Neutral Citation [2023] EWHC 1145 (Ch)

Case No: PT-2022-BHM-000058

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

Birmingham Civil Justice Centre
33 Bull Street, Birmingham, B4 6DS
Date: 5th May 2023

Before:

HIS HONOUR JUDGE TINDAL
(sitting as a Judge of the High Court)

- -

Between:

(1) JENNIFER BAKER **(2) EMMA SPIERS**	**Claimants**
- and –	
DIANE HEWSTON	**Defendant**

Judgment

Mr John Aldis (instructed by **Somerfield & Co**) for the **Claimant**
Mr Martin Langston (instructed by **Richard Nelson LLP**) for the **Defendant**

Hearing dates: 19th and 20th April 2023

HHJ TINDAL:

Introduction

1. This is a case which at a legal level is about the relationship between the common law test of testamentary capacity in *Banks v Goodfellow (1870) LR 5 QB 549* and the Mental Capacity Act 2005 ('MCA'). However, at a human level, it is about the impact of a deceased testator leaving his affairs in a sadly messy state and whether that was due to his diagnosis of dementia or – as I will find – his capacious, if harsh, decisions.

2. Stanley (as I shall call him) saw many changes in his long life. He was born in 1929 at the height of the Great Depression and died aged 91 on 5th August 2020 at the height of the COVID Pandemic. He was a widower of Agnes, who died in 2019. In 2020 Stanley left their three children: Ronald, Martin and Jennifer (who as one of Stanley's Executors is the First Claimant). Stanley also left eight grand-children: including Jennifer's daughter Emma (as Stanley's other executor, the Second Claimant) and Ronald's son Luke. All those named except Martin are beneficiaries of Stanley's last will dated 23rd May 2020. As Martin has not participated in this litigation so far, in a public judgment I will respect his and his family's privacy. This is the main reason that I do not give Stanley's (and their) surname in this judgment (though it is on the Court file and Orders and there is no basis under CPR 39 to anonymise any party).

3. Yet for many years, Stanley had another family. Though he and Agnes never divorced, they separated in the 1980s and Stanley moved in with his partner Kathleen. They were supported for years by her daughter Diane (the Defendant). In 2010, Stanley and Kathleen each made wills leaving half-shares in their new jointly-owned home in Birmingham (which I will call 'the Bungalow') to Diane and Martin. When Kathleen died in April 2014, I will find Stanley handed Diane the deeds to the Bungalow in an envelope where he wrote *'Di keep safe your half of house, Stan'*.

4. However, only a few weeks later in June 2014, Stanley changed his will so as to disinherit Diane and to favour Agnes and their children, Ronald, Jennifer and Martin However, in a later will in 2017 Stanley disinherited Martin, only to 're-inherit' him in a will in 2018, only to disinherit him again in his last will in May 2020. Therefore, this case concerns no fewer than six wills (with one in 2009 and drafts in 2017 and 2019) in one decade with family beneficiaries shifting in and out of inheritance.

5. After Stanley's death, Diane objected to Stanley's 2020 will being granted Probate, pointing out that Stanley had a diagnosis of dementia for several years and she was concerned that he did not have mental capacity to make any wills from 2014 onward. If that is right, Stanley's last valid will would be the 2010 will, which like Kathleen's left half-shares in the Bungalow to Diane and Martin. It is not fair to assume why Martin did not get involved in the dispute or this subsequent litigation. However, as he was a beneficiary of Stanley's 2018 will as well as the 2014 and 2010 wills, he has an interest in and is affected by these proceedings. In any event, as Stanley's executors under his 2020 will, Jennifer and Emma have brought these proceedings to seek the Grant of Probate (i.e. declaration of validity) of the 2020 will. Under the contentious probate rules in Civil Procedure Rule ('CPR') 57, Diane was perfectly entitled to require Jennifer and Emma to prove the validity of Stanley's 2020 will without putting forward a positive case as to its invalidity but also to cross-examine witnesses involved in the preparation or execution of Stanley's 2020 will (see CPR 57.7(5)).

6. At trial, we heard the evidence of the solicitor who drafted Stanley's 2020 will Mr Penn; and two of Stanley's friends Mr Rainsford and Mr Graham who attested that will (i.e. witnessed Stanley signing it). Having heard them, Diane withdrew her objection to the 2020 will as part of a compromise that she would receive a payment from Stanley's Estate (and I was happy to see, also a payment from it to a dementia charity). That was an entirely fair compromise which reflected Diane's unpleaded claim in relation to Stanley's promise to her in 2014 of a half-share in the Bungalow when he gave her the deeds, arguably amounting to a trust of it. I am happy to record in the order the parties agree that it was both Kathleen's and Stanley wish and intention that Diane should have half the Bungalow. Ordinarily when parties to litigation reach such a compromise, the judge's role is simply to make an order ending the proceedings - certainly not to write a judgment such as this. But in this very unusual case I do so for three distinct reasons.

7. Firstly, s.49 of the Administration of Justice Act 1985 enables the High Court to pronounce on each relevant will with the consent of all 'relevant beneficiaries'. But Diane asked me to pronounce upon not only the 2020 will, but the earlier ones of which Martin was also a beneficiary, yet unusually he has not participated so has not 'consented' under s.49: *Boast v Ballardi [2022] EWHC 1533 (Ch)* p.15. It would be unfair simply to pronounce on the 2020 will without considering the others.

8. Indeed, as Martin was a beneficiary under the 2018 will, he is plainly 'affected' by the validity of the 2020 will and even now, he may attempt to challenge it. So, it is appropriate to give him an opportunity to object within 28 days to pronouncement of its validity by sending him this judgment, failing which he is bound by it under CPR 19.13. I hope he would understand that would give some finality to proceedings and to allow everyone to move on. From what I understand, it may well be Martin does not want anything to do with Stanley's wills, but it is only fair to give him a chance to say.

9. Secondly, whilst Martin has not participated in the litigation and Diane has now settled it, in my judgment it was entirely understandable why she was concerned that Stanley's chopping and changing between wills in his final decade may have been related to his dementia diagnosis. Whilst Diane is entitled to her own view, in my view on all the evidence I have (including hers), there is no evidence whatsoever that Jennifer, Emma and Ronald manipulated Stanley, whose decisions it is clear to me were entirely his own. Whilst Martin and Diane's memories of Stanley are tarnished, I recognise his memory for the rest of his family is important so I will try to respect that in my choice of words. Yet as part of my judgment I must explain why I am satisfied that Stanley's decisions about his wills in his last decade had more to do with his caprice than his capacity.

10. Thirdly, whilst the Skeleton Arguments of Mr Langston and Mr Aldis touched on the execution of Stanley's 2020 will and his 'knowledge and approval' of it, both rightly argued the main issue was his testamentary capacity – indeed for Stanley's wills going back to 2014. They were all made after the MCA came into force in 2007 and must be analysed without retrospective medical evidence and indeed without live evidence, save as to the 2020 will, for which Mr Penn did not obtain a doctor's assessment of capacity, nor read over the will to Stanley, due to COVID intervening. This raises acutely whether or not there is a 'presumption of testamentary capacity' and the significance of the absence of explanation of the will to Stanley, on which issues the approaches of the common law and MCA are said to be different. Since the litigation was compromised (but a judgment is still needed), this seems a good opportunity to discuss in a little detail a potential compromise between *Banks* and ss.2-3 MCA which I am not aware has yet been proposed: possibly due to lack of merit, possibly as too difficult to do in a contested case. In short, my own view is whilst ss.2-3 MCA do not apply in Probate cases, they are consistent with the common law and can accommodated within it.

Testamentary Capacity: *Banks* v MCA or *Banks* = MCA ?

11. In *Banks,* Lord Cockburn CJ summarised the test on testamentary capacity at pg.565:

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

Over 135 years later in Sharp v Adam *[2006] WTLR 1059 (CA)*, May LJ said at p.66 this test in *Banks* had 'stood the test of time' and quoted it at p.68 with the addition of [a]-[d] to distinguish the four different elements of the test.

12. Indeed, *Banks* had so 'stood the test of time' that *Williams & Mortimer & Sunnicks on Executors, Administrators & Probate* (21st Edition 2018), *Williams on Wills* (10th Ed 2nd Supp 2021) and *Theobold on Wills* (19th Edition 2021) do not refer to very much 20th Century authority on testamentary capacity, especially above High Court level. Yet in the last 20 years, according to *Westlaw*, *Banks* has been considered by the Court of Appeal no fewer than seven times: *Sharp, Hoff v Atherton [2005] WTLR 99 (CA), Perrins v Holland [2011] Ch 270, Burgess v Hawes [2013] WTLR 453, Simon v Byford [2014] WTLR 1097, Burns v Burns [2016] WTLR 755* and most recently *Hughes v Pritchard [2022] Ch 33*. In the High Court, *Banks* has been analysed by (among others) Lord Briggs (as he now is) in *Re Key [2010] 1 WLR 2020*; Fancourt J in *Re Templeman [2020] WTLR 441;* Falk LJ (as she now is) in *Re Clitheroe [2021] EWHC 1102 (Ch);* and most recently by Zacaroli J in *Re Clarke [2023] EWHC 14.*

13. I have carefully considered, but will not discuss, all these cases. However, *Hoff* is most relevant to the common law / MCA issue. An elderly testatrix with dementia changed her main beneficiary from her godson to her neighbour. The will was drawn up by her solicitor, but she did not meet him to discuss it, nor did he read it to her; but it was read to her by another solicitor acting as witness and she confirmed it. In upholding the judge's decision that the testatrix did have capacity, Peter Gibson LJ said at ps.33-35:

33. It is a general requirement of the law that for a juristic act to be valid, the person performing it should have the mental capacity (with the assistance of such explanation as he may have been given) to understand the nature and effect of that particular act (see, for example, Re K (Enduring Powers of Attorney) [1988] Ch 310 at p. 313 per Hoffmann J.). To make a valid will the law requires what is always referred to as testamentary capacity and, as a separate requirement, knowledge and approval…The former requires proof of the capacity to understand certain important matters relating to the will… stated in Banks…:'It is essential that a testator shall understand the nature of his 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 might give effect."

34. [Counsel for the appellant] fastens on the words "shall understand"…[b]ut that is an over-literal approach….and one which ignores the subsequent words "shall be able to comprehend and appreciate"….If there is evidence of actual understanding, then that would prove the requisite capacity, but there will often be no such evidence, and the court must then look at all the evidence to see what inferences can properly be drawn …..It would be absurd for the law to insist in every case on proof of actual understanding at the time of execution.

35. There will be cases, as the judge recognised, where a testator will not have testamentary capacity in the absence of an explanation. In Re Beaney [1978] 1 WLR 770…[the donor] could not understand the relevant transaction and its effects without explanation. The test of capacity is issue−specific, as was pointed out by this court in Masterman Lister v Brutton [2003] 1 WLR 1511: the question must be considered in relation to the particular transaction and its nature and complexity. In the present case the judge found nothing would justify holding that an explanation was needed….Given [she instructed the will]..was well aware of her assets and….the straightforward nature of the will…[that] was justified."

14. Whilst *Hoff* and the other cases speak with one voice that *Banks* remains central to testamentary capacity in the 21st Century, unsurprisingly with so much judicial analysis of its Victorian language, the *Banks* test has been clarified and indeed to an extent modernised. Whilst in *Sharp* the Court at p.82 declined to re-phrase *Banks*, in *Burns* McCombe LJ at ps.26 and 46 did endorse this more modern phrasing taken from the 10th Edition of *Williams on Wills* at p.4.11, namely that the testator should be able to:

> *"a) Understand that he is giving his property to one or more objects of his regard; b) Understand and recollect the extent of his property; c) Understand the nature and extent of the claims upon him, both of those whom he is including in his will and those whom he is excluding from his will; d) Ensure that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it, which, if the mind had been sound, would not have been made."*

15. In *Templeman*, Fancourt J said at p.12 that *"Th[is] modern formulation is to the same effect as the original language and does not substitute any different test."* Indeed, in the most recent (11th) edition of *Williams* at p.4.8, [a] has been changed again to: *'The testator must be able to understand the nature of making a will and its effects'* which is more consistent with *Banks* itself. This change also addresses one of the two criticisms of the *Williams* formulation in *Theobald on Wills* at p.4-009: that it previously focussed on actual understanding, which *Hoff* clarified was not required. Indeed, *Theobold* welcomes *Williams*' formulation of [c] as focussing not just on who is included but who is excluded by the will. But in my view, *Theobald* is right that [d] should also include 'mental disorders' other than 'delusions' as the latter were treated as a term of art in *Clitheroe*. I would also question the word 'ensure' in [d] which does not appear in *Banks*. Subject to these small points, I would adopt *Williams'* re-phrasing of *Banks* approved in *Burns*, which not only modernises the rather antiquated language in *Banks*, but faithfully reflects how it is applied in all of these 21st Century authorities.

16. Also of relevance is the so-called 'Golden Rule', discussed in *Key* by Briggs J at ps.7-8:

> *"The substance of the golden rule is that when a solicitor is instructed to prepare a will for an aged testator, or for one who has been seriously ill, he should arrange for a medical practitioner first to satisfy himself as to the capacity and understanding of the testator, and to make a contemporaneous record of his examination and findings: see Kenward v Adams The Times, 28 November 1975..*
>
> *Compliance with the golden rule does not, of course, operate as a touchstone of the validity of a will, nor does non-compliance demonstrate its invalidity. Its purpose, as has repeatedly been emphasised, is to assist in the avoidance of disputes, or at least in the minimisation of their scope."*

A similar point was made in *Burns* at p.47 by McCombe LJ: this 'Golden Rule' is a *'prudent guide for solicitors…as a means of avoiding disputes'*, not a *'rule of law'*.

17. Perhaps one reason for so much judicial attention on *Banks* in the 21st Century (after a century of relative inactivity in the law of testamentary capacity) is the Mental Capacity Act 2005 ('MCA'), coming into force on 1st April 2007. The MCA refers in Court of Protection ('CoP') jargon to the subject person as 'P', but first critically states at ss.1-3:

> ***"1 The principles***
>
> *(1) The following principles apply for the purposes of this Act.*
>
> *(2) A person must be assumed to have capacity unless it is established that he lacks capacity.*
>
> *(3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.*
>
> *(4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.*
>
> *(5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests…..*
>
> ***2 People who lack capacity***
>
> *(1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.*
>
> *(2) It does not matter whether the impairment or disturbance is permanent or temporary.*
>
> *(3) A lack of capacity cannot be established merely by reference to (a) a person's age or appearance, or (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.*
>
> *(4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.*
>
> ***3 Inability to make decisions***
>
> *(1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable— (a) to understand the information relevant to the decision, (b) to retain that information, (c) to use or weigh that information as part of the process of making the decision, or (d) to communicate his decision (whether by talking, using sign language or any other means).*

(2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language…)

(3) The fact a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make [it]

(4) The information relevant to a decision includes information about the reasonably foreseeable consequences of— (a) deciding one way or another, or (b) failing to make the decision.

Also relevant are these provisions on 'statutory wills' in ss.16, 18 and Sch.2 MCA:

***16** (1) This section applies if a person ("P") lacks capacity in relation to a matter or matters concerning— (a) P's personal welfare, or (b) P's property and affairs.*

(2) The court may— (a) by making an order, make the decision or decisions on P's behalf in relation to the matter or matters…..

(3) The powers of the court under this section are subject to the provisions of this Act and, in particular, to sections 1 (the principles) and 4 (best interests)

***18** (1) The powers under section 16 as respects P's property and affairs extend in particular to— (i) the execution for P of a will…*

***Sch.2 p. 2** The will may make any provision (whether by disposing of property or exercising a power or otherwise) which could be made by a will executed by P if he had capacity to make it."*

ps.3-4 Sch.2 make consequential provisions about how the statutory will once made by the Court of Protection is to be executed and that it has the same effect as a normal will.

18. In <u>*ALA v JB*</u> *[2021] 3 WLR 1381,* the Supreme Court recently considered the effect of ss.2-3 MCA. As this was in the very different context of capacity to engage in sexual relations, it may be unfamiliar to Chancery lawyers (it was to expert and experienced Chancery Counsel in this case who helpfully referred to all the other key authorities), I summarise Lord Stephens' guidance on ss.2-3 MCA more generally from ps.58-79:

18.1 At ps.58-61, Lord Stephens considered the different potential approaches to capacity – including by 'outcome' (i.e. a decision inconsistent with the review's values is by definition incompetently made); by 'status' (i.e. based on status of disability or age); or a 'functional' approach where capacity depends on the individual's understanding of particular information (or his ability to retain, use or communicate it). This 'functional' approach is the one taken by the MCA.

18.2 At p.63, Lord Stephens made this observation:

"The test of capacity in sections 2 and 3 of the MCA together with the principles in s.1 applies to all decisions, whatever their character..."

18.3 At p.64, Lord Stephens pointed out capacity may fluctuate over time and said:

"The 'material time' within s.2(1) is decision-specific… The question is whether P has capacity to make a specific decision at the time when it needs to be made. Ordinarily…this will involve a general forward-looking assessment made at the date of the hearing…."

18.4 At ps.65-6, Lord Stephens stressed the core test for capacity is s.2(1) MCA:

"s.2(1) is the single test, albeit that it falls to be interpreted by applying the more detailed description….in ss 2 and 3."

He also stressed that s.2(1) requires the court to address two issues.

18.5 At ps.67-8, Lord Stephens explained the first issue is the individual's ability to make a decision, but as the determination of capacity is 'decision-specific', the Court must first identity the 'matter' which is to be decided.

18.6 At ps.69-70, Lord Stephens said this about 'relevant information' in s.3 MCA:

"The correct formulation of 'the matter' leads to a requirement to identify 'the information relevant to the decision' under s.3(1)(a) includ[ing] about the reasonably foreseeable consequences of deciding one way or another or of failing to make the decision s..3(4) [T]he court must identify the information relevant to the decision within the specific factual context..".

18.7 At ps.76-77, Lord Stephens explained that once the 'relevant information' under s.3(1) has been identified, the Court should consider whether P is able to understand it (s.3(1)(a)), retain it (s.3(1)(b)), or use or weigh it (s.3(1)(c)) but that:

"….*should not involve a refined analysis of the sort which does not typically inform the decision…made by a person of full capacity…."*

18.8 At ps.78-9, he said only then should the Court consider the second issue:

"If the court concludes P is unable to make a decision for himself in relation to the matter… the second question that the court is required to address under s.2(1) is whether that inability is 'because of' an impairment of, or a disturbance in the functioning of, the mind or brain. The second question looks to whether there is a clear causative nexus between P's inability to make a decision for himself in relation to the matter and an impairment of, or a disturbance in the functioning of, P's mind or brain."

19. The Court of Appeal has not yet considered *Banks* and the MCA, which pre-dated *Hoff,* and in *Sharp*, *Perrins*, *Burgess*, *Simon* and *Burns* the wills predated April 2007. In *Hughes* the will post-dated April 2007, but there was no argument on the MCA (p.62). This was also true in *Key, Templeman* and *Clarke*. Falk LJ considered it in detail in *Clitheroe*, but it was *obiter*. Yet in *Walker v Badmin [2015] WTLR 493,* followed in *James v James [2017] WTLR 1313* (p.83) it was *ratio* that in probate cases, even with post-April 2007 wills, testamentary capacity is still governed by the common law.

20. As Mr Strauss QC noted in *Walker* at p.18, in *Perrins v Holland [2009] EWHC 1945* Lewison J (as he then was and *obiter* as the will predated 2007) had said at p.40 that the common law test in *Banks* had been 'superseded' by the MCA. This had initially persuaded many, including himself (*Walker* p.13), but Mr Strauss QC added at p.26:

> *"There has been a tendency in the cases and textbooks…to suggest the provisions Act are simply a modern restatement of Banks [and]…can, optionally, be applied and…will or may gradually….replace the formulation in Banks. It does not seem to me..this compromise solution is an available one. There are clear differences... The tests overlap, and will often produce the same result, but not always."*

Unfortunately, a polarised debate has developed between Chancery and CoP lawyers:

20.1 'In the red corner', *Theobald* now takes quite a trenchant view at p.4-004:

> *"Following the coming into force of the MCA, many judges and lawyers (and indeed the 17th edition of this work) assumed that the common law test for testamentary capacity had been replaced by the statutory test for capacity under the Act. However, it has now been established, albeit only at first instance, that the test remains the common law test. This, in the view of the present editors, is clearly correct. The clarity of this position was not helped by a confusing statement [at p.4.33 of] the "Mental Capacity Act Code of Practice" (……with some statutory force, but not binding)….*
>
> > *"The Act's new definition of capacity is in line with the existing common law tests, and the Act does not replace them. When cases come before the court on the above issues, judges can adopt the new definition if they think that it is appropriate."*
>
> *In the light of the [first instance] cases…both sentences are plainly wrong."*

20.2 'In the blue corner', '*Court of Protection Practice 2023'* now fumes at p.1.244:

> *"The reluctance of judges of the Chancery Division to mould the common law to assimilate the features of the statutory test is striking, and with respect, somewhat difficult to understand, not least because it means that lawyers and doctors have to consider two different tests in respect of a (live) testator with potentially impaired decision-making capacity."*

This debate was reviewed by the Law Commission in their 2017 Consultation (No.231) *'Making a Will':* It proposed replacing *Banks* with the MCA or alternatively putting it on a statutory footing (pgs.18-48 esp ps.32-8). An update report is due later this year.

21. Speaking as a Judge who sits in both the Court of Protection and (more recently) in the Chancery Division as well, I can see both sides. Caution not to discard the common law which has 'stood the test of time' is entirely understandable. However, I respectfully disagree with *Theobald:* in my view the MCA Code of Practice was right that ss.2-3 MCA are '*in line with the existing common law tests and the Act does not replace them'* Munby J (as he was) in *A LA v MM [2007] EWHC 2003* also did consider it 'appropriate' to adopt ss.2-3 MCA on various issues of capacity (not wills) at p.80:

> *"What is being said is that judges sitting elsewhere than in the Court of Protection and deciding cases where what is in issue is, for example, capacity to make a will [or gift]…. can adopt the new definition if it is appropriate….having regard to the existing principles of the common law. Since, as I have said, there is no relevant distinction between the [common law] test…in Re MB and… s.3(1) of the Act, and since the one merely encapsulates in the language of the Parliamentary draftsmen principles expounded by the judges in the other, the invitation to the judges by the Code is entirely understandable and..appropriate."*

22. I respectfully agree and pending the Law Commission's work, I tentatively propose (with respect to Mr Strauss QC in *Walker*) a 'compromise solution'. I make five points:
    - 22.1 ss.2-3 MCA do not strictly apply to testamentary capacity in Probate cases;
    - 22.2 ss.2-3 and general common law on capacity are aligned (and consciously so);
    - 22.3 ss.2-3 are broadly consistent with the common law on testamentary capacity;
    - 22.4 ss.2-3 and the *Banks* criteria are consistent and can 'accommodate' each other;
    - 22.5 ss.2-3 are 'appropriate', in a similar sense as in *MM* to be included by analogy within the common law approach to testamentary capacity in Probate cases.

After explaining these points I will apply them to Stanley's wills as 'worked examples'.

23. Firstly, I respectfully agree with Falk J (as she then was) in *Clitheroe*, HHJ Matthews in *James* and Mr Strauss QC in *Walker* that the MCA does not apply to assessing testamentary capacity in Probate cases, which continue to be governed by the common law. But I respectfully agree with Falk J in *Clitheroe* at p.67 that contrary to comments in *Walker* and *James*, the MCA makes no simple distinctions between living and dead or prospective or retrospective assessment. As Falk J pointed out at p.69, the Court of Protection may sometimes conduct a retrospective assessment of the capacity of a dead person applying ss.2-3 MCA, including capacity to make a Lasting Power of Attorney ('LPA') under s.22 MCA (and even more commonly, retrospective capacity of a living person e.g. *Public Guardian v RI [2022] WTLR 1133 (CoP)*). Yet these distinctions were also made in *Kicks v Leigh [2015] 4 All ER 329 (Ch)* p.64 to hold the MCA did not apply to capacity even for a living gift. Moreover, *Kicks* (which did not involve a contract) is the only case *Chitty* (34th Edition p.11-093) cites in favour of its proposition that the MCA does not apply to contractual capacity, despite noting the MCA has been held to apply to contracts of necessities (see s.7) and even to a pre-nuptial agreement.

24. I am also respectfully unsure I would draw the line quite where Falk J did in *Clitheroe* at p.61: *'The purposes of the MCA do not extend to determining whether an individual had capacity to enter into a particular transaction he or she has entered into'*. As she noted at p.65, 'statutory wills' for individuals undisputedly lacking testamentary capacity were made under s.18(1)(i) and Sch.2 MCA in the Court of Protection by Munby J in *Re M (Statutory Will) [2011] 1 WLR 344* and then by HHJ Hodge QC in *Re D [2011] 1 WLR 1218*. In the course of their 'best interests' decisions on the statutory wills under s.4 MCA, both considered previous wills as potential *'relevant written statements made by him when he had capacity'* under s.4(6) MCA. In neither case did either rule on capacity, but they could have - as HHJ Hodge QC said at p.16:

> *"A previous will is obviously a relevant written statement which falls to be taken into account by the court. But the weight to be given to it will depend upon the circumstances under which it was prepared; and if it were clearly to be demonstrated that it was made at a time when the protected person lacked capacity, no weight at all should be accorded to it."* (My underline)

Such a retrospective assessment of capacity to enter into a transaction (including a will) is unquestionably 'for the purposes of the MCA' and so ss-2-3 MCA would apply to it.

25. However, I do agree with the key point, which has been consistently made by Mr Smith QC in *Scammell v Farmer [2008] EWHC 1100 (Ch)*, Mr Strauss QC in *Walker*, Morris J (as he now is) in *Kicks*, HHJ Matthews in *James* and Falk LJ (as she now is) in *Clitheroe* Whether the MCA applies depends on whether a decision is taken 'for the purposes of the MCA' under s.2(1). If it is, s.2 (and so s.3) MCA apply. If not, they do not. Lord Stephens' observation in *JB* at p.63 that the MCA applies to 'all decisions whatever their character', must be seen in that context (and he, like the case he cited there, was concerned with Court of Protection cases). It is a question of statutory interpretation of *'For the purposes of the Act'* in s.2(1) MCA. As stressed in *Black-Clawson v PWA [1975] AC 591 (HL)* and *R(O) v SSHD [2022] 2 WLR 343 (SC),* the primary source in interpreting a statute is its wording *considered as a whole*. 'For the purposes of the MCA' relates to the many different decisions under the MCA *itself*.

26. So, noting the Law Commission's question in *'Making a Will'* p.2.58, in my judgement, if a Court of Protection Judge is assessing P's capacity or making a decision under any provision of the MCA, they will do so 'for the purposes of the Act' and so ss.2-3 MCA apply (e.g. a Judge considering P's current testamentary capacity with a view to making a statutory will, or capacity at the time of previous wills under s.4(6) MCA: *Re D*). Indeed, I cannot presently conceive any decision by a LPA Attorney, Deputy or Judge *of the Court of Protection* which is not 'for the purposes of the MCA' and to which s.2-3 MCA would not apply, including a '*Re D*' assessment of testamentary capacity. But as Falk J noted in *Clitheroe* at p.64, Munby J confirmed in *Re M* at p.50 that the Court of Protection has no jurisdiction to rule on the validity of any will. Indeed, I go further: as that Court has no greater power than P has themselves when making a decision (*N v A CCG [2017] 2 WLR 1011 (SC)*) it cannot declare a gift 'invalid' either.

27. In High or County Court proceedings about invalidity of a gift or will, the assessment of litigation capacity is 'for the purposes of the MCA' as it applies under CPR 21: see *Dunhill v Burgin [2014] 1 WLR 933 (SC)* (discussed below). However, assessing capacity to make a gift itself is not 'for the purposes of the MCA' so it does not apply: I respectfully agree with the result in *Kicks*. In a Probate case, unless one of the parties lacks litigation capacity, I cannot see how any decision would be 'for the purposes of the MCA'. Certainly, the ultimate decision on testamentary capacity is not, so I respectfully agree with *Scammell, Walker*, *James* and *Clitheroe:* common law applies.

28. I move to my second point: that ss.2-3 MCA were consciously aligned with the common law on capacity. I will consider suggested differences between ss.2-3 MCA and the common law on testamentary capacity as my third point. However, it follows from my first point that **if** the approach to testamentary capacity in common law is substantively different from that in the MCA, as the Law Commission notes in '*Making a Will'* at ps.2.57-8, there could be different decisions about the capacity of the same (living) testator for the same will in different Courts. The Chancery Division could find P had capacity for a will at common law so it was valid; whilst the Court of Protection could find that P did not have capacity and so could make a statutory will. I accept those are different contexts (see HHJ Matthews in *James* p.80), as the Law Commission says at p.2.45, this may cause confusion. Still more seriously, as Falk J accepted in *Clitheroe* at p.75, if the other way around and the testator lacked capacity at common law but not under the MCA, in theory no valid will could be executed at all. Far from a theoretical risk, if there is a real difference on the presumption of capacity (which I consider below), that risk could be quite common. In my view, this would be an impracticable, illogical or inconvenient result (for these reasons and those of the Law Commission) and as Lord Kerr said at p.24 of *R v McCool [2018] 1 WLR 2431 (SC)*:

> *"The court seeks to avoid construction producing an [impracticable, illogical, or inconvenient] result, as this is unlikely to have been intended by the legislature"*

29. The simple way to avoid such a result would be to interpret the MCA where it applies in the context of testamentary capacity (as just discussed) as aligned with the common law test in *Banks* as clarified and modernised (as discussed earlier). In my judgement, not only would that not require any 'strained construction' of ss.2-3 MCA as discussed in *McCool*, it is precisely what Parliament intended (in the sense stated in *R(O)* at p.33). That conclusion could be expressed in different ways. One way, analogous to the point first made by HHJ Matthews in *James* at p.86 then by Falk J in *Clitheroe* at ps.76-79, is to apply the presumption that Parliament does not intend to over-rule well-established rules of the common law without clear words or necessary implication: *Black Clawson.* Another way to put it (which I prefer) is that the MCA's statutory background and the Law Commission reports which led to it (especially as one proposed a draft Bill in similar terms to the eventual Act) throw light on its interpretation (*Black-Clawson*) and demonstrate that it was intended to be aligned with the common law and indeed vice-versa. I will explain why - with a brief chronological tour of the MCA's background.

30. As noted in *JB* at p.57, the MCA had a long gestation and derived from no fewer than three Law Commission reports: *'Mentally Incapacitated Adults and Decision-Making: An Overview (1991); 'Mentally Incapacitated Adults and Decision-Making: A New Jurisdiction (1993);* and the *'Report on Mental Incapacity (1995)'.* I note the first report (co-authored, as was the second, by Professor Brenda Hoggett QC - now better known as Lady Hale) at p.2.17 referenced *Banks* when reviewing various common law tests of mental incapacity. However, the most presently relevant is the third report (co-authored by Lord Burrows, as he now is, who sat on *JB*). That report said at p.3.23:

> *"We did not consult on the need to replace any existing definitions of capacity at common law with the new statutory definition, and our draft Bill makes no attempt to do this. After implementation of the new statutory definition, it is likely that common law judges would consider it and then adopt it if they saw fit. The new definition expands upon, rather than contradicting, the terms of the existing common law tests. The only point of difference is the provision requiring an explanation of the relevant information to have been made, if a finding of incapacity is to have prospective effect."* (My underline)

This supports my first point above - the MCA was not intended to replace the common law on testamentary capacity in Probate cases (unless judges chose to adopt it), but also the draft Bill was not intended to differ from the common law (except on one point).

31. Moreover, in the decade between that report in 1995 and the enactment of the MCA in 2005, Courts were consciously aligning the common law on capacity consistently with the Law Commission's proposals. As Munby J later noted in *MM*, Butler-Sloss LJ did so in *Re MB (Medical Treatment) [1997] 2 FLR 426* at pg.437, also drawing on *Banks*:

> *"A person lacks capacity if some impairment or disturbance of mental functioning renders the person unable to make a decision whether to consent to or to refuse [medical] treatment. That inability…will occur when: (a) the patient is unable to comprehend and retain the information material to the decision, especially as to the likely consequences of having or not having the treatment in question; (b) the patient is unable to use the information and weigh it in the balance as part of the process of arriving at the decision.….As Lord Cockburn CJ put it in Banks…at 569: '… one object may be so forced upon the attention of the invalid as to shut out all others that might require consideration."*

32. Similarly, at the start of this century, in *Masterman-Lister* the Court of Appeal, in the context of capacity to litigate, adopted a similar 'functional' issue-specific approach to capacity as the Law Commission had earlier recommended: so capacity to litigate could differ from capacity to manage any award. This approach was approved in *Dunhill* in holding a litigant had lacked capacity to litigate due to brain injury; and despite the rule of contract law that incapacity only invalidates a contract if the other party knows or ought to know about it, CPR 21 meant that a settlement had been invalid without Court approval. Lady Hale (who knew all about the purpose of the MCA) said at ps.13-14:

> *"The general approach of the common law, now confirmed in the Mental Capacity Act 2005, is that capacity is to be judged in relation to the decision or activity in question and not globally….Given that the courts had already arrived at a test of capacity on which the 2005 Act test was closely modelled, it seems unlikely this has introduced any differences between the old and the new law."*

33. In that context that I return to Peter Gibson LJ's judgment in *Hoff* quoted above, which is particularly important for five reasons (aside from being the first of the run of 21st Century Court of Appeal cases on *Banks*). Firstly, Peter Gibson LJ 'tuned in' to this general 'convergence' in the law of mental capacity. Whilst he did not refer to the Law Commission reports or *Re MB*, he did refer to *Masterman-Lister* and called capacity 'issue-specific', endorsing Hoffmann J's (as he was) test in *Re K*: '*mental capacity (with assistance of such explanation as ..may have been given) to understand the nature and effect of that particular act'*. For wills Peter Gibson LJ cited the first three limbs of *Banks* as requiring 'understanding' (i.e. a functional test). Secondly, he focused not on the literal wording of *Banks* which suggested actual understanding, but on the *ability to understand*, just like the Law Commission had and ss.2-3 MCA would. Thirdly, Peter Gibson LJ's approach in *Hoff* was (in the later jargon noted *JB*) not just 'issue' but 'decision-specific' – i.e. depending on the particular facts – with such a simple will on the facts explanation was not needed. Fourthly, this focus on explanation closed the gap between the Law Commission draft Bill and common law: framing it retrospectively as capacity to understand '*Banks* information' when explained (but then asking whether there had been such an explanation). Finally, *Hoff* came only months before the MCA was enacted, showing Parliament that testamentary capacity was not 'out of step'. So, the drafters of Code of Practice were right: the MCA was 'in line with' the common law, even on testamentary capacity. I respectfully disagree with *Theobald* on this point.

34. I turn to my third point, like the Law Commission in *'Making a Will'* p.2.55, I respectfully consider the differences between the MCA and *Banks* were over-stated by Mr Strauss QC in *Walker* at ps.21-25, which *Theobald* nevertheless adopted at p.4-005. I will start with the first reason at ps.21-2 of *Walker*, where Mr Strauss QC said:

> *"The….presumption of capacity in s.1(2)…is to be contrasted with the common law position which is set out by Briggs J. in Re Key at p.97: 'The burden of proof in relation to testamentary capacity is subject to the following rules: (i) While the burden starts with the propounder of a will to establish capacity, where the will is duly executed and appears rational on its face, then the court will presume capacity; (ii) In such case the evidential burden then shifts to the objector to raise a real doubt about capacity; (iii) If a real doubt is raised, the evidential burden shifts back to the propounder to establish capacity nonetheless. The difference between the common law and the Act as to the burden of proof would be unlikely to make any difference in practice in most cases, as there is usually a considerable body of evidence available to the court, which will enable it to decide the issue. As has been repeatedly stressed in the authorities (..[e.g.] Sharp at [74]), where there is evidence, the court should make up its mind one way or the other. It is unsatisfactory, and rarely appropriate, to decide the issue by reference to the burden of proof. Nevertheless, there may be cases in which there is a dearth of evidence and the burden of proof may be decisive; in such cases the common law position would be reversed if the Act applies."* (My underline).

35. So, even on the analysis in *Walker*, a *practical* difference on the burden of proof is rare. Even with a dearth of evidence, if due execution (analytically distinct from capacity) is proved and 'the will appears rational on its face' *there is a presumption of capacity even at common law*. In *Clarke*, Zacaroli J found at ps.93-4 that a will was 'rational' even with unexplained changes of beneficiaries (see also *Sharp* p.79). Moreover, if the will is 'irrational on its face', that would rebut a 'presumption of capacity' under s.1(2) MCA anyway. So, with almost all validly executed wills, there will be a 'presumption of capacity'. Whilst the evidential burden can then shift back to the propounder of the will if there is 'real doubt', that is not just 'some doubt' (*Clarke* p.77) and is an *evidential* burden, not a *legal* one (see *Phipson on Evidence* (20th Edition, 2021) p.6.02. This resolves any 'inconsistency' with s.1(2) suggested in *Kicks* at p.67, as does the test applied of Asplin LJ (as she now is) in *Gorjat v Gorjat [2010] 13 ITELR 312* p.139:

"At common law, the burden of proving lack of mental capacity lies on the person alleging it. To put the matter another way, every adult is presumed to have mental capacity to make the full range of lifetime decisions until the reverse is proved. s.1(2) MCA….put the presumption of mental capacity on a statutory footing. This evidential burden may shift from a claimant to the defendant if a prima facie case of lack of capacity is established." (My underline)

36. Turning next to Mr Strauss QC's third reason in *Walker* at ps.24-5 (adopted by *Theobald* at p.4-005), he said understanding 'reasonably foreseeable consequences' under s.3(4) MCA is inconsistent with *Banks*. This was based on *Simon* (in fairness Mr Strauss QC had heard it at first instance and was upheld) where a testator changed her will from leaving all her shares in the family company to her son who was the main shareholder to avoid deadlock, to leaving her shares equally to her children which risked it. Lewison LJ (as he now is) having reviewed *Banks* and *Hoff* said at ps.45-6:

"….I do not believe that previous authority goes to the length of requiring an understanding of the collateral consequences of a disposition as opposed to its immediate consequences. Nor do I think it desirable that the law should go that far. As Mummery LJ put it in Hawes….at p.14: "The basic legal requirement for validity are that people are mentally capable of understanding what they are doing when they make their will and that what is in the will truly reflects what they freely wish to be done with their estate on their death."….I do not think that any of the authorities requires as a condition of testamentary capacity that the testator should understand or remember the extent of anyone else's property. [This]…submission really amounts to is a memory test. In fact, the classic formulations of testamentary capacity (quoted above) limit themselves to requiring the testator to understand no more than the extent of his property. They do not require him to understand the significance of his assets to other people."

37. Whilst Mr Strauss QC in *Walker* suggested the MCA does not distinguish like common law between consequences that are (i) 'direct'/'immediate' and (ii) 'collateral'; in fact s.3(4) does distinguish between those which are and are not 'reasonably foreseeable':

"The information relevant to a decision includes information about the reasonably foreseeable consequences of— (a) deciding one way or another, or (b) failing to make the decision."

I accept (not least in remoteness in tort) 'directness' and 'reasonable foreseeability' are not exact legal synonyms. However, the point is that both common law and s.3(4) MCA draw distinctions between different types of consequence which will turn on the facts - and in both cases have practical limits. As Lord Stephens emphasised in *JB* at p.75:

> *"There should be a practical limit on what needs to be envisaged as the 'reasonably foreseeable consequences' of a decision, or of failing to make [it] .....the notional decision-making process attributed to the protected person… should not become divorced from the actual decision-making process carried out in that regard on a daily basis by persons of full capacity…"*

Having said that, I do acknowledge that in *JB* at p.73, Lord Stephens also said this:

> *"s.3(4)…consequences are not limited to 'reasonably foreseeable consequences' for P, but can extend to consequences for others. This again illustrates the information relevant to the decision must be identified within the factual context of each case…"*

I accept Lewison LJ in *Simon* said testamentary capacity at common law *'does not require [a testator] to understand the significance of his assets to other people'* whereas Lord Stephens in *JB* said that 'relevant information' under s.3(4) MCA '*can extend to the consequences for others'*. However, Lord Stephens stressed this *depended on the factual context* and that capacity is 'issue-specific' depending on the 'matter' (see *JB* ps.68-9). It makes complete sense that s.3(4) MCA in the context of the capacity to engage in 'bilateral' sexual relations should encompass understanding of the consequences for one's sexual partner. But that does not mean in the context of capacity to make a 'unilateral' will, that s.3(4) MCA also requires understanding of the consequences for others. As stressed in the authorities (including *Hawes* at p.14 which was quoted in *Simon*) freedom of testation means a testator who has capacity is free to make a will which is 'hurtful, ungrateful or unfair'. It is a totally different decision.

38. This leads to the last suggested difference by Mr Strauss QC in *Walker* at p.23: that s.3(1) MCA *'requires a person to be able to understand all the information relevant to the making of a decision'*, whereas *Banks* does not. This begs the more fundamental question about what 'information' is 'relevant' to making a will, which I discuss next. But first, I respectfully suggest this is not how s.3(1) MCA works anyway.

39. This point can be illustrated with a context much closer to a will: an LPA. In *RI* Poole J decided under s.22 MCA that a person with a life-long learning disability had lacked capacity to make a property LPA years earlier, but he nevertheless said at p.28:

> *"…I have regard to the relevant information which RD would need to understand, retain, weigh and use, and communicate to make decisions about executing the LPA. The court should not set the bar too high. Furthermore, RD, like many people, relied on a lawyer and his family for explanation and advice. The fact that he may not have understood every provision in the LPA or every possible consequence of making it or not making it, does not necessitate a finding that he could not have understood explanations given to him in a way that was appropriate to him, for example by the use of simple language."* (My underline)

This not only shows that an individual need not understand 'all relevant information' (which s.3 MCA does not say). It shows even with an LPA where a living individual hands over control of their property to another, 'the bar must not be set too high' and there is a crucial role for explanation, as Peter Gibson LJ also stressed for wills in *Hoff*.

40. So, since the MCA is 'issue-specific' as discussed in *JB*, understanding of relevant information to make a will would be no higher and probably lower than for an LPA, because there would be few if any 'consequences' for the testator after they die, other than their 'legacy'. So, there is no inconsistency between s.3 MCA and the tradition of 'setting the bar low' for testamentary capacity as Mr Strauss QC thought in *Walker* ps.32-4 (I note *Fuller v. Strum [2001] EWCA Civ 1879* which he referred to at p.23 was about knowledge and approval, which is analytically separate: see *Hoff*). Indeed, Mr Strauss' point at p.34 that s.3 MCA applies one definition to various circumstances based on *IM v LM [2014] 3 WLR 409 (CA)* at p.52 overlooks that the Court there said:

> *"The statutory test when applied to the question of capacity in the wide range of areas…covered by the Act, will inevitably give rise to different considerations."*

41. This leads to my fourth point. Given differences between ss.2-3 MCA and the common law on testamentary capacity are over-stated, I consider there is a straightforward way of reconciling them and for ss.2-3 MCA (which are 'issue-specific') to 'accommodate' the common law test. That is for the first three limbs of the *Banks* test to be treated as the 'relevant information' under s.3 MCA and for the fourth limb to map onto s.2 MCA

42. As noted, Lord Stephens explained in *JB* at ps.57-79, ss.2-3 MCA adopt an 'issue-specific' test of capacity which depends on the particular 'matter' under consideration. This means the 'relevant information' under s.3 MCA which must be understood, retained, weighed and communicated will differ too. In *JB,* Lord Stephens echoed Munby J's 'issue-specific' approach to capacity in *MM,* who had said at ps.64-5:

> *"[As] capacity is 'issue specific'…someone may have capacity for one purpose but lack capacity for another purpose…..[C]apacity is [also] issue specific [for] different transactions of the same type. [Someone] may have capacity to consent to a simple medical procedure but lack [it] to consent to a more complex [one]."*

So, s.3(1) 'relevant information' will not only differ on the *type* of case, but on the *particular facts* of a case. In *JB* Lord Stephens at ps.95 endorsed the list of relevant information for the decision to engage in sexual relations which Baker LJ gave in the Court of Appeal (that Lord Stephens quoted at p.84), including information such as the nature of sexual intercourse, its risks and consequences and the importance of consent. Rather closer in context, in *RI* at p.16 Poole J listed 'relevant information' for LPAs:

> *"a. The effect of the LPA. b. Who the attorneys are. c. The scope of the attorneys' powers and the MCA restricts the exercise of their powers. d. When the attorneys can exercise those powers, including the need for the LPA to be executed before it is effective. e. The scope of the assets the attorneys can deal with under the LPA. f. The power of the donor to revoke the LPA when he has capacity to do so. g. The pros and cons of executing the particular LPA and of not doing so."*

43. In my judgement, given the lesser personal significance of a will than a LPA for its maker, the 'relevant information' for a will should be less extensive (e.g. it would not include b, c, d or f). Moreover, given the consistency between testamentary capacity at common law and ss.2-3 MCA, were it assessed under the MCA e.g. by the Court of Protection, the 'relevant information' would be the same as the first three limbs of *Banks*: [a] to understand '*the nature of making a will and its effects'* (compare [a] in *RI*) [b] to understand and retain ('recollect' for a short period – s.3(3) MCA) *'the extent of his property'* (compare [e] in *RI*); and [c] to weigh *'the nature and extent of the claims upon him, both those whom he is including in his will and those he is excluding from it'* (compare [g] in *RI).* I am fortified in this view by its consistency with the view of the Law Commission in *'Making a Will'* at p.2.55 (which I consider is of significant weight).

44. However, whilst the Law Commission suggests at p.2.95 that the rule in *Parker v Felgate* endorsed in *Perrins* is arguably inconsistent with the MCA, I suggest they can also be reconciled. As Lord Stephens said in *JB* at p.64, capacity can fluctuate over time and s.2(1) MCA applies 'at the material time' which is 'decision-specific'. In the context of *deciding on* a will, the 'relevant information' in *Banks* applies at *that* 'material time'. But if a testator has capacity but it deteriorates before execution, at *that* 'material time', the 'relevant information' for *executing* a will is just that listed in *Parker/Perrins*. After all, information need only be retained 'for a short period' under s.3(3) MCA. There is no wider 'memory test' under ss.2-3 MCA than at common law (see *Hoff* and *Simon).* I would add, as the Explanatory Notes to s.3(1)(d) MCA state (relevant to its meaning: *R(O)* p.30), the lack of ability to communicate will not commonly arise – certainly in relation to a will. It has not been suggested to be a relevant difference with *Banks*.

45. It has also not been suggested that the fourth element of *Banks* differs from the MCA in the cases suggesting there are such 'differences' between them such as *Walker*. However, at first sight, the language is clearly different. Yet the Law Commission in *'Making a Will'* summarise the essence of the fourth *Banks* limb in modern language at p.2.19: *'Understanding must not be impaired by any disorder of the mind or delusions'*. Stripped of its more complex language, that was essentially how it was applied in *Banks* itself, where the testator still had delusions, but the Court held his understanding was not impaired by them *when making the will*. Moreover, as the Law Commission also says at p.2.21, this element must be applied with a modern understanding of cognitive impairments and psychiatric diagnoses: see *Key* p.95 and *Clitheroe* p.106. There is a close correlation between *'disorders of the mind or delusions'* in that modern sense and *'an impairment or disturbance of the mind or brain'* in s.2(1) MCA influenced by *Re MB* (adopted by the MCA rather than the draft Bill's 'mental disability'). In both cases, there is a (slightly different) 'causative nexus' (see *JB* at p.78): in s.2(1) between *'inability to make a decision'* and *'impairment/disturbance of the mind'*; in the fourth *Banks* element rephrased by the Law Commission between *'impairment of understanding'* and *'disorder of the mind or delusion'*. The same is true if one returns to the key language in *Banks:* "*no disorder of the mind….[or] insane delusion shall…bring about a disposal of it which, if his mind had been sound, would not have been made."* s.2 MCA does not ask this counterfactual 'but for' causal question because it is <u>general</u>; *Banks* does because it focusses on a <u>specific past will</u> (even if not framed in exactly the same way as s.2 MCA).

46. Of course, I do not suggest that ss.2-3 MCA applied to testamentary capacity on one hand and the common law test in *Banks* on the other are *identical*, simply that they are broadly *consistent* and one can 'accommodate' the other, depending on which applies. So, if a will is validly executed and 'rational on its face' there is a presumption of capacity either way (although if the will were irrational on its face, that would be the most powerful evidence to displace the presumption under s.1(2) MCA). 'The Golden Rule' that solicitors should obtain a capacity assessment if in doubt is a rule of practice not of law (*Key / Burns*) and so unaffected by s.1(2) MCA. s.3 MCA examine *inability* to make a decision and are expressed disjunctively ('or'), whilst the first three limbs of *Banks* examine *ability* to make a decision and are framed conjunctively ('and'). Either way, should a testator lack ability with any of the stated elements, they lack capacity.

47. Furthermore, the 'relevant information' under s.3(1) MCA for wills is supplied by the first three limbs of the *Banks* test: (i) '*the nature of the act and its effects';* (ii) *'the extent of the property of which he is disposing';* and (iii) *'claims to which he ought to give effect'*. 'Communication' of a decision is unlikely to arise in this context. 'Ability to understand' and the importance of explanation (s.3(1)(a) and 3(2) MCA and *Hoff*) are common features of s.3 and *Banks*. s.3(1)(c) speaks of 'using or weighing' that information in making a decision and s.3(4) the 'reasonably foreseeable consequences' (in the limited sense discussed above) of deciding one way or another (failing to make a decision would not arise if a will had been made). *Banks* similarly speaks of 'comprehending and appreciating the claims to which he ought to give effect' or as modernised: *'both those whom he is including in his will and those he is excluding from it'*, which presupposes weighing of the 'claims' with the 'property' and the 'effect' of the will. The only element of s.3 MCA which does not snugly fit the first three *Banks* criteria, which *Simon* stresses does not require a memory test, is s.3(1)(b) MCA 'retain the relevant information'. However, s.3(1)(b) and (3) MCA only require retention of 'relevant information' and 'for a short period': namely during the process of making the will. Should capacity to make the will be lost once the testator has instructed a solicitor, then the 'matter' under s.2 MCA changes from 'deciding' upon the will to 'executing' it and the 'relevant information' changes from the first three limbs of *Banks* to the four limbs of *Parker* as updated in *Perrins*. Finally, as noted, properly understood the fourth limb of *Banks* is essentially a causal test, required in both common law and also in s.2(1) MCA: *JB*. In short, statute and common law can 'accommodate' one another.

48. This brings me to my last point. If the Court of Protection is assessing testamentary capacity for a statutory will application, then it can use *Banks* (and *Parker*) to 'put flesh on the bones' of ss.2-3 MCA as just discussed. But as I have also found, the MCA does not apply to Probate proceedings (save on litigation capacity). The lastissue is whether it is *'appropriate having regard to the existing principles of the common law'* to apply ss.2-3 MCA by analogy within the *Banks* approach. That was the course taken by Munby J in the Family Division of the High Court in *MM*, where I note that he also said at p.77:

> *"It would be worse than unfortunate if a judge of the Family Division exercising the inherent jurisdiction had to adopt an approach significantly different from the approach to be adopted by the same judge when sitting in the Court of Protection exercising the statutory jurisdiction [under the MCA]."*

Munby J in *MM* took the view at p.80 that ss.2-3 MCA '*merely encapsulates in the language of the Parliamentary draftsmen principles hitherto expounded by the judges in the other'* on common law of capacity. So, he found it 'appropriate' to adopt ss.2-3 MCA even within a common law jurisdiction on various capacity decisions (not wills).

49. *MM* was distinguished by Mr Strauss QC in *Walker* at ps.38-9 on the basis that *'there was a potential difference between the tests'*. However, for the reasons I have explained, I find just as there was 'no relevant distinction' between the MCA and the common law in *MM* for those capacity decisions, nor is there for testamentary capacity. Indeed, I have just tried to show how ss.2-3 MCA and the common law approach as properly understood could be 'synthesised', to use the word of Morris J in *Kicks* at p.66:

> *"Finally, if, contrary to the foregoing, it is appropriate for me to adopt the statutory test, I consider that it can only be applied 'alongside' the test in Re Beaney and that the two tests would need to be synthesised…the detail of ss 2-3… should be applied, as a more detailed exposition of the common law principles."*

Whilst a Probate case would involve 'accommodating' ss.2-3 MCA within the common law not *vice-versa*, it does not involve applying the MCA and using *Banks* to put 'flesh on bones', but rather applying *Banks* but using the MCA as a 'cross-check'. If the MCA suggests a different result, that does not trump the common law but suggests further consideration. This is using the MCA to 'supplement' the common law in HHJ Dight's word in *Fischer v Diffley [2013] EWHC 4567* p.25; and indeed, taking a 'flexible approach' as suggested by Mr Rosen QC in *Bray v Pearce (2014)* (as quoted in *James*).

50. Returning one last time to p.4.33 of the MCA Code of Practice, I respectfully agree that '*The Act's new definition of capacity is in line with the existing common law tests, and the Act does not replace them"* and this remains correct. This was the view of Lady Hale with capacity to litigate in *Dunhill* and of Munby J on various different capacity decisions in *MM*. Yet, in this context, I do not consider it 'appropriate' to 'adopt' ss.2-3 MCA *in place of* the common law as Munby J did in *MM* – which I note was the argument rejected by Mr Strauss QC in *Walker*, HHJ Matthews in *James* and Falk LJ in *Clitheroe.* Rather, I consider it 'appropriate' more cautiously to use ss.2-3 MCA as a 'cross-check' to the *Banks* test at common law, but for the same reasons as Munby J in *MM* – because ss.2-3 MCA and the common law are analytically consistent and to avoid inconsistent *application* of them - as the Law Commission discussed in 2017. Indeed, 'adoption' was the original idea of Lord Burrows and his Law Commission colleagues in 1995 who said '*common law judges would consider [the new statutory definition] and then adopt it if they saw fit',* although as I have explained, the gap between their draft Bill and the common law closed between 1995 and the MCA in 2002 on both sides: including *Hoff.* Lord Burrows considers such 'interaction' between common law and statute in *'Thinking About Statutes' (2018)*. At pg.53 he cites Lord Hoffmann (as he had become after *Re K*) in *Johnson v Unisys [2003] 1 AC 518 (HL)* p.37:

> *"[Judges'] traditional function is to adapt and modernise the common law. But such developments must be consistent with legislative policy…in statutes. The courts may proceed in harmony with Parliament but there should be no discord."*

To end this overlong analysis, in Lord Burrows' book at pg.51, he gave an example of applying a statute by analogy which may be reassuring to Chancery lawyers. It goes back to the time of *Banks*: applying statutes of limitation by analogy with issues of delay on equitable relief in *Knox v Gye (1872) LR 5 HL 656,* where Lord Westbury said at p.673:

> *"…[A] court of equity acts by analogy to the Statute of Limitations…where the suit in equity corresponds with an action at law…in the words of the statute, a court of equity adopts the enactment of the statute as its own rule of procedure."*

It is this sort of familiar exercise I suggest with the MCA. As with the 'convergence' of common law and statute in the lead up to the MCA, this 'analogy' approach would smooth any legislative change to *Banks*. It may even show Parliament that buttressed by the MCA and with some of its language updated, *Banks* remains as vital as ever.

Conclusions

51. Having set out the principles, I now turn to my conclusions, which incorporate my findings of fact on the balance of probabilities on the evidence I heard from Mr Penn, Mr Rainsford and Mr Graham (all of whom I found honest and reliable witnesses) and the documentary evidence and helpful chronologies each side prepared. Given the nature of this judgment, I will set out my conclusions rather more briefly than usual.

52. Stanley was born in April 1929, Agnes a few months later in September. After the War, Stanley did National Service and obtained an HGV licence. It was around this time in July 1950 that Stanley and Agnes got married. Stanley then worked as a delivery driver, then set up a removals business with his father and eventually a haulage company. He was hardworking and industrious; and the company was successful (eventually allowing him to indulge interests in golf, snooker and watching Birmingham City FC). Ronald was born in 1954, Jennifer in 1965 and Martin in 1968. They each married and later had children, giving Stanley and Agnes eight grandchildren. I only name the beneficiaries: Ronald's son Luke and Jennifer's daughter Emma were both born in the 1980s. In the late 1980s, Stanley and Agnes moved to a new property.

53. However, shortly afterwards, when Stanley and Agnes were in their late 50s, they separated and Stanley moved in with Kathleen, whom he had known since she was 18. She was in her early 50s and had not long separated from her husband with whom she had six children in the 1960s, including Diane (one later tragically died). In 1995, Stanley and Kathleen moved together to a cottage they had jointly bought and renovated. In 2004, Stanley developed cancer and according to his nephew Adam, Diane supported Stanley through it and helped him run the company. That year, Martin also had a daughter and with his son in 2008, this made the eight grand-children in all.

54. 2009 was a difficult and important year. Stanley turned 80 in April and that year, was diagnosed with dementia which affected his behaviour and he and Kathleen separated after an incident. Medical records in September 2009 note a diagnosis of frontal lobe dementia secondary to Pick's Disease and he was compulsorily admitted to hospital under s.2 Mental Health Act 1983 (i.e. 'sectioned') on 4th September 2009. Stanley was discharged a month later on 1st October. He seems to have reconciled with and moved back in with Agnes who was living with Jennifer and her family, including Emma.

55. That brings me to the first of the relevant wills. I have not been told what Stanley's previous will(s) may have provided, but on 4th December 2009 when back living with Agnes, Jennifer and Emma, Stanley made a will prepared and attested by Keelys solicitors. This appointed them and Ronald his Executors and made legacies of personal effects to Ronald, Martin and Jennifer with the residue of Stanley's Estate to all three of them equally, but not mentioning Kathleen or Agnes. There are three concerning features about this 2009 will. Firstly, it was executed within two months of Stanley's discharge from compulsory 'section' in hospital which raises serious concerns about his state of mind and capacity. Secondly, it was prepared in the throes of a dramatic change: Stanley's separation from Kathleen and reconciliation with Agnes, which proved very short-lived. Thirdly despite that, Agnes is not even mentioned in the 2009 will. To make matters worse, there is a total absence of contemporaneous evidence.

56. This 2009 will therefore acutely raises the concern of Mr Strauss QC in *Walker* at p.22 about the presumption of capacity in s.1(2) MCA: where "*there is a dearth of evidence and the burden of proof may be decisive; in such cases the common law position would be reversed if the Act applies."* At common law, given the three serious concerns I have outlined, I am prepared to accept that the omission of Agnes from the will means it is not 'rational on its face' (I accept 'on its face' is debatable and I will return to it). This means the common law presumption of capacity in *Key* does not apply. It is a very simple will indeed and the silence about the jointly-owned cottage with Kathleen is probably explicable in relation to the second *Banks* limb if they held it as joint tenants as they later did with the Bungalow (c.f. *Simon*). The absence of any evidence of explanation (*Hoff*) against the background of the recent mental health episode raises concerns on the first limb of *Banks*. However, the real concern is the third and fourth limbs of *Banks*. The unexplained exclusion of not only Kathleen but also Agnes would appear to undermine the third limb – Stanley's ability to *'comprehend and appreciate the claims to which he should give effect'*. Moreover, this feature – especially Agnes' omission – with the close correlation of Stanley's mental health episode and his abrupt change of will the following year back to Kathleen (see below) would make it difficult to be satisfied on the balance of probabilities (with no presumption of capacity) that "*no disorder of the mind….[or] insane delusion [had brought]…about a disposal of it which, if his mind had been sound, would not have been made."* In short, I find the will is invalid because it has not been proved that Stanley had capacity to make it in December 2009.

57. Turning to the MCA as a 'cross-check', a simple application of the 'presumption of capacity' under s.1(2) MCA might suggest a different result. Here, Mr Strauss QC was concerned in *Walker* that a dearth of evidence would mean that presumption was decisive and a will may be valid despite such concerns. As I have explained, a different result does not trump the common law test, but does suggest further consideration. In fact, this would show that far from being inconsistent as might first appear, the two tests once properly understood are consistent. However s.1(2) MCA may operate in prospective welfare decisions, for past property transactions (not wills), as Asplin LJ (as she now is) said in *Gorjat* at p.139, s.1(2) simply put a common law presumption of capacity on a statutory footing. As she added, under this, the *evidential* burden can still shift if there are concerns even applying that *legal* burden. The three serious concerns I have highlighted clearly do shift the *evidential* burden and the absence of contemporaneous documentation – especially of explanation from or to Stanley – meaning the three concerns (which are evidenced, indeed undisputed) cumulatively would rebut the s.1(2) MCA presumption of capacity. Moreover, if Stanley's 2009 will is actually 'rational *on its face'* (as would have been argued had any party sought to propound the 2009 will and which would be my own view), there would have been a presumption of capacity at common law too (*Key*), but the result would have been the same for the same reasons. To repeat: whilst statutory and common law approaches at first sight appear different, on reflection they are consistent and lead to the same result: Stanley did not have capacity to make his 2009 will. So, I place no evidential weight on it for any later wills.

58. As I said, my doubts about the 2009 will are heightened by Stanley's volte-face in 2010. His medical notes do not show any psychological after-effects and there are few entries for most of the year until a general check-up with a few issues such as blood pressure in September 2010. By then, he had left Agnes once again and reconciled with Kathleen. Indeed, having sold their previous cottage, they found another property to buy: the Bungalow. At the same time, Stanley and Kathleen made their wills on 16th August 2010. This is the will that Diane had relied on in this case. At the insistence of their then-solicitors (not Mr Penn's firm) that any client over 60 must supply a capacity assessment (which goes substantially beyond the Golden Rule and not easy to square with s.2(3) MCA or the Equality Act 2010), Kathleen and Stanley obtained confirmation of capacity from their GPs (despite some reluctance on Stanley's part). In any event the medical examination a month later showed no hint of incapacity and nor does any 2010 entry.

59. Stanley and Kathleen's 2010 wills are not complete 'mirrors' as they left legacies of personal property to their own children: Kathleen to Diane and her siblings; Stanley to Jennifer, Martin and Ronald; with their residual estate between their own children. However, as noted at the start of this judgment, there is a parallel provision in each for the Bungalow, which each specified to be left to Martin and Diane in half shares. The effect of the wills is explained in a solicitors' letter to both at the time. Kathleen also signed a letter explaining she wished to benefit Diane because of her support and care for Stanley whereas he wanted to provide for Martin who was living in a small cottage, unlike Ronald and Jennifer. This is a perfectly rational explanation of the will and I accept it, although I note from the solicitors' file that Stanley wavered over whether to include Martin, but then confirmed their original instructions in a further meeting. However, in that meeting, they were advised and confirmed they owned the Bungalow as joint tenants so the survivor would own it completely and so was entitled to change their will.

60. Unlike Stanley's 2009 will, I have no concerns whatsoever about the validity of his 2010 will. It was validly executed and I infer Stanley had full knowledge and approval of it – not least as he signed it having prevaricated over Martin. Far from suggesting incapacity, that suggests Stanley was well-aware he was favouring Martin over his other children. Given the contemporary explanation from Kathleen and the reassurance for Stanley that he could change his will if he survived her, the will is rational on its face and so there is a presumption of capacity at common law. It is true the 2010 will was rather more sophisticated than the 2009 one, but it was clearly and simply explained by letter and following *Hoff*, the understanding required is that of an appropriate explanation of the relevant information to the decision: namely the nature and effect of the will, the extent of property and the different claims. There is no indication either of any lack of understanding of the extent of the various claims and who was being included and excluded (each catered for individually as reflected in both wills seen alongside one another); nor the extent of relevant property (clearly differentiated in the various legacies), nor indeed the nature of effect of the will. It is also clear any disorder or delusion Stanley may have had the previous year was not causative (like the testator in *Banks*). As a cross-check under the MCA, the result would be exactly the same for similar reasons: there was a presumption of capacity not rebutted indeed confirmed by Stanley's evident understanding, retention and weighing of the *Banks* 'relevant information' and the absence of 'causal nexus' to his past 'disturbance of the mind'. So, the will was valid.

61. Whilst Stanley and Kathleen spent I am sure some happy last years at the Bungalow, on 7th April 2014, Kathleen sadly died. (Stanley's medical notes from March 2014 just before Kathleen died suggest his 2009 mental health episode was in remission). I accept Diane's evidence, which was untested in cross-examination, but which was corroborated by her possession of the deeds to the Bungalow with the envelope on which had been written *'Di, keep safe your half of house, Stan'* in handwriting which to my eyes closely resembled the sample of Stanley's own. I accept this was delivered to Diane's house and a couple of days later Stanley confirmed to Diane that he had delivered it to her and it was on the table in front of them at the time. Indeed, it was consistent with their wills. I have no doubt that Stanley had loved Kathleen and was genuine about this.

62. However, what happened next does not show Stanley in the best of lights. Of course, by mid-2014, he was 85 years old. His partner of many years had just died and his own thoughts doubtless passed to his own mortality. Agnes was still alive and he still had his own children and indeed eight grand-children. Just as in 2009 when he split up with Kathleen temporarily, Stanley's mind turned back to his own family, although this time he stayed at the Bungalow. On 17th April 2014 (within two weeks of Kathleen's death), Stanley returned to Keely's solicitors to change his will and instructed them to draft a new will appointing themselves and Ronald as Executors, with specific legacies but the residue left equally between Ronald, Martin and Jennifer, as with the 2009 will. However, by the time Stanley executed his will on 13th June 2014, its terms had changed significantly. Ronald Martin and Jennifer were now trustees and executors, with the personal items left to them and the residue not left to them but to Agnes, with them as the alternative residual beneficiaries should Agnes die first. Mr Langston's Skeleton pointed out there was a close incidence in time between this change in will instructions and the Police being contacted about Stanley's odd behaviour on 20th June 2014. However, a dementia review was organised on 1st July 2014 noting a broadly normal score for Stanley's cognitive functions – indeed some irritation with the questioning about it. In any event, unlike the 2009 will, the detailed file notes from Keelys of the initial instruction in late April 2014 (handwritten) and the execution of the will on 13th June (typed) evidence a perfectly rational explanation. In the meeting on 17th April, the solicitor noted no concerns about his mental health and that Stanley had been apparently concerned about how much of his estate would go to Inheritance Tax. The solicitor then explained in a letter it would be reduced if Agnes were benefitted.

63. This explains why by 13th June 2014, the will had changed leaving the residue estate to Agnes i.e. the tax-efficient approach. The file note states after Ronald left them alone, Stanley told the solicitor he had reconciled with Agnes about a month before and they had a family meeting about his will. I note the solicitor was keen to discuss the change in will and wanted to ensure he was not under any family pressure, but Stanley was clear that he was not and his children had told him to spend his money. There was a discussion about transferring the property (I infer, the Bungalow) into his and Agnes' names.

64. Stanley's change in will disinheriting Diane within weeks of her mother's death, his abrupt change from his benefitting his children to Agnes apparently on fairly mercenary tax grounds and his grumbling about Martin (although in fairness he benefitted equally with Ronald and Jennifer) all show Stanley in a less than positive light. Indeed, his decision-making about Diane, given his recent promise to her, was frankly callous. I have considered whether these abrupt changes in Stanley's mind – from the promise to Diane to benefitting his children to benefitting Agnes in the space of two months – taken with the incident on 20th June suggest a relapse in his mental health as had happened in 2009. After all, the loss of Kathleen would have hit him hard. One might infer that Stanley had a steady deterioration of mental health between instruction and execution resulting in an episode days later. However, on the other hand, in the file note of 13th June 2014, the solicitor went through the will with Stanley clause by clause and had specific instructions about the change to benefit Agnes which Stanley explained. He also mentioned the family meeting about the will, his attitude to Martin and his plans to put the Bungalow in Agnes' joint name, which would explain his disinheritance of Diane.

65. At common law, the rule in *Parker* as updated in *Perrins* could not apply to Stanley's apparently deteriorating mental state because his will had *changed* between instruction (of which there is no contemporary evidence of that change) and execution. However, as the June 2014 will was duly executed and rational on its face, a presumption of capacity applies at common law (*Key*) and the file note on that day evidences Stanley's understanding of the nature and effect of the will (hence his desire to save tax), the extent of his property (including the Bungalow by survivorship notwithstanding his promise to Diane) and the claims to which he should give effect (including Martin). Whilst Stanley may have experienced a recurrence of mental disorder some days later, his execution of the will on 13th July seems entirely rational, lucid and unrelated to it (if rather callous).

66. Using ss.2-3 MCA as a cross-check, the same result would be reached. The 'material time' under s.2(1) MCA was 13th June 2014 given Stanley's instructions had changed. Given the 'disturbance of his mind' less a week later, whilst there is a presumption of capacity under s.1(2) MCA, as with 2009, the evidential burden has shifted. However, whilst there was no 'Golden Rule' capacity assessment, that does not make the will invalid (*Key* and *Burns*). Unlike 2009, the points made above about the first three *Banks* limbs still apply and do prove Stanley's understanding, retention and weighing of the requisite 'relevant information' under s.3(1) MCA. Moreover, by analogy with s.3(2) MCA (and indeed *Hoff* at common law), the solicitor gave a detailed explanation to Stanley and received rational responses in return. However unfair this 2014 will was on Diane, that does not suggest incapacity (s.1(4) MCA; *Sharp, Hawes* in common law). Therefore, as it was validly executed and known/approved, the 2014 will was valid.

67. However, whilst Diane's claim relying on the 2010 will therefore would have failed, I must continue, not least due to Martin's position under the 2020 will. In late 2016, an incident occurred between Stanley and Martin's family which I will not detail. It may be Martin and his family would wish to say what happened, but that is his prerogative not mine. Of course, I am in no position to make any findings about what happened. Suffice it to say that there was a break between Martin and Stanley and yet another change in his will. In February 2017, Stanley went to different solicitors and executed a will which is incomplete in my copy, but which changed the residuary beneficiaries to Agnes, Jennifer and Ronald, so disinheriting Martin. Stanley executed in July 2017 another (complete) will to similar effect making Jennifer and Ronald Executors, giving Emma £10,000 and dividing the residue equally between Agnes, Ronald and Jennifer.

68. I am entirely satisfied that Stanley had capacity to make this July 2017 will. Whilst the position in February 2017 is less well-evidenced, it is academic because Stanley had a dementia review in late April 2017 without any concerns. Even if a testator makes a vindictive decision to disinherit their own child, this does not make that will irrational or evidence a lack of testamentary capacity (*Sharp*, *Hawes*). Here Stanley's logic was harsh but perfectly rational – he fell out with Martin, so he cut him out his will. Given that dementia review and the cold rationality of the will validly executed, there is a presumption of capacity that has not been rebutted (nor has knowledge and approval). The same conclusion would be reached on the MCA. So, the July 2017 will was valid.

69. However, in September 2018 Stanley changed his mind yet again. He instructed different solicitors to prepare a new will re-inheriting Martin as he told the solicitor he had 'sleepless nights' despite the fact they had not settled their differences. This time, Stanley wished for Ronald to be sole executor and to inherit the Bungalow, with a car to Jennifer and a watch to Martin (which he had previously bequeathed him) with the residue between them in equal shares. The draft will was sent to Stanley with a detailed clear explanation from the solicitors a few days later in September and on 1st October 2018 Stanley attended the solicitors' offices and the solicitor specifically went through the will, recorded the *Banks* criteria were established and Stanley executed it. Whilst there was no contemporary medical capacity assessment, a clear explanation was given to a simple will for which Stanley had given a clear explanation. I have no hesitation whatsoever in holding that this will was valid at common law and by analogy valid under the MCA.

70. Therefore, Martin's ability to inherit (whether or not he is interested in doing so) depends on the 2020 will – if invalid, the 2018 will be admitted to Probate and Martin entitled to an equal residuary share – and I would add Ronald would inherit the Bungalow. If the 2020 will is valid and admitted to Probate, Martin will be disinherited and Jennifer will receive a legacy of £100,000 and Ronald, Emma and Luke shares in the residue. Stanley's chopping and changing did not only involve Diane and Martin. However, before tuning finally to the May 2020 will, I should address the events of late 2019. In September 2019, Agnes sadly died. Whilst Stanley's dementia review in May 2019 had confirmed no concerns, after Agnes' death, still living alone in the Bungalow, Stanley fell in November 2019 and the medical records note his confusion. This doubtless reinforced sense of mortality by Agnes' death and his own frailty led Stanley back to a solicitors' office for yet another will, which he signed but it was never executed, although its terms are revealing. Stanley recorded in a letter that he made no provision for Martin as he had no contact with him and had offered him the Bungalow but he did not want it. I need not go into detail about this issue, but simply note instead Stanley wanted the Bungalow to go to Emma who was living with Jennifer to give her space. In the final version of the (signed but unexecuted) draft will, Stanley left £100,000 each to Ronald and Jennifer and £20,000 each to Emma and Luke with the Bungalow held on trust for Emma and Ronald and Jennifer being the residuary beneficiaries. However, for whatever reason (perhaps reflecting on Martin and whether to 're-disinherit' him) Stanley did not execute it.

71. However, just before the COVID Pandemic erupted, on 13th March 2020, Stanley made one final visit to a solicitor's office to change his will for the last time. He attended Anson's solicitors and saw Mr Penn, who gave evidence and was questioned in detail. I found Mr Penn a candid, helpful and entirely reliable witness, not least because he accepted that in hindsight he would have done things differently – in particular that he would have obtained a capacity assessment on Stanley. However, the reason Mr Penn did not seems clear: that Stanley had returned to his 2019 solicitors' offices to complete his will but they had required a capacity assessment. Stanley had refused and gone to see Mr Penn instead – and said so in their meeting on 13th March. The medical records in June 2020 suggest Stanley was declining physically and needed increasing care (during lockdown, he moved in with Jennifer) but noted he was 'alert and orientated'.

72. That was also Mr Penn's impression of Stanley on 13th March. His note records Stanley as a *'bright, if not very sprightly, 90 year old'* who was hard of hearing but that he *'could not have been more alert and conversant'* and Mr Penn saw *'absolutely no reason whatsoever why he would lack capacity'* and whilst hard of hearing, *'he gave instructions clearly'*. Indeed, Mr Penn recalled after the discussion of the will, he and Stanley made polite conversation for some time and Mr Penn was not at any stage concerned about Stanley's capacity. Confronted in Court with the medical notes, Mr Penn said he should in hindsight have got a medical letter on capacity – especially as the other solicitors had required one which prompted Stanley to instruct him. However, he was and is an experienced solicitor and his views about Stanley's capacity on the day carry weight (although create no presumption: *Hughes*). Stanley's intentions were clear: he had the Bungalow valued at £400,000 (as he had said in 2018) and savings of £700,000 (in 2018, he only suggested £300,000, but this was before Agnes' death). Mr Penn explained that as Agnes had never owned the Bungalow, they could not use the Nil Rate Band for it and Stanley said straight away he would spend some money to reduce his tax liability. This not only shows consistency with Stanley's dislike of paying tax in 2014, but awareness and understanding of the tax implications of his property situation. His intentions were also clear: for Jennifer to have the Bungalow and £100,000 tax free and the rest split into 150 shares between Ronald (100 shares), Emma (40) and Luke (10). The Executors were to be Jennifer and Emma. No provision was made for Diane, although that is hardly surprising as there had not been since 2010 and her exclusion in 2014 had remained since. But no mention was made of Martin.

73. The only concerning (as opposed to sad or unfair) feature about Stanley's May 2020 will is the exclusion of Martin. It is not only unexplained, he is not mentioned at all (nor his children). In his Skeleton Argument, Mr Langston for Diane submitted this suggested Stanley had forgotten or overlooked Martin, or that his capacity was rapidly deteriorating. However, this is contradicted by the medical note from 1st June 2020 - even after Stanley had a fall, he was still described as 'alert and orientated' and as I have said, that was Mr Penn's impression on 13th March. The obvious inference is not that Stanley overlooked Martin, but that he deliberately did not mention him or his children to Mr Penn, who was an entirely new solicitor to him, because Stanley wanted to change his will and did not want to be questioned about his decision to exclude Martin as the previous solicitors had done at the end of 2019. However, the letter he prepared then explains his decision to exclude Martin and I infer Stanley still thought the same.

74. Stanley's last will was unfair on Martin, but it was not irrational (c.f. *Sharp* and *Hawes*) - in principle or on its face - and it was duly executed so there is a presumption of capacity (*Key*) which is plainly not rebutted. In relation to the first three limbs of *Banks*, Stanley clearly had understanding of the nature and effect of the will, the extent of his property and of the claims upon him – indeed he excluded Martin whilst also favouring Jennifer by leaving her the Bungalow and £100,000, whilst Ronald became the largest residuary beneficiary. These were rational, considered choices, doubtless reflecting the support Jennifer was giving him and the fact Ronald's share was still considerable (as Martin had been excluded). Mr Penn gave Stanley some explanation, but with a relatively simple and obviously considered will, Stanley did not need much (*Hoff*). There is simply no evidence of any mental disorder or delusion affecting his decision-making. Mr Penn's failure to follow the Golden Rule does not in this case undermine that conclusion, as it did not in *Clarke*. The medical notes do not suggest incapacity at that point. Whilst Mr Penn's own view that Stanley had capacity creates no presumption, weight can be attached to it (*Hughes*). As a cross-check, I reach exactly the same conclusion under the MCA. There is a presumption of capacity and Mr Penn's evidence shows that Stanley had a good understanding, retention and ability to weigh the nature and effect of his will, the extent of his property and the claims upon it for the same reasons. There is no real evidence of any 'disturbance of the mind' for Stanley at this time, still one with a causative impact on his decision. Given the doctor's view on 1st June 2020, there is no evidence of any significant cognitive decline for Stanley before he executed the will on 23rd May 2020.

75. Therefore, looking at the wills from 2010 onwards individually; and standing back and considering them together in the light of all the evidence, including his medical notes and the diagnosis of dementia, I find Stanley had testamentary capacity from the 2010 will corresponding to Kathleen's then, to his final 2020 will, disinheriting Martin once again. And so, at long last, I turn to Stanley's execution of his will on 23rd May. In the intervening two months, COVID had erupted. From the GP note in June, Stanley moved in with Ronald in mid-May and had a fall. However, before he did so, Jennifer arranged for two friends of hers who knew Stanley, Mr Graham and Mr Rainsford, to come to the driveway of Stanley's house. He stayed in the car and they saw him sign the will through the window, which he then passed to then and they each witnessed. This was an ingenious arrangement which predated the amendment to the Wills Act permitting 'remote attestation'. In any event, it was a valid execution. Whilst the will was not read over to Stanley, Mr Penn sent it to him with a clear client care letter and Stanley signed the acknowledgement slip and Jennifer made minor amendments to it to correct her address as executor. Stanley was plainly very familiar and happy with it – after all, he had plenty of practice with wills. As Mr Aldis says, 'Knowledge and Approval' of the May 2020 will is clearly proved, as is execution and capacity as I have said. It follows that Stanley's final will on 23rd May 2020 – only three months before his death on 5th August 2020 – was valid, it superseded all previous wills and I admit it to Probate. I remind Martin that should he wish to object, he must do so within 28 days of service of this judgment otherwise he is bound by it. He may well remain silent – it is his right.

HHJ Tindal