr Gardiner did meet Mark in the ward when he arrived, as she described.

106. It is inherently likely that, as he said, Mr Hammoud did bring with him to the hospital on 29 May 2017 the draft will that he had only just prepared, having contacted Mr Lahkim a little earlier. I accept that it was Mr Hammoud's intention to deal with signing a will that day. I am unable to accept that Dr Gardiner knew nothing about this. Given that she was the intended beneficiary, had brought the 2009 Memorandum and given it to Mr Hammoud, had been present at the hospital on 26 and 27 May 2017 and had subsequently provided her address and telephone number to him, it is not credible that there was no contact between them and that Dr Gardiner was unaware of what Mr Hammoud was intending to do. I was not persuaded by Dr Gardiner's evidence that she peeked round the curtain in the ward on 29 May and was surprised to see Eric signing something.

107. The position, in my judgment, was probably this. Mr Hammoud knew of Eric's wish to leave his estate to Dr Gardiner. Dr Gardiner had shown him further evidence of this, in the shape of the 2009 Memorandum, and she must have told him, as she knew, that it would not stand up as a valid will. Mr Hammoud wished to give effect to the wishes of his close friend, Eric, by creating a valid will, and Dr Gardiner naturally wished to see that done too. She must have been advised by Bolt Burdon – though she did not say so – that in the absence of a will Eric's estate would pass to his siblings. There was therefore a community of interest in bringing into existence a valid will. Dr Gardiner also knew – because Bolt Burdon had told her – that a capacity assessment should be carried out. She mentioned it to Eric, who displayed a lack of enthusiasm. The decision not to invite Bolt Burdon to do so must have been taken by Dr Gardiner and Mr Hammoud, if only to agree that Eric's response that day meant that he did not want that to happen.

108. Mr Hammoud therefore set about preparing a document that could be signed and witnessed as a valid will. For that purpose, Mr Lahkim or someone else disinterested in the estate was needed. The intention was for Eric to sign a will on 29 May. Dr Gardiner would have been made aware of that. In evidence, she and Mr Hammoud attempted to distance themselves from each other after the 26 May 2017 hospital visit and to distance Dr Gardiner from the attempt to create a valid will. In my judgment, Dr Gardiner was more closely involved than she was willing to say.

109. Given the timing of the preparation of the draft will and the intention to execute it, an obvious difficulty for the Defendants' case is this: if there had been no suitable opportunity on 29 May, because of Mark's presence, Mr Hammoud would surely have created another opportunity in the following days. There was no need for the will to be executed on 29 May in particular, though doubtless Dr Gardiner did not want any great delay, given Eric's prognosis and unstable condition. Even if (as Mr Hammoud said) Mr Lahkim was unavailable for the rest of the week, someone else from among the Waterloo House family could have obliged. On 3 June, Dr Gardiner, Mr Hammoud and Mr Rughani signed the power of attorney. There clearly was no perception that Eric could not sign documents.

110. It is therefore not clear why someone other than Eric would have signed the will. If, however, that is what happened, it is equally unclear why it was dated 29 May 2017 – a date when to Mr Hammoud's and Dr Gardiner's knowledge Mark was present at the hospital until he left in their company at about 7pm. In response to questions raised by the Defendants' solicitors about 3 months later, Mr Mohammad (then acting for Dr Gardiner) volunteered that the will had been executed in the late afternoon of 29 May,

a time when Dr Gardiner would surely have recalled that Mark was present, since she met him for the first time that day.

111. I consider it likely that all three of Dr Gardiner, Mr Hammoud and Mr Lahkim arrived on 29 May at about the same time. I am not persuaded that Mr Lahkim recalls accurately the time of his arrival or that he was on his own with Eric for as long as 40 minutes. On balance, I consider that Mark's recollection that he was the first to arrive was influenced well after the event by the terms of the diary entry, showing his name before the names of the other three. I find that he arrived a relatively short time after the other three, but long enough to give the opportunity for Eric's will to be signed.

112. *(2) Admissions*.

As to Mark's evidence that Dr Gardiner and Mr Hammoud each confirmed later that day that Eric had no will, that may well be true, although it is denied by each of them. Even if it is true, it is not persuasive evidence that there was no will at the time. Both Mr Hammoud and Dr Gardiner wished to keep Mark in the dark about the existence of a will, because disclosing its existence would have led to "a fuss", which Eric was keen to avoid, and because it might have set in train events leading to Eric making some different testamentary disposition, or other events (such as a failed capacity test) that might cast doubt on the validity of the will. I consider it very likely that Dr Gardiner and Mr Hammoud would have denied knowledge of the will if Mark did indeed ask them on that day. They wanted to keep it quiet.

113. *(3) Expert evidence of impressions on the will.*

It is important to note that the expert handwriting and document examination evidence does not conclude that the will is a forgery. Ms Briggs said that she was unable to assess the significance of any of the impressions on the will or even identify the person who wrote "29/5/2017" on the overlay document as being the same person who dated the will. Ms Radley, whose report is the more thorough of the two, correctly identified that the "29/5/17" impression was written by the same hand as the other dates on the will and expressed the opinion (in appropriately guarded terms) that the impressions of individual elements of Eric's signature "might not be expected from the genuine writings of a signature on another document".

114. Both Mr Hammoud and Mr Lahkim belatedly advanced the explanation that Eric had to sign several copies before he was satisfied with his signature on the will. Once he was satisfied, they said, the will was passed to Mr Hammoud first and then Mr Lahkim to witness. But that evidence does not account for two aspects of the impressions detected by use of ESDA:

i) The practising of individual elements of Eric's signature rather than the whole or just the start of the signature;

ii) The impression "29/05/2017" written in Mr Hammoud's hand.

Although Mr Hammoud speculated that the latter might have been because Eric passed a version of the signed will for him to sign and only after that became unhappy with his own signature, that was not the evidence that Mr Hammoud had given about the attestation of the will.

115. I have given anxious thought to whether it is proper to draw from the expert evidence the factual conclusion on the balance of probability that someone other than Eric was practising his signature. I do not consider that it would be an appropriate conclusion to draw for the following reasons:

i) First, the expert opinion evidence is guarded or equivocal about the right conclusions to draw.

ii) Second, I consider that the partial appearance of Eric's signature could well be explained by the difficulty that Eric, in his condition and propped up in a hospital bed, could have had in making a clear signature. This is consistent with Ms Radley's observation that the signature in dispute is made with light pen pressure. It may be that only part of an earlier attempt at a signature was strong enough to make an impression on an underlying document.

iii) Third, although Mr Hammoud did not recall signing and dating an earlier version of the will, it is possible that it did happen, and in any event it is difficult to see why Mr Hammoud would for any other reason have dated another document on that occasion. He hardly needed to practise appending a date to a document in his own hand.

116. I am therefore not persuaded that the impressions detected are evidence of someone other than Eric practising his signature. The difference in appearance of the impressions from Eric's signature on the will and his other signatures at about the same time can be explained by his ill health or his posture, or both, as Ms Radley accepts. That is also in my judgment the likely explanation for the different appearance of his signatures on 29 May, 3 June and 4 June, as compared with his pre-illness signatures.

117. *(4) The 2 June 2017 email*.

I turn finally to the absence of a photograph of the signed will as an attachment to Dr Gardiner'e email of 2 June. On the basis of the evidence as to the purpose of the email, it is difficult to believe that Dr Gardiner would not have taken a photopraph of the signed will at that time if she had it in her possession. It seems unlikely that she would have overlooked it, even if Mr Hammoud had not expressly asked for it: the whole object of the exercise was to produce a valid will and obtain confirmation that it was valid. Although both Mr Hammoud and Dr Gardiner thought that the will had been given to Dr Gardiner, it is possible that they are wrong about that. Mr Hammoud may have kept the will to investigate what if any "registration" was required, or for safekeeping or other reasons. Another possible explanation is that the signed will did not exist at that time, but if it did not then it is hard to imagine why the draft was not taken to the hospital for signature after Mr Mohammad had given his advice, together with the power of attorney. On balance, therefore, I consider that the more likely explanation is that Mr Hammoud and Dr Gardiner are mistaken in saying that the will had been given to Dr Gardiner on 29 or 30 May 2017 and that accordingly no adverse inference should be drawn from the absence of a photograph of the will.

118. Given the conclusions that I have reached about evidence that is potentially probative that the will was not signed, it follows that unless I entirely reject the evidence of Mr Hammoud and Mr Lahkim and conclude that they are lying to the court, my conclusion is likely to be that the will dated 29 May was duly executed, as it appears to be.

119. As my summary of the evidence indicates, there are aspects of the evidence of Mr Hammoud about which I entertain real doubt. I do not consider that the full, unvarnished truth about what occurred has been presented to the court. The concerted efforts of Mr Hammoud and Dr Gardiner to provide a valid will has been concealed. Various embellishments to the original evidence of Mr Hammoud were made in his 2020 witness statement that I do not accept are genuine recollection, even allowing for the corrupting effect on memory of frequent recall and consideration of events over a long period of time. Mr Hammoud has added to his original "full and transparent" account not just to deal with the expert document analysis evidence but to add weight to his original witness statement.

120. I do not criticise Mr Hammoud for adding to his evidence of what happened on 29 May 2017 to address facts newly identified in the expert evidence. I accept that Mr Hammoud's original account of Eric signing the will in his hospital bed could not have been expected to focus on the fact that Eric had a pile of copies of the will on which he was writing, such as to be capable of leaving an impression on an underlying copy. On the other hand, the allegation that Eric could not write or read had been raised in correspondence months before the date of the first witness statement. In those circumstances one would expect Mr Hammoud, if he were giving a full and transparent account in his first statement, to have described any difficulty that Eric experienced in making a signature with which he was content. It is however possible that Mr Hammoud was only reminded of that detail when he was shown the expert evidence at a later time.

121. However, I do not accept that Mr Hammoud remembered Eric saying "Mitzi is to have everything" when he made his first witness statement and decided not to include it because it only confirmed what he already knew. That is not a credible explanation. It would not have been omitted from his first statement if he had a memory then of Eric's saying so. The reservation of the right to add further information later was in relation to other matters that might arise in proceedings, not important details of the same matters that were addressed in the first statement.

122. Nor do I accept the claimed recollection that Eric was specific about small changes from the terms of the 2009 Memorandum to be made in the draft will to the terms of the 2009 Memorandum, such as including the word "all" and deleting "illness/incapacity", or that Eric checked on 29 May to make sure that Mr Hammoud had correctly carried these changes into the final version of the will. These events are inherently improbable given Eric's condition, and the suggestion that they have since been remembered by Mr Hammoud or were knowingly omitted from his first statement is equally improbable. Nor do I accept that Eric discussed whether there should be a deposit paid by Dr Gardiner under the terms of a tenancy agreement to be prepared, or that the rent should be $100 per month.

123. I consider that the above matters are details that have been added by Mr Hammoud to lend more credibility to the evidence that Eric was able to take an active interest in the transactions that he dealt with from his hospital bed, to help to counter the defence that Eric did not have testamentary capacity.

124. The question raised by that conclusion is whether I should reject Mr Hammoud's evidence as unreliable in its entirety, on account of its incompleteness and partial untruthfulness. I remind myself that even if I am satisfied that Mr Hammoud has lied about certain parts of his evidence, I should not automatically draw the conclusion that

all his evidence is untruthful. A witness sometimes lies about matters for particular reasons, such as a desire to avoid embarrassment or to hide dishonourable conduct, or to try to improve the evidence about other events that did in fact happen. It does not therefore automatically follow that I should conclude that Mr Hammoud is lying about the execution of the will.

125. That question must be considered more broadly, in the light of other evidence. I take into account the undisputed facts, other evidence that I do accept as truthful, documentary evidence (such as it is in this case) and the inherent probability of certain events occurring. Having done that, and for reasons already touched on, it seems to me that I can accept Mr Hammoud's evidence about Eric signing the will on 29 May 2017. It is sufficiently supported by other evidence, including that of Mr Lahkim, who gave evidence without having been present when Dr Gardiner and Mr Hammoud were questioned. The countervailing evidence that the will was not signed is not compelling, for the reasons that I have given. It seems to me inherently likely that the will was signed on 29 May 2017 because Dr Gardiner and Mr Hammoud needed a signed will, Mr Hammoud prepared the will on that day and went to the hospital to meet Dr Gardiner and Mr Lahkim for that purpose, and Eric was able to sign his name. Although doubts about the evidence on behalf of the Claimant were skilfully exposed by Mr Briggs's questions, on balance I am satisfied that the will was in fact signed by Eric on the afternoon of 29 May 2017.

126. The factual conclusion that I have reached is not in my view inconsistent with Mark's evidence (which I accept) that Eric told him that he had no will and wanted his flat to go to Mark, and that on another occasion he wanted £30,000 to go to a charity and £500 to Mr Hammoud and the residue to Mark. I consider that Eric told Mark that he had no will because he did not want to discuss his testamentary intentions with Mark. He wanted to leave his estate to Dr Gardiner and did not want there to be a scene with Mark (or with Maia) about why he was not leaving his estate to his natural family.

127. Eric, on the other hand, certainly did want maximum attention during his illness from those who were close to him, both his friends and his blood relatives. He was frightened of being abandoned and "lost in the system", as Mr Hammoud put it. Eric was anxious that Mark should remain beholden to look after him. The medical notes show that Eric frequently asked for Mark when he was not present and felt safer when he was around. Making generous-sounding assurances of this kind would be one way of ensuring that Mark continued to pay him attention. All the evidence that I heard suggests that Eric was quite manipulative of others - in health and in hospital - to get the attention that he craved. In my judgment, though ill and not mentally fully functioning, Eric was still sharp enough (when alert and not drugged) to behave in this way.

Testamentary capacity

128. Turning to the question of whether Eric had testamentary capacity on 29 May 2017, the relevant questions are set out in paragraph 91 above.

129. Mr Briggs submits on behalf of the Defendants that I should take into account the following evidence of Eric's mental condition, in the following order of importance:

i) The assessments made by medical practitioners at the time;

ii) The contemporaneous medical records, as explained by the psychiatric expert witnesses, Professor Robin Jacoby and Dr Waleed Fawzi;

iii) The video/audio evidence, that is to say recordings made on 29 May 2017 by Mr Hammoud and Mr Lahkim and on 11 June 2017 by Mr Guy Barrett;

iv) The evidence of lay witnesses about Eric's condition.

130. I agree that each of these sources of evidence about Eric's mental state is valuable evidence, though I do not agree that they should be ranked rigidly in the way that Mr Briggs proposes. None of the categories of evidence is conclusive and it is important to weigh them all and see to what extent conclusions expressed in each sit with evidence provided by others. I shall nevertheless review each briefly in the order in which Mr Briggs placed them.

131. There were informal assessments made by medical practitioners and more routine notes made on a daily basis, recording Eric's condition at the time he was observed and any matters relating to his treatment. The informal assessments were:

i) 8 May 2017: mini-mental state exam (MMSE) – scored 16/30 as compared with a previous 25/30 (on a date not specified). There was no evidence about what a score of 16/30 signifies, other than a significant deficit as compared with normal performance.

ii) 9 May 2017: abbreviated mental test (AMTS) – scored 6/11 and unable to identify the year or the hospital, recall an address or count backwards from 20 to 1.

iii) 18 May 2017: on balance, Dr Sinha concluded that Eric did not have capacity to decide on cardio-pulmonary resuscitation status.

iv) 23 May 2017: Dr Pigott conducted an assessment of mental capacity for the purpose of considering Eric's discharge from hospital and found that he had a general understanding of the decision that needed to be made and why it needed to be made, including the foreseeable consequences, but that the understanding was fluctuating. It was present in lucid times, but Eric was unable to recall issues or his diagnosis, or explain reasons, but that when something is explained to him he is agreeable to the proposal and can communicate. Steps being taken to maximise capacity were noted as "quiet environment, weaned steroids, using family and friends".

v) 12 June 2017: Dr Donaldson concluded that Eric did not have capacity to make decisions about his care and transfer to placement (and recorded that he wanted "nice people to talk to").

132. These assessments therefore appear to present a consistent picture of a significant deficit on normal mental functioning and, in the opinion of clinicians, insufficient capacity to decide certain complex issues. The first two assessments were before the correct diagnosis of Eric's illness and the third only shortly after appropriate treatment

had started. The fourth was at a time when the steroid treatment could have been producing some effect, and the fifth was after the steroid treatment had been reduced.

133. The routine medical records are extensive. I accept that the records of Eric's condition before the correct diagnosis show him to be lacking mental and physical capacity. After Eric caught shingles in mid-June 2017 and was moved to the North Middlesex Hospital, his condition rapidly deteriorated. The focus is therefore on the extent to which his mental capacity improved temporarily between about 12 May 2017 and mid-June 2017. I have already found that the steroid treatment produced (as was predicted) a temporary improvement in both mental and physical functioning. The medical notes consistently record that Eric showed signs of being confused as well as manic manifestations of his illness.

134. A note made by Dr Burns on 24 May 2017 states that he was lying in bed, answering questions appropriately and had understanding of his poor prognosis, and that he said that it was difficult to say whether the medication was right because he was coming to terms with the diagnosis. Thereafter notes on 25, 26, 27 and 28 May 2017 record his being confused and agitated on several occasions, or alert, and settled on other occasions. On 28 May 2017 he was noted as "remains a little confused but settled down and slept" and on 30 May 2017 as being "in bed alert and disorientated asking questions 'where he is' and 'what to do'". On 31 May 2017, the notes record on 3 separate occasions that he is "alert and delirium", "complaining does not know why here" and "just 'determined' to get his affairs in order and 'have a happy end'". Further notes in the first week of June 2017 record his being confused on several occasions and alert and agitated on others. Palliative care notes on 5 June 2017 record "Discussion with Eric who claims to be physically comfortable and spiritually at peace. Erics concerns are food and being 'shunted around'. Noted pressure of speech and flight of ideas…"

135. In my judgment, these notes demonstrate a problem with confusion that was more or less continuous when Eric was being assessed or observed by nurses or clinicians, though there is some indication of a moderate improvement in late May 2017 and particularly in early June 2017. It is notable that there was a perception – of Eric and the clinicians – that good company of family and friends and conversation was important to him, for his feeling of well-being and that he was keen to have Mark present. The notes do not comment at all on Eric's condition when he had visitors.

136. The old age psychiatric expert witnesses agreed that Eric suffered from a disorder of the mind, owing to rapidly progressive brain damage due to his glioblastoma multiforme. They agreed that he did not have significant (or any) cortical blindness. While Dr Fawzi considered Eric to suffer from episodes of delirium, Professor Jacoby considers that it was bipolar disorder. They agree that he displayed manic mental state phenomena. By reference to the test in Banks v Goodfellow, they now agree that Eric probably did have an adequate understanding of his estate and of the general nature and act of making a will, though Professor Jacoby is more guarded about this. Whereas Professor Jacoby is unable to conclude whether Eric had testamentary capacity, because he is uncertain whether Eric understood the moral claims of his siblings or rejected them because of mental disorder, Dr Fawzi considered that he had testamentary capacity.

137. Professor Jacoby initially doubted that Eric had sufficient understanding of the nature and act of making a will and of the nature of his estate, but he changed his opinion

having seen the 20 minute recording of Eric taken on the afternoon of 29 May 2017. That is in my judgment an important piece of evidence because the recording of Eric gives an accurate picture of his mental condition on the day on which the will was executed, indeed within an hour or so of the execution. The recording amply demonstrates Eric's loquacity and pressure of speech, as well as mild flight of ideas. To a lay person, it raises questions about the extent to which Eric's mental functioning was affected. However, in view of that evidence, both Professor Jacoby and Dr Fawzi consider that Eric was broadly coherent and demonstrated the capacity to understand matters concerning his estate and his family. Professor Jacoby says that there is little or no evidence of delirium but leaves open the question of awareness of moral claims for the court to decide, in the light of all the evidence.

138. I consider that he was right to do so: that question is affected by all the evidence that the court has heard, touching on the relationship between Eric and Mark and Maia and the time that they spent together from April to July 2017, as well as the strength of the claims of the Waterloo House family. Nevertheless, I have a sense, reading between the lines of Professor Jacoby's addendum report, that he was persuaded that Eric had periods of lucidity – one of which is illustrated by the audio recording taken shortly after the signing of the will – and that in such periods he had testamentary capacity, subject only to the question whether he was capable of understanding the moral claims of his siblings.

139. There is a brief video recording also taken on 29 May 2017, recording a conversation between Eric and Dr Gardiner, in which Eric seems a little confused about which month it was and of the context in which that question arose. In view of the time that he had spent in a hospital environment, I did not find that particularly surprising or revealing.

140. A further short recording made on 11 June 2017 shows Eric happily consuming a sandwich from a packet, using each hand in turn to feed himself. I have already commented on what that demonstrates.

141. There was also evidence from Mark, Maia, Dr Gardiner, Mr Hammoud, Mr Lahkim and others about Eric's condition as it appeared to them when they visited him. Mark's evidence strongly supports a conclusion that Eric was perfectly able to understand at various times (even when in poorer condition on 10 May 2017) the purpose of making a will and those who had a moral call on him. There was further evidence of Eric's mental alertness from Mr Rughani and Mr Barrett, on which I feel able confidently to rely as both witnesses impressed me with their straightforwardness, care and honesty in answering questions. Both of them confirmed that Eric had improved a good deal from his condition when he was first admitted to hospital. That is supported to some extent by Maia's evidence: she records that on 4 June 2017 Eric was "very lucid on some things, people, events"; on 7 June 2017 he was alert and feeling that his system was stable; and similar comments are made for 8 and 9 June 2017. Maia's evidence about 10 June 2017 was that Eric was very upbeat, alert and voluble in the presence of Mr Hammoud and Mr Rughani, who commented that he had never seen him so strong since the diagnosis. This evidence confirms my view that Eric was much more alert and capable when he was energised by the presence of his friends and family, but in particular his closest friends, during a short period of a few weeks before his health very significantly declined.

142. I conclude that there was a period, from about 25 May 2017 (some two weeks after the start of treatment to reduce the swelling) until mid-June 2017, when Eric's physical and mental condition were improved, and during which he had some almost entirely lucid times. That improvement reached its peak around 10 June 2017, but was already evident by 29 May 2017. The lucid times were, invariably, when he felt energised by the presence of family and friends. It is evident – and not at all surprising – that when he felt abandoned and alone he presented and responded very differently. I consider that this improvement in condition was somewhat exaggerated by Dr Gardiner, whose evidence really minimised any serious symptoms at all; and, correspondingly, it was rather underplayed by Mark, who treated Eric's condition as a level continuum of disability from April to July 2017. The true position, evident from all the evidence considered together, is that there was, as predicted by Dr Burns, a brief period when Eric's functioning was, at times of lucidity, almost back to normal. As demonstrated by the audio and video recordings made on 29 May 2017, as assessed by the expert witnesses, that afternoon was one such lucid period.

143. As to the question of whether Eric was capable of weighing the moral claims of Mark and Maia alongside those of the Waterloo House family, I have no doubt that this was so. Eric's reconciliation with his siblings demonstrates that his mind was not poisoned against them by mental illness. Eric discussed his wishes about his estate with Mark and with Maia, according to their evidence, and demonstrated his ability to consider their claims. He discussed with both Mark and Mr Rughani that he might leave £30,000 to a charity. That is, perhaps, a little two-edged in relation to conversations after 29 May 2017, in that it may suggest that Eric had subsequently forgotten that he had signed a will. But it is nevertheless clear that he was capable of giving thought to what he should do with his estate, and clear too that he considered leaving it to Mark, or for Mark to share with Maia. The fact that he decided not to do so, despite the reconciliation with Mark that had occurred and his desire for Mark's presence in hospital, does not in all the circumstances (of long estrangement from his siblings and his close friendship with the Waterloo House family and Dr Gardiner in particular), raise any real question about his ability to weigh the moral claims on him. It was for Eric to decide whether, given the long estrangement, the claims of his close relatives outweighed the claims of his closest friends.

144. I therefore conclude that on 29 May 2017, when he signed the will, Eric had testamentary capacity. He understood what he was doing in making a will; he knew what his estate comprised – essentially only the Waterloo House flat and his share of the Lebanese property; he knew the competing claims on his estate, and although he did suffer a disease of the mind it was not such as to poison his mind against his siblings or such as to prevent him from making a just and rational testamentary disposition of his estate.

Knowledge and approval

145. I consider that Eric wanted to leave his estate to the Claimant for the benefit of all his close friends, who clearly meant a great deal to him during his life. He would not have wanted the Waterloo House family to be broken up and left without a base after his death. Although he was reconciled with Mark and Maia at the end of his life, and despite the strength of the blood tie, he must have understood that Mark and Maia were both

well established in life and did not need his support. The same might be said of Dr Gardiner and, to a lesser extent Mr Hammoud, but not all the friends and lodgers in the Waterloo House family were secure and well established. Eric had made it a purpose of his life to help those in need and befriend the friendless.

146. I am satisfied on the balance of probability that the will does represent Eric's testamentary intentions. Although the attempts of Mr Hammoud and Dr Gardiner to procure a will in Dr Gardiner's interest were in some respects underhand, in that they concealed from Mark what they were about, and the impetus for making a will came from them and not from Eric, that is not a matter that ultimately affects the question of knowledge and approval, in the absence of any suggestion of undue influence. It does though cause the court to inquire closely into the circumstances in which the will was signed, which I have done. I am satisfied that Mr Hammoud's endeavours coincided with Eric's wishes: Eric wanted Dr Gardiner to inherit his property for the benefit of the Waterloo House family.

147. In any event, I am persuaded that in late 2016 Eric had discussed his testamentary intentions with Mr Hammoud, stating that he wanted Dr Gardiner to inherit his estate; and that on 27 May 2017 Mr Hammoud did discuss with Eric the 2009 Memorandum and the preparation of a will. I am also persuaded that on 29 May 2017 Mr Hammoud read the will to Eric, who probably also read it himself, as best he could, and that he understood the simple content of it.

148. In view of those conclusions and my conclusion about Eric's testamentary capacity when he signed the will, I am satisfied that Eric knew and approved of the content of the will.