Neutral Citation Number: [2019] EWHC 3366 (Ch)

Case No: D31BS354

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

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 12/12/2019

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

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Between :

Michael James Todd	**Claimant**
- and -	
(1) Alexandra Deborah Louise Parsons	**Defendants**
(2) David Patrick Christopher O'Hagan	
(3) Elizabeth Jane Todd	

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Raj Sahonte (instructed by **Ince Metcalfes**) for the **Claimant**
Alex Troup (instructed by **TLT LLP**) for the **Third Defendant**
The First and Second Defendants did not appear and were not represented

Hearing dates: 1-3, 7-10 October 2019

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Approved Judgment

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

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HHJ Paul Matthews :

Introduction

1. This is my judgment on the trial of a claim and counterclaim concerning the estate of the late Minnie Eileen Todd, who died on 6 April 2009, aged 96 years. She left two adult children, the claimant and the third defendant. By a will dated 25 September 2008, the validity of which is in issue in these proceedings, she appointed the first and second defendants as her executors. The first defendant is the daughter of the third defendant and the only grandchild of the deceased. The second defendant is a solicitor, who also drafted the will under consideration. Both have stated their desire to remain neutral in these proceedings, and neither has taken any part in the trial as a party (though each gave evidence, the first defendant on behalf of the third defendant, and the second defendant on behalf of the claimant).

2. The claim was started by claim form issued on 6 June 2017, for probate in solemn form of the will of September 2008, and for an order removing the first and second defendants as executors and appointing an independent personal representative. The claim was opposed by the third defendant, challenging that will on the grounds of lack of testamentary capacity, want of knowledge and approval and undue influence. The third defendant also brought a counterclaim for a declaration that the deceased's property known as West Winds, at Littleton on Severn, South Gloucestershire, is held on trust for her or alternatively for a family trust known as the Alexandra Trust absolutely by way of constructive trust or proprietary estoppel. On 25 May 2018 District Judge Howell gave directions for the future conduct of this claim and counterclaim, which included a direction that

> "for the purposes of the future determination of steps to be taken and by whom, the trial is to be the trial of the counterclaim and for that purpose the defendant is to be treated as the claimant and will open the case at trial".

Witnesses

3. A number of persons were tendered for cross-examination at the trial. On behalf of the third defendant, these were the third defendant herself, Lydia Kozickyj (a former nanny to the first defendant), Michael Evans (a solicitor who advised the third defendant), Geoff Speirs (a chartered accountant who advised the third defendant), Julian Barge (the third defendant's second husband) and the first defendant herself. On behalf of the claimant, these were David O'Hagan (the solicitor who drafted the disputed will), Angela Neary (his former legal executive), the claimant himself, Diana Scrafton and David Boulton (both friends of the claimant).

4. In addition, I heard expert evidence from two old age psychiatrists, Prof Robin Jacoby (for the third defendant) and Dr Andrew Barker (for the claimant).

5. I set out my impressions of these witnesses below.

6. The third defendant was cross examined for nearly 2½ days. Her evidence was clear, straightforward, well-organised and precise, full of detail. She stood up to cross-examination well, and did not seek to avoid difficult questions. It is clear that she enjoys being in charge, and seeks to dominate situations. Indeed, she sought on a

number of occasions to question counsel. It is also clear that she resents criticism of any kind. But she has insight, and accepted that she could be seen as overbearing and controlling. On the other hand, she insisted that she was never overbearing to the deceased, because she was an intelligent woman whom it was not possible to overbear. However, I have no doubt that the deceased did find her controlling and overbearing. In my judgment, the third defendant has convinced herself that she is in the right, and sees the events in her family over the last forty years through that prism. This has I think led her into error in relation to some aspects of her evidence, and indeed once or twice led her to go further than probably she herself believed. Her relationship with her brother, the claimant, is highly problematic, and she was quick to see his hand in any difficulties or reverses she might suffer. She also formed a bad impression of the second defendant, and, given what I say about his evidence below, in my judgment this does diminish the reliability of the third defendant's evidence. On the whole, however, I consider that she was telling me what *she believed* to be the truth, even though in a number of instances I consider that she was at least mistaken. In particular, I do not think that the claimant did all the things that she complains he did.

7. Lydia Kozickyj was a patently honest and transparent witness. She did not have much to contribute, but I accept what she told me.

8. Michael Evans was a clear and straightforward witness, very professional and obviously truthful. I accept his evidence.

9. Geoff Speirs was a clear and business-like witness, with nothing to hide. I am sure that he was telling the truth.

10. Julian Barge was a careful and clear witness, who was understandably protective of his wife, the third defendant, but no more than necessary, and defended his own opinions when challenged on them. I accept his evidence.

11. Debbie Parsons was a quick-witted, even feisty witness, very good at dates and times, giving clear evidence with the ring of truth, although tinged on occasion with a certain disdain (I am not sure who for). I accept her evidence on the whole, except where it conflicts with that of the second defendant.

12. David O'Hagan, now retired and living abroad, was a clear and very professional witness, quite evidently a solicitor of the old school, with an old-fashioned, client-focused approach. It is clear that the deceased liked and trusted him. He made full and detailed attendance notes and wrote contemporaneous letters, which set out events with clarity. His answers were precise and his evidence was to the point. He had no axe to grind, and brought a professional outsider's eye to the difficult family relationships between the deceased and her children. I accept what he said without reservation. In particular, where his evidence conflicts with that of the first or third defendant, I prefer his.

13. Angela Neary was tendered for cross-examination, but in the event her written evidence was not challenged and she was not cross examined.

14. The claimant is six years older than the third defendant, with some hearing difficulties, and a weak voice. But he is clearly intelligent and quick-witted, and with

a keen sense of injustice. On the other hand, his memory was often shown to be at fault when compared with contemporaneous documents (although this is hardly surprising, going back over more than forty years). Also, he was not present or involved in many of the important events in the earlier days, and therefore is dependent on other sources for his belief as to what happened. He comes across as naïve and unworldly. He sees things very much from his own point of view. He and the third defendant have plainly fallen out in a big way. But I am satisfied, notwithstanding these points, that he was trying to tell me the truth, at least as far as he remembered it, even if on some points I think he was mistaken.

15. Diana Scrafton and David Boulton were both straightforward and open witnesses, obviously telling the truth. In each case they had only a small amount to contribute, but I accept their evidence.

16. Prof Jacoby and Dr Barker were both very precise and professional. Each has considerable experience in the medical field relevant to testamentary capacity, and can properly be regarded as an expert for the purpose of giving opinion evidence on this question. I am satisfied that both of them were doing their best to assist the court and that I can rely with confidence on what they said where they agreed. Fortunately, the area of disagreement was not very great. I return to this later. I should add that it is clear from the papers that, in 2011 the third defendant had consulted another old age psychiatrist, Prof Robert Howard, about the deceased's mental capacity for the purpose of making a will. I will return to this later.

17. A witness statement was also served in relation to the deceased's cousin, Pat Phillips, and this was supported by a hearsay notice under the Civil Evidence Act. She was not tendered for cross-examination. Her evidence was not central, but it was confirmatory on some points.

Factfinding

18. For the benefit of the parties, and any others who are interested, I should say something about how English judges in civil cases decide cases of this kind. First of all, judges are not superhuman, and do not possess supernatural powers that enable them to divine when someone is not telling the truth. Instead they look carefully at all the oral and written material presented, with the benefit of forensic analysis (including cross-examination of oral witnesses), and the arguments made to them, and then make up their minds. But there are certain important procedural rules which govern their decision-making, some of which I shall briefly mention here, because lay readers of this judgment may not be aware of them.

The burden of proof

19. The first is the question of the burden of proof. Where there is an issue in dispute between the parties in a civil case, one party or the other will bear the burden of proving it. On the question of the validity of the will of 2008, in *law* that is the claimant, because he is propounding it. This is however subject to some important nuances which I shall mention later. On the question of the proprietary estoppel or constructive trust alleged to affect West Winds, it is the third defendant who has the burden of proof, because it is she who argues that West Winds, which in law belonged

to the deceased, is subject to an equity in her favour. There are other issues in the case too, but they are the main ones.

20. The significance of who bears the burden of proof in civil litigation is this. If the person who bears the burden of proof of a particular matter satisfies the court, after considering the material that has been placed before the court, that something happened, then, for the purposes of deciding the case, it *did* happen. But if that person does *not* so satisfy the court, then for those purposes it did *not* happen.

The standard of proof

21. Secondly, the standard of proof in a civil case is very different from that in a criminal case. In a civil case it is merely *the balance of probabilities*. This means that, if the judge considers that a thing is more likely to have happened than not, then for the purposes of the decision it did happen. If on the other hand the judge considers that the likelihood of a thing's having happened does not exceed 50%, then for the purposes of the decision it did not happen. It is not necessary for the court to go further than this. There is certainly no need for any *scientific* certainty, such as medical experts might be used to.

Failure to call evidence

22. Thirdly, where a party could give or call relevant evidence on an important point without apparent difficulty, a failure to do so may in some circumstances entitle the Court to draw an inference adverse to that party, sufficient to strengthen evidence adduced by the other party or weaken evidence given by the party so failing. Such a suggestion has been made in the present case. I deal with it later on.

Reasons for judgment

23. Fourthly, a court must give reasons for its decisions. But judges are not obliged to deal in their judgments with every single point that is argued, or every piece of evidence tendered. Moreover, it must be borne in mind that specific findings of fact by a judge are inherently an incomplete statement of the impression which was made upon that judge by the primary evidence. Expressed findings are always surrounded by a penumbra of imprecision which may still play an important part in the judge's overall evaluation.

Overall

24. So decisions made by civil judges are not necessarily the objective truth of the matter. Instead, they are *the judge's own assessment* of the *most likely facts* based on the *materials which the parties have chosen* to place before the court, taking into account to some extent also what the court considers that they should have been able to put before the court *but chose not to*. And, whilst judges give their reasons for their decisions, they cannot and do not explain every little detail or respond to every point made.

25. In cases where witnesses give evidence as to what happened based on their memories, which may be faulty, civil judges nowadays often prefer to rely on the documents in the case, as being more objective. In *Gestmin SGPS SPA v Credit Suisse (UK) Ltd*

[2013] EWHC 3560 (Comm), [16]-[20], an experienced commercial judge, Leggatt J (as he then was), commented on modern research into the nature of memory and the unreliability of eyewitness evidence. A particular problem in the present case is that the deceased, who was involved in many of the important events which fall to be considered, is now dead and therefore cannot give evidence about what happened. This is not a commercial case, but it is still about money and property. In my judgment, the problems of memory over the years and the absence of the deceased mean that the documentary evidence available to the court becomes even more important.

26. Indeed, in the *Gestmin* case, Leggatt J said this (at [22]):

> "In the light of these considerations [about the unreliability of memory], the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

27. This approach has been followed in many subsequent cases. Of course, its main application will be in commercial cases (such as *Gestmin* was), because in such cases it is likely that the bulk of the relevant facts and matters are recorded or referred to in written documents. In domestic cases, where typically there are fewer documents, it is less obviously applicable. And, in any event, even where it does apply, it does not mean that a judge should ignore the oral evidence, or even devalue it. In the extract above, Leggatt J made express reference to the usefulness of oral evidence. Even though this is not a commercial case, here there are sufficient written records, letters, emails and so on (partly because of the involvement of professional persons, such as lawyers, financial advisers and clinical staff) as to make it nevertheless relevant to this case. And the oral evidence stretches back over more than forty years. I will therefore give appropriate weight to both the documentary evidence and the oral evidence, bearing in mind both the fallibility of memory and the relative objectivity of the written evidence, as well as the non-degradation of such evidence over time.

Facts found

Background

28. The deceased was born in 1913, one of three Hicks sisters. Her sister Gladys died in 1966. Her sister Violet Edith died in 1984. They had a cousin, Pat Phillips, who also features in the narrative. The deceased was a highly intelligent woman, and studied at the University of Oxford. She had a strong personality, and knew what she wanted. Subsequently she married James Todd, who was a minister in the United Reformed

Church. He died in March 1977. During her married life, the deceased and her husband did not own their own home, but lived in tied accommodation belonging to the church. In November 1973, the Rev Todd bought a house in Ashtead for them to live in after his retirement, but sadly he died in the year before he actually retired, and only the deceased ever actually lived there. The deceased and her husband adopted two children, the claimant, born in 1942 and the third defendant, born in 1948.

29. The claimant spent most of his school years away from home at boarding schools. He saw his family only during the school holidays and occasional weekends. He went to University College London to study architecture, but left without taking a degree. He worked in an architect's practice. Thereafter he worked in progressive education in Scotland for 11 years, but continued to live and work there afterwards. More recently, he spent long periods of time in South America, in particular Peru, coming back to the UK only intermittently.

30. The third defendant also went to university, and eventually qualified as a medical practitioner. She has had a career as a general practitioner. She has been married twice. Her first husband was Christopher Parsons, who died in 2002 from cancer. He was a producer of wildlife documentary television programmes. They had one child, the first defendant, born in 1983. Mr Parsons also had two children from a previous marriage. Some time after the death of her first husband, the third defendant married Julian Barge, her current husband, who was the administrator of her GP practice.

31. As I have said, the deceased lived at Ashtead from August 1977, after the death of her husband. She had a job teaching inmates at a local prison, Send. At this time, the claimant was living and working in Scotland, and the third defendant was living and working in Bristol. There is a dispute between the parties as to whether the deceased was lonely and finding it difficult to cope. Whether or not this is true, I find that she lived by herself, but had little experience of running a home of her own, having previously lived in tied accommodation all paid for by someone else. I also find that she kept in close contact with the third defendant by letter and by telephone, and that there were a number of occasions when she got into difficulty and the third defendant and her then husband had to drive to Ashtead to deal with the problem and return for work the next day.

32. The deceased's sister, Violet Edith Hicks, known as "Auntie Vi", lived in a house in Blandford Forum in Dorset, which she had inherited together with the deceased on the death of their sister Gladys in 1966. She was a spinster, with no children. Since the death of Gladys, she too had lived on her own, and was now nearly 80 years old. Although she had a housekeeper and gardener, they did not work at weekends. As with the deceased, Violet Hicks called on the third defendant whenever she had a problem that she could not solve, and the third defendant and her husband had to deal with it, if need be by driving to Blandford and back.

33. In October 1977 the third defendant wrote to the deceased expressing the wish that both the deceased and her aunt Violet could come and live nearer to Bristol. After the end of 1977 the deceased stayed at Ashtead only intermittently, for the purposes of her job, and spent all her free time with the third defendant at her house in Bristol or with her sister Violet in Blandford. At this time there was no suggestion that the deceased was about to retire. But in early 1979 she was made redundant from her remedial teaching job at Send, and after she moved to Bristol permanently she started

a job in mid-1979 in Leyhill Prison, South Gloucestershire. She put her house at Ashtead on the market in September 1979. In fact it did not sell until July 1980.

Lynch Farm

34. The deceased looked for a property around Bristol, and liked the look of Thornbury, a market town which was similar to Blandford. At weekends the third defendant would take the deceased househunting, and in 1979 in a Thornbury estate agent's window the deceased found a derelict property, in the nearby village of Littleton upon Severn. It consisted of a farmhouse and a number of outhouses. It would need a lot of work and expense to make it habitable. The deceased showed the property to her sister Violet, and they both liked it and the village it was in. But they could not afford to buy and develop it by themselves. Nor did they have the relevant experience or indeed the energy. The third defendant and her husband, on the other hand, were much younger, and also had previous experience renovating old properties. In fact, they had just finished refurbishing what they called their "forever house" in Fremantle Square, in central Bristol.

35. The third defendant says that the deceased and her aunt Violet persuaded the third defendant and her husband to join with them in buying the property and turning it into three separate but inter-dependent dwellings, one for the deceased, one for Violet Hicks and one for the third defendant and her husband. The claimant says that it was the other way round, and the third defendant and her husband did the persuading. The third defendant of course was there, taking part in the discussion, and can give direct evidence, whereas the claimant was in Scotland, and cannot.

36. I prefer the account of the third defendant, and think the claimant is mistaken. The third defendant and her husband had just finished six years of refurbishment of their central Bristol house, which was where they worked and they had no wish to move from there. Their house included a large sound-insulated music room with three pianos, which could be used as a recording studio. There would be nothing similar at Lynch Farm. Moreover, her husband was busy on a television project ("Life on Earth") which took him abroad for long periods of time until 1981. It makes no sense for them to have sought to persuade an unwilling deceased and her sister to buy into an entirely new and complex redevelopment project in the countryside some distance outside Bristol, increasing their commuting time manifold. I am satisfied that it was the deceased and her sister Violet who persuaded the third defendant and her husband to take on and manage the new project.

37. The plan as originally developed (as, for example, set out in a Lloyds bank memorandum of 21 September 1979) was that the sale of the deceased's property at Ashtead (which was still on the market, awaiting a buyer) would fund the initial acquisition costs, and the sale of the property at Blandford (owned jointly by Violet and the deceased) would fund the early development costs, to construct dwellings for the deceased and her sister. Finally, the sale of the Bristol property belonging to the third defendant and her husband would fund the remaining development costs, in particular for the refurbishment of the farmhouse, where the third defendant and her husband would live. The deceased called the whole property a family "commune". The properties, which would be just feet away from each other, would share services and a common entrance to the site.

Promise or expectation?

38. The third defendant and her husband were concerned about giving up the value of their Bristol home for a share in the new development, where a sale by any one participant could lead to a difficult relationship with the new owner. The third defendant says that the deceased and her sister Violet both orally promised the third defendant and her husband that they would safeguard the interests of the third defendant and her husband by leaving their own dwellings to them and not selling them or giving them to anyone else. On the other side, the third defendant says that they promised to be the major investors of both money and time in the project. The claimant challenges this. He accepts that he was not directly involved in the project but says he was in regular correspondence with the deceased, who told him what was going on. He says the third defendant and her husband were behind the whole project, and it would not have been possible without the financial support of the deceased and her sister Violet. For the claimant, there was no promise by the deceased and Violet to leave their properties to the third defendant.

39. The third defendant relies on a number of matters. First, the deceased in her wills made in 1992, 1996 and 1998 left West Winds to the third defendant or on a trust for her daughter, the first defendant, after that trust had been set up in 1998, with the residue passing to the claimant. Second, Violet's own will and codicil left her own part of the commune (Dove Cottage) to the deceased for life with remainder to the third defendant. Third, a document created by the third defendant and called the "List of Actions" (to which I will come in due course) stated that the deceased acknowledged that she had agreed that her house would be left to the third defendant's side of the family rather than to the claimant. Fourth, the third defendant's "Diary of Events" also expressly stated that "there was an agreement between all three parties that no member should sell or give their house away outside the members of this commune". In addition, the first defendant gave evidence of having heard conversations between her father and her grandmother as she was growing up about the intended devolution of Lynch Farm to her.

40. On the other side, the claimant relies on the fact that there is no such promise or other arrangement to leave property to the third defendant's side of the family referred to in subsequent documents of title. These are: the original conveyance of the property in 1979, the declaration of trust between the parties in March 1980, and the deed of partition of July 1983. The claimant also relies on documents that are said to show that the solicitors involved in the conveyancing were never told of the arrangement between the three parties, despite the third defendant's evidence that she had told them.

41. I am, however, entirely satisfied that there *was* an informal arrangement between the three parties that the individual properties carved out of Lynch Farm should not be sold or given outside the members of the commune, and that, given their respective ages, in practice this meant that they would be left to the third defendant or her daughter the first defendant. It seems to me highly unlikely that the third defendant and her husband would readily give up their just renovated (and conveniently situated) "forever house" in the centre of Bristol to start an ambitious new development project in a (more remote) small village outside Bristol in which the three units to be constructed or renovated would be interdependent in a number of

ways, *without* first ensuring that the value of their participation would not be endangered by units passing to non-members of the commune.

42. There was no reason why the deceased or her sister should not willingly agree to this. They wanted to live in (at least) close proximity to each other and with increasing support from the third defendant and her husband. The deceased looked forward to the possibility of grandchildren. She had other assets with which to satisfy her desire to provide for her son, the claimant (who was then living in Scotland, and was not intended to be a part of the commune). Her sister Violet was unmarried, without children, and even older than the deceased. She too relied on the third defendant and her husband. The two sisters wanted to live at Lynch Farm but had neither the experience nor expertise nor energy to carry out the redevelopment project by themselves. What the defendant and her husband were asking would have made perfect sense to them, and kept family property within the family.

43. The fact that this arrangement was informal, and not referred to in any of the documents of title, does not surprise me at all. As between close family relatives in this situation, it would have seemed unnecessary, even churlish, to insist upon reducing it to writing in a legal document for anyone to read. Moreover, the arrangement put forward is consistent with what actually happened when Violet died in 1984, and with the several wills made by the deceased, other than the last one in 2008. It is also supported by the evidence of Michael Evans, the solicitor, in relation to the setting up of the Alexandra Trust in 1998, and the making of the deceased's 1998 will in particular. Nor am I surprised at the claimant's evidence that the deceased did not mention any such arrangement to him. The deceased would not have wanted to hurt her son's feelings by explicitly referring to an arrangement which did not include him. Moreover, she intended (as shown by her earlier wills) to provide separately for him out of her other assets.

The purchase and development

44. The plan was that the Ashtead house should be sold in order to finance the acquisition of the new property, and it was put on the market in September 1979. An initial sale in November fell through, and in fact it did not finally sell until July 1980. In order not to lose Lynch Farm in the meantime, that property had been bought by and conveyed to the third defendant and her husband, the deceased and Violet Hicks "as joint tenants" on 30 November 1979. The purchase price of £52,500 and associated costs of £1422.57 were financed by obtaining a bridging loan from Lloyds Bank (at which both the deceased and the third defendant's husband banked), as referred to in the Lloyds Bank memorandum of the 21 September 1979.

45. Some four months later, on 29 March 1980, a declaration of trust was entered into by the joint tenants, declaring that they held Lynch Farm on trust for the third defendant and her husband as to 50%, for the deceased as to 30% and for Violet Hicks as to 20%. However, this was stated to be

> "a provisional declaration of the shares which the parties shall have in the entire property pending partition subject however to the right of the parties hereto to amend the trusts if it should prove that their respective financial outlays differ from the fractional shares of ownership hereby declared".

The third defendant explained that they were not really concerned about the power to amend the shares, because of the promises to leave individual shares within the "commune". So the third defendant and her husband thought they would have the property in the end.

46. The deceased's house at Ashtead was sold in July 1980 for £62,450. After deduction of costs, this left £60,494, which was employed in paying off the bridging loan. The house at Blandford was also put up for sale by auction in September 1979, but did not reach its reserve. It was finally sold in February 1981 for £48,000. After deduction of costs, this left £47,552 (split equally between the deceased and her sister Violet), which was employed in the revelopment of West Winds and Dove Cottage. Violet had already moved out to a rented property in Blandford. But she frequently came to Bristol and stayed with the deceased in the Bristol house belonging to the third defendant and her husband. That house itself was sold in March 1981 for £70,000, plus £3,000 for certain fittings.

47. This was sold earlier than anticipated, because there was a purchaser anxious to buy it and the third defendant and her husband did not wish to lose the sale. Unfortunately, because it was sold early, the separate units at Lynch Farm were not yet ready for occupation. So, as an emergency measure the third defendant acquired a small house in Ravenswood Road, Bristol, in which everyone lived until Dove Cottage became available for Violet Hicks and the deceased to occupy. They moved into Dove Cottage on 6 May 1981. Shortly afterwards, Michael arrived from Scotland and began to stay there with them too. He had first seen Lynch Farm at Christmas 1980, but had then returned to Scotland briefly, before coming to live in Bristol. He did some work on both that house and on West Winds. The deceased moved into West Winds in July 1982. But there was a certain amount of moving around from property to property thereafter, as different stages of the development were completed. Eventually, the claimant moved into West Winds with the deceased.

48. Because Lynch Farm was both derelict and a listed building, there was a great deal of work to do in demolishing some buildings and building new ones, and in refurbishing others. There were some planning consent problems. Services were installed. There were professional fees to pay to surveyors, architects planning consultants and project managers. The third defendant and her husband organised and supervised contractors. In addition, they worked at evenings and weekends on site, digging trenches, moving stone, building walls, plastering and decorating. They also laid out, landscaped and then maintained the gardens. The whole project took some six years.

49. From 1981, once he had moved back down from Scotland, the claimant also worked on the site, even though he had not been a party to the arrangement and was not contributing financially to the project. Indeed, he was paid money by the deceased for the hours which he worked on West Winds. There was a dispute at trial as to whether the claimant had done anything of any significance. I am satisfied that he did, and that his physical contribution to the project was not trivial or minimal. However, it is clear to me from the evidence that the claimant as a workman is something of a perfectionist, which meant that he took a long time to achieve satisfaction with the work that he did. This probably reduced its value in the eyes of the third defendant and her husband.

50. The costs of building works and the persons who paid for them are set out in a notebook kept by the third defendant's husband and referred to as the "Blue Book". Of course he, now being dead, did not give evidence, but the third defendant was examined on the book, and I have no reason not to treat what he wrote in the book as accurate. It shows that the contributions of the parties were as follows:

    Violet Hicks: £32,401.57, making 16.71% of the total.

    The deceased: £64,957.41, making 33.49% of the total.

    The third defendant and her husband: £96,591.86, making 49.8% of the total.

    The total recorded as spent therefore was £193,950.84, of which third defendant and her husband paid about half. The third defendant's evidence was that there was other expenditure too, though not recorded. They also carried out a great deal of labouring work which the deceased and Violet Hicks could not, and performed all the necessary project management. In terms of the informal arrangement to which I have referred, the third defendant and her husband entirely carried out their side of the bargain.

Subsequent events

51. Also in 1982, Violet Hicks was diagnosed as suffering from ovarian cancer which had spread to her liver. She was given a maximum of two years to live. Her illness led to a reappraisal of the project and the taking of legal advice. This in turn led to the execution of a deed of partition dated 6 July 1983, and Violet's own will of 26 August 1983. The deed of partition terminated the beneficial tenancy in common of the whole property and divided it into three physically separate parts, each owned absolutely beneficially. Henceforth the farmhouse belonged to the third defendant and her husband, Dove Cottage to Violet, and West Winds to the deceased. Violet's will, as originally executed, left a beneficial life interest to the deceased with remainder over to the third defendant absolutely. Violet died in October 1984.

52. The first defendant was born in 1983. The deceased was delighted to have a grandchild and wanted to be greatly involved with her. But at the same time she made clear to the third defendant and her husband that she did not have the energy or inclination to provide full-time care. As both her parents had busy careers of their own, they therefore employed childminders, or "nannies" to look after her. One of them, Lydia Kozickyj, gave evidence at the trial. She looked after the first defendant between about 1989 and 1991.

53. In 1984 the claimant saw a Bolivian band perform in Bath, and found that he liked what he had seen and heard. He met the impresario, a man called Mo Fini, and also Diana Scrafton, who took over the management of the band. During the next few years, the claimant accompanied the band on tours in the UK, in the capacity of a voluntary "roadie", supporting the band in various roles.

54. After the death of her sister Violet, the deceased (by virtue of her life interest) rented out Dove Cottage in order to produce extra income. But in 1986 she decided it would be better to disclaim her interest, and a deed of variation of Violet's will was produced, dated 30 June 1986. Under this deed, the deceased gave up her beneficial life interest, and Dove Cottage, instead of going directly to the third defendant, was

divided beneficially between the third defendant and the first defendant (her half share to vest at the age of 25). The claimant as a beneficiary under Violet's will (entitled to a half share of residue, the other half going to the third defendant) also executed the deed of variation. He ultimately received about £28,000 worth of investments in satisfaction of his legacy. This was spent by him on financing his lifestyle until it ran out in about 2006.

55. After Violet's death and the completion of the works at Lynch Farm the third defendant and her husband continued with their busy careers whilst the first defendant was looked after (as I have said) by a succession of nannies, who also assisted with other household and family tasks such as cleaning, washing and shopping. The first defendant spent a lot of time with her grandmother, the deceased, who also got on very well with the third defendant's husband, her son-in-law. The three of them would have tea together every day that they were all there. As I have already mentioned, the first defendant would hear her father and her grandmother discussing the arrangements at Lynch Farm, including the expected devolution of the properties to her, and on the other hand her intention to leave the claimant all her money and investments. The deceased enjoyed talking with her granddaughter, the first defendant, telling her stories about family history and life during the war. The first defendant used in turn to confide in the deceased. During these conversations, the deceased sometimes acknowledged the promise that she had made to the third defendant to leave West Winds to her side of the family.

56. Apart from touring the UK with the Bolivian band, the claimant was also employed by Mo Fini in 1988 to design and build a large wooden cabin at his home near Bath. Then, in January 1989, the claimant went with Mr Fini the first time to South America. As he put it in his evidence, he "fell in love with Peru and South America, and stayed there for ten months." Thereafter he came back to England and lived with his mother at West Winds for some time, before returning to Peru. He went back and forth on a number of occasions, sometimes returning to the UK only for a matter of weeks, sometimes for months. When he was in Peru he kept in touch with the deceased by telephone and also by fax.

57. On 16 March 1998 the Alexandra Trust was created as part of inheritance tax planning for the third defendant and her husband. This was essentially a trust for the benefit of the first defendant. On the same date the deceased, the third defendant and her husband executed an Assignment and Declaration of Trust, by which the third defendant assigned her one half share of Dove Cottage to the trustees of the Alexandra Trust. Also on the same date the third defendant and her husband executed a Declaration of Trust severing their beneficial joint tenancy of Lynch Farmhouse and declaring that they held the property on trust for each of themselves and the trustees of the Alexandra Trust in equal one third shares. In 1998 the deceased also granted a lasting power of attorney to the third defendant, but it was not then registered, because the deceased continued to be able to deal with her own affairs.

58. In 2000 the third defendant's husband was diagnosed with cancer. By this time he had retired, but the first defendant was still at school. The third defendant accordingly was still working full-time as the family breadwinner. By 2002 her husband was housebound, requiring full-time care. He died in November 2002. Although the third defendant sent money to the claimant to enable him to return England to assist while her husband was alive, the claimant did not in fact return until after he had died.

59. The deceased remained active and very independent, continuing to drive until her early 80s, when she had an accident and decided to stop. She still read the *Financial Times*, and continued to manage her own share portfolio. In her late 80s, however, her health began to decline. Both her hearing and her sight deteriorated, and she became tired easily. She stopped going out so often and relied more on others and on home deliveries.

60. During this time the third defendant was the deceased's GP and therefore responsible for her healthcare. In addition, the third defendant either took the deceased to appointments or arranged transport and oversaw her home care provision and various other domestic activities. At the deceased's request, the third defendant from about 2002 on began to deal with most of her financial affairs, including obtaining cash, paying in cheques at the bank, and completing her tax return. The deceased authorised her bank to send statements to the third defendant, and entrusted her cheque-book to her to keep it safe. But the third defendant still did not apply to register the 1998 power of attorney. Once the first defendant had gained her driving licence (in 2000) she assisted her mother by taking the deceased to appointments when the third defendant was not able to. A stair lift was installed at West Winds to enable the deceased to get up and down stairs.

61. In 2006 the deceased suggested to the third defendant that she buy West Winds from her, in order to free up capital which she could use in part to provide for the claimant, in particular to buy land for him in Peru. The deceased did not want to sell any of her investments for this purpose, as she depended on them for her income. She went to meetings with and took advice from financial advisers such as Alan Hulse and Geoff Speirs. She was advised that there would be reservation of benefit problems for inheritance tax purposes if she sold the house to the third defendant, but continued to live in it without paying a market rent. She was concerned as to how any money given to the claimant could be required to be used only for the purposes of buying land in Peru. It was suggested that she create a trust for the first claimant's benefit, but she demurred, on the basis that it would be humiliating for him.

62. She did however ask the third defendant to write a summary of the advice including the deceased's own ideas. This document (during the trial referred to as the "List of Actions") was typed up by the third defendant and given to the deceased to check. When the claimant next came to England, the deceased discussed the matter with him but he refused to agree to it, saying that it was an attempt to cheat him of his rightful inheritance as the eldest son. I reject the claimant's view that this document was entirely the third defendant's creation and that the deceased had no input and was being told what to do. The claimant had a great deal of contact with the deceased when he was in England, living with her at West Winds. Yet he does not say, for example, that the deceased told him she did not want to do this or that she had been told to do it. On the contrary, the document records that the deceased was "concerned her will was now unfair" to the claimant and she wanted to do something about it. I find that this document represented indeed what the deceased then wanted to record and to do. It is clear, not only from the evidence of the first and third defendants, but also Geoff Speirs (who gave evidence before me) that the deceased in 2006 was still intending that her house should pass to the third defendant and her side of the family rather than to the claimant. His need, as she saw it, was for cash for Peru, not land in England.

63. Also in 2006 the third defendant married Julian Barge. Both the deceased and the claimant were invited, but only the deceased attended, despite her mobility problems, although the claimant turned up during the celebrations to drive the deceased home.

64. On 31 March 2006 the deceased signed a typed document acknowledging that she had paid sums amounting to £3000 in each of 2004 and 2005 and intended to make a similar payment in 2006 to the claimant, all as an advance against his final inheritance. The third defendant was unable to recall who prepared it. Her second husband, Julian Barge, witnessed it. He said that the deceased called him over to West Winds in order to sign it. He did not recollect anyone else being present at the same time. The first defendant said that she did not remember typing it, but considered that that was possible. She was unable to say whether she was involved in the drafting. The drafting of the document is quite precise and careful, and the first defendant had indeed completed a law degree. I am satisfied that the first defendant did draft this document and typed it up, and that the deceased agreed with it and signed it.

65. Subsequently the deceased's health deteriorated and she relied more and more on the first and third defendants for many day-to-day matters, including personal hygiene and cooking meals. Eventually, the first and third defendants took turns on alternate evenings to prepare the deceased's evening meal and carry out basic housework. In addition, they would receive calls at other times from the deceased to say that she felt unwell or had fallen over, and would leave what they were doing and tend to her. The deceased was now also suffering from problems with her balance, which meant that she found it difficult even to use the stair lift. In addition she could not walk to the toilet at night, and had to use a commode in her bedroom.

66. In late 2007, the claimant returned from South America, and as before he stayed at West Winds. He also assisted the deceased with her needs. There is a dispute between the claimant and the third defendant as to the extent of this assistance, but I do not need to resolve that.

Admission to hospital

67. In the middle of one night in early April 2008, the deceased used her personal alarm system to alert the third defendant. When she went over to West Winds she found that the deceased had fallen over upstairs. The claimant was also in his room but for some reason had not come to her aid. With the assistance of Julian Barge she managed to put the deceased back in her bed, where she refused to be moved further. The claimant thereafter took over her care. But a few days later the deceased rang the third defendant to complain about the pain she was in. On 19 April 2008 the third defendant arranged for her to be taken to a private hospital, as it was the weekend. X-rays showed a dislocated prosthetic hip. She was then admitted to the Frenchay hospital for the hip to be repositioned. However, a scan showed severe osteoporosis leaving insufficient bone in which to cement a replacement hip. In fact this meant that she would never walk again. Thereafter she had to be lifted from her bed into a chair or onto the toilet. As will be seen below, it also meant that she never returned to live at West Winds.

68. There is in fact a conflict of evidence as to the deceased's state whilst she was in Frenchay hospital. The first defendant and third defendant (who visited her) each gave evidence that at times she was confused and behaving abnormally. For example they

said she thought she was at home, or near home. They also said that she made comments about the staff (including racist comments) which were out of character for her, and that she was rude and abusive. The third defendant went so far as to say that the deceased suffered a complete personality change. On the other hand, the claimant (who also visited her) said she may have suffered a brief disorientation but thereafter was always the same as she had been before whenever he went to visit her.

69. A consultant arranged for the deceased to have a Folstein mini-mental state examination (MMSE) test, designed to check mental capacity. This took place on 27 May 2008. The deceased scored 28 out of a maximum of 30. The deceased's medical records do show some documented episodes of confusion during the time that the deceased was in hospital, and then in the care home to which she transferred in July. But they also show periods without any confusion. I am satisfied that the deceased did have some confusion episodes, but not that her personality changed. Because the deceased was no longer living at home and the first and third defendants were no longer involved in her daily care, but she had professional nurses and carers, there was less contact between the third defendant and the deceased, who was accordingly freer to express herself as she wished, and whose behaviour was observed and recorded by third parties. That may well have been seen, from the third defendant's point of view as an alteration of the deceased's personality.

70. The social worker, Rachel Bees, called a family meeting to discuss the deceased's future. It took place on 23 May 2008. The claimant maintains that he was excluded from this meeting. The first defendant and third defendant each say that he refused to attend. It is not necessary for me to decide which is true. The deceased expressed a preference for returning to live at home. The third defendant showed the social worker and the ward sister photographs she had taken of the rooms in the house filled with boxes, such that a live-in carer would have nowhere to sleep. The ward sister and the social worker agreed that the boxes would have to be moved. The social worker was to investigate the possibility of a house care package being put in place by the local authority. In the meantime, however, they discussed the possibility of a nursing home for the deceased, by way of temporary expedient.

71. On 25 June 2008 the third defendant telephoned the deceased's bank and stopped her bank debit card. This was at a time when relations between the third defendant and the deceased were at a low ebb. They rowed about money, and in particular about how much the deceased owed to the third defendant, which the deceased denied. The deceased said she wished she had never granted a power of attorney to the third defendant. The consequence of cancelling the bank card was that the deceased could pay bills only by way of cheque, for which purpose she needed her cheque-book.

St Monica's

72. Since the boxes had not been cleared from the corridors and rooms of West Winds, it was not possible for the deceased to be discharged back home. The hospital was concerned that the deceased could not stay there indefinitely, especially since they could do nothing further for her. They needed the bed for other patients. The deceased agreed to try a nursing home at least on a temporary basis. The search for an appropriate care home continued. The third defendant researched this, and eventually found St Monica's, which was near enough for the family to be able to visit the deceased regularly. The deceased was admitted to Wills House at St Monica's on 7

July 2008. It is clear that she went somewhat unwillingly, and would have preferred to return home.

73. At least from the time that the deceased entered St Monica's the first and third defendants' evidence is that she became more confused and less able to deal with others in the way that she used to. Her short-term memory worsened. She mistook people, one for another, or introduced them by the wrong names. Her relationship with the third defendant deteriorated. She accused the third defendant of behaving badly towards the claimant, although she did not explain how. But she also telephoned her day and night, complaining that the nurses would not come when she rang, and yet screamed and shouted at her carers. The third defendant wanted the deceased to see a geriatric psychiatrist, Dr Eastleigh, for a professional opinion. But the deceased refused to see Dr Eastleigh.

74. On the other hand, the deceased asked the third defendant to prepare a list of her financial assets, that is, bank deposits and stocks and shares. She made clear that the list should not include the house, as that was "out of the equation". I find that by this she acknowledged that she had agreed to leave it to the third defendant's side of the family. This is all quite rational. However, when the third defendant gave her the list that she had prepared, she says the deceased told her that it was wrong, and tried to throw it away.

75. By September 2008 she had told the third defendant that she no longer wanted to see her or the first defendant ever again. By mid-September, the frequent telephone calls from the deceased to the third defendant ceased. When visiting the deceased, the third defendant noticed that the claimant had written out a new telephone list for the deceased, which omitted the first and third defendants' telephone numbers. When she asked the deceased why their numbers were not on the list the deceased told her that the claimant as the eldest son decided everything. Whether that was a deliberate provocation or an aberration is not clear.

76. What is clear is that the deceased had been thinking of changing her will and now wished to do so. The deceased had been the patient of her daughter, the third defendant, as her GP for more than 25 years. But when the St Monica's care home manager, Angela Healey, was assessing her in June 2008, the deceased had told her that she wished to change her GP (as she put it) "to relieve [the third defendant] of the burden of being my doctor". In September 2008 she asked to change to the GP who regularly attended St Monica's, Dr Kershaw. The deceased may have thought it would be difficult to make a valid new will disadvantaging the third defendant whilst she remained her GP. At all events, it also appears that the nursing staff at Frenchay Hospital had expressed the view that a relative of the patient could not be that patient's GP, and raised the issue. The social worker, Rachel Bee, shared their concerns. That view may in fact have been erroneous, at least at the time, because there were exceptions for patients in rural areas such as the deceased was.

77. After her admission in July 2008 to St Monica's, Angela Healey had asked the deceased again if she wished to change her GP, but this time she did so in the presence of her daughter, the third defendant. The deceased said No. The care home manager did not raise the matter again. Nevertheless, on 15 September 2008 the deceased asked staff if she could change her GP to Dr Kershaw, and staff nurse Lesley Collins informed Angela Healey. She spoke to the deceased about this, and

asked whether she wanted to talk to the third defendant about the change. The deceased however refused, as (according to her) it would make the third defendant angry. She showed Angela Healey a draft letter from her to the third defendant. Angela Healey suggested that it should be typed up. For this purpose, Sue Robinson, the senior administrator had a long meeting (alone) with the deceased, and typed up the deceased's letter to her daughter. According to Sue Robinson, the deceased told her that her son, the claimant, would post it to her daughter. The claimant's evidence was that at the deceased's request he posted the final version of this letter to the third defendant. The third defendant's evidence is that she never received it. I am satisfied that the claimant posted it. It is not necessary however for me to decide whether it was ever delivered.

78. A formal request to change GPs was signed by the deceased by 17 September 2008 at the latest, and the deceased was placed on the list of Dr Kershaw. The third defendant says she found out about the change only (by 29 September 2008, at the latest) by looking at the primary care trust list of patient "deductions" at her own surgery. She was angry, and wrote somewhat intemperately to St Monica's to complain about pressure which she said the care home manager had put upon the deceased to change GP. I find that no pressure was put on the deceased. It was entirely her decision.

The new will

79. Also in September 2008 the deceased told the third defendant that she wanted to see a solicitor to change her will, and asked for her help in finding one. She said she did not want to use their usual family solicitor. She also said she did not know what was in her estate and asked the third defendant for a list of her assets and values. However, she added that she knew that her house was to be left to the first defendant, and nothing would change this. In fact, as mentioned above, the third defendant had done this exercise earlier in the summer. She found the list of assets which she had given to the deceased then, and presented it to her again. The deceased asked the third defendant to work out how long her money would last if she were to stay at St Monica's. The third defendant also made some enquiries to try and find a solicitor experienced in dealing with wills for the elderly, but found some difficulty in doing so. When the third defendant told the deceased about this, the deceased said that she no longer wished to redo her will and that the third defendant need not bother. However, she still wished to know what her *financial* assets were, although she found it hard to retain the information for long.

80. In fact, the deceased was probably just being polite to the third defendant, and trying to avoid a confrontation. This is because in September 2008 the *claimant* had visited another local firm of solicitors to ask about the deceased's making a new will. They had recommended the second defendant's practice (known as Barry and Blott) as more conveniently situated for the deceased. The claimant therefore visited the second defendant to say that his mother (the deceased) wanted to make a new will.

81. A few days later, on 17 September 2008 the second defendant went to see the deceased at St Monica's, accompanied by the claimant. After introducing the second defendant to the deceased, however, the claimant left them alone together. The second defendant is a very experienced will maker. Over a 25 year career he has come across a few cases in which he was not satisfied with his clients' capacity and declined to make a will for them. Whilst noting that the deceased was bedbound, hard of hearing

and did not see very well, the second defendant concluded from his discussions with her that there were no “red flags” so far as her capacity was concerned and that she was capable of giving clear instructions for a will. The deceased told him that she had passed a mental capacity test while she was in hospital.

82. The deceased’s instructions included an explanation by her that she considered her daughter, the third defendant, to be too controlling, and did not trust her to do what was in her best interests. She said she wanted to recover her independence. On the evidence I have seen, I do not consider that she was mistaken in describing her daughter’s behaviour as “controlling”. Moreover, although the third defendant had been acting as her GP, the deceased had now arranged to be transferred to the care of the regular GP for St Monica’s, Dr Kershaw.

83. So far as concerns her estate, she explained that, because her son, the claimant, was the poorer of her two children, and in her opinion the more deserving, she wished to get the balance right between them. Her previous will, leaving West Winds to the third defendant, and her financial investments to the claimant, had been made at a time when there was a closer balance between their respective values. In the “List of Actions” document, made in 2006 after the meeting with Geoff Speirs, the deceased is recorded as being concerned that her then existing will was now unfair to the claimant, since the value of the house had increased over that of her investment portfolio. She thought her gross estate, including West Winds, would be worth between £400,000 and £500,000. I reject the third defendant’s view that the second defendant put forward this valuation. The attendance note does not say he did, and there would be no basis for him to know. Moreover, he denies it, and I accept his evidence. Nor do I think that this demonstrates that the deceased had forgotten her promise. The second defendant’s note of the meeting refers to “daughter inheriting her mother’s properties”. This is awkward to interpret. It literally means the third defendant inheriting from the deceased, but that makes no sense in the context. The only sensible reading is that it refers to the *first* defendant inheriting the *third* defendant’s properties. I am satisfied that the deceased was aware of what her estate comprised, that the persons with moral claims on her property were her two children and (to a lesser extent) her granddaughter, and that she knew very well that she had promised to leave West Winds to the third defendant’s side of the family.

84. After a long discussion, the deceased said that the claimant should have 70% of her estate, the third defendant 25%, and the first defendant 5%. I reject any suggestion that the claimant told the deceased to make a new will, or what to put in a new will. I am quite satisfied that these instructions were those of the deceased alone, and that she asked the claimant, as indeed she asked the third defendant, to find her a solicitor. It was not the claimant’s idea, but the deceased’s. I am also quite certain that the second defendant would not have accepted the claimant’s instructions as to the contents of the deceased’s new will. That is after all why the claimant was not permitted to be present during the instructions meeting with the deceased.

85. However, she told the second defendant that West Winds might have to be sold to finance her accommodation at St Monica’s. She did not mention the promise to leave that property to the third defendant or her granddaughter, the first defendant. But I find that she was well aware of it, and did not mean to be bound by it in what she regarded as changed conditions. She did not want either the third defendant or the claimant to be an executor of the will, the former because of her controlling behaviour

and the latter because he would be in Peru. The second defendant indicated that, if a professional executor were to be appointed, then a family member should be appointed as well. The deceased agreed therefore that the second defendant should be appointed executor together with the first defendant, her granddaughter.

86. The second defendant at this meeting also discussed with the deceased the question of powers of attorney. The deceased said that there was an enduring power of attorney in favour of the third defendant, but this had never been registered. The second defendant discussed the possibility of a lasting power of attorney being granted by the deceased. In the interim, however, the deceased instructed the second defendant to prepare a short form power of attorney pending a decision on the lasting power of attorney. She also wanted the existing enduring power of attorney to be cancelled, though she was concerned at how the third defendant would be likely to react to news of that cancellation.

87. The second defendant drafted the new will for the deceased, and sent it to her under cover of a letter dated 22 September 2008. On 24 September 2008 the second defendant visited the deceased at St Monica's. His attendance note of that meeting shows that they discussed the question of the ownership of Lynch Farm. Relevantly, it says this:

> "apparently all three sisters – that is herself, Vi and Gladys – owned the properties at Lynch Farm, the other two had died without children, and she saw no reason why Michael should not receive a the larger share now that Elizabeth had gained benefit earlier on from being left the farmhouse itself, even if she had joined in with her daughter Deborah as joint owner for tax reasons. DOH said he did not know whether they were tenants in common or disproportionate shares."

88. This statement in the attendance note of the ownership of the properties at Lynch Farm, which can only have come from the deceased, is incorrect. The farmhouse had not been *left* to the third defendant, but on the contrary belonged (at least notionally) from the beginning to her and her then husband. On the other hand, Dove Cottage *had* been left to the third defendant, subject to the deceased's life interest. So it may have been (as the claimant suggested) simply "a slip of the tongue". Gladys had died long before the project was even conceived, and was never an owner. Violet Hicks *had* owned Dove Cottage, but on her death that had passed to the deceased for life with remainder to the third defendant absolutely, although the deceased had subsequently given up her life interest, and the property had been divided between the first and third defendants equally. Since the establishment of the Alexandra Trust, the third defendant's half share had belonged to the trustees of that trust, for the benefit of the first defendant, who also owned the other half. In substance, therefore, Dove Cottage belonged beneficially to the first defendant. What *was* correct was that the deceased owned one of the three properties, *ie* West Winds. It was also the case that the third defendant was much better off than the claimant.

89. The next day, 25 September 2008, the second defendant visited the deceased again at St Monica's, together with his secretary and legal executive Angela Neary, to deal with the signing of the will and the short form power of attorney. The claimant was not present. Angela Neary's evidence, which I accept, was that she saw the deceased looking at the will, appearing to be reading it and taking it in. The conversation which took place, and with which the deceased engaged, was a sensible one. Angela Neary

had witnessed other wills in her work with the second defendant, and on this occasion had no reservations about the deceased's capacity. The other witness to the will was a member of staff at St Monica's, Staff Nurse Lesley Collins.

90. The terms of the will revoked all previous wills and other testamentary dispositions, and appointed the first and second defendants as executors and trustees (thereafter referred to as her "Trustees"). Clause 4 of the will was worded so as to give to such of those living at the deceased's death of the

> "people named in a List prepared and signed by me such items of my personal chattels [*etc*] as are respectively described therein opposite to their respective names".

That was the only specific gift in the will. Clause 5 of the will dealt with residue. It gave "all my real and personal property not otherwise specifically disposed of" to her Trustees upon trust to pay her debts and funeral and testamentary expenses, to hold the balance upon trust as to 70% for the claimant, as to 25% for the third defendant, and as the 5% for the first defendant. There was no specific mention of West Winds.

91. Although the second defendant had had no doubts himself about the deceased's capacity to make a will, he nevertheless wrote to Dr Kershaw, who he understood now to be her GP, some four days later, on 29 September 2008. He replied by letter dated 1 October 2008 stating that he considered her mental capacity to be such as to enable her to give valid instructions for a will. Neither the second defendant's letter nor Dr Kershaw's letter however referred to the elements of the legal test for capacity to make a will (as set out in, for example, the case of *Banks v Goodfellow* (1870) LR 5 QB 549). Nor was the enquiry or the response of Dr Kershaw contemporaneous with the making of the will. Nor did Dr Kershaw examine the deceased before expressing his view, or make a contemporaneous record of his examination findings. There was therefore no compliance with the so-called "golden rule": see *eg Re Key Deceased* [2010] 1 WLR 2020, [7], per Briggs J (as he then was). I will return to this later.

Events after the execution of the will

92. On 29 September 2008 the second defendant wrote on behalf of the deceased to her bank asking for a cheque book to be sent to her at St Monica's, and also to forward to her there copies of her bank statements.

93. On 9 October 2008 the second defendant wrote to the first defendant to say that the deceased wished to make her one of the executors of a new will. It appears that the first defendant never received this letter. On 29 October 2008 the second defendant wrote a further letter to the first defendant, chasing up on the earlier letter. It asked the first defendant to contact him. She did so by telephone in November, explaining that she was about to leave on a trip to Portugal for the purpose of competing in horseriding competitions. They arranged to discuss matters upon her return. In the meantime, the first defendant asked the deceased whether she had made a new will with the second defendant. The deceased said she had discussed it, but not actually done it.

94. The third defendant's evidence, which I accept, is that the deceased told her that she could not remember the name of the solicitor who had attended her, or when or how

often he had visited. She also told the third defendant that the new will referred only to her money and stocks and shares, that is, not to her house. I find that she was in effect fobbing off the third defendant. In January 2009, the second defendant informed the third and first defendants that the deceased had made a new will in September 2008. The first defendant then asked the deceased about this, but the deceased replied that she could not recall signing anything. I find that the deceased was not being truthful with the first defendant. Similarly, when the first defendant raised the question of the new will, the deceased told her that she could not discuss the contents of her will with her, as that would invalidate it. As an intelligent, educated woman, the deceased must have known that this was nonsense. On yet another occasion in January 2009 the deceased told the first and third defendants that the new will favoured the claimant, but that the first defendant would nonetheless receive the house. I do not find any of these to be symptoms of a lack of capacity. On the contrary, I find that, on all these occasions, the deceased was simply making excuses to defer what she thought would be an otherwise inevitable row with the third defendant, which she did not want to have.

95. At about the same time, the third defendant noticed that she was no longer receiving bank statements from the deceased’s bank, as had previously been the case. She discovered that the claimant had informed the bank that statements were no longer to be sent to her. She was concerned that there would not be sufficient funds to pay the deceased’s fees at St Monica’s (about £3600 per month). Indeed, that proved to be the case, as the administrator subsequently informed her.

96. The third defendant then prepared to register the 1998 enduring power of attorney in her favour, by serving notice on the various persons interested. The first defendant wrote to the second defendant on 1 January 2009 to inform him of this. The third defendant wrote to the claimant on 2 January 2009 giving notice of her intention to register the power. The second defendant wrote to the third defendant on 5 January 2009 to say that he had visited the deceased about this matter, that her instructions were clear that she did not want the third defendant to register the enduring power of attorney, and that he would therefore be writing to the Court of Protection accordingly. He also suggested that a “family meeting” take place shortly in order to try to resolve the situation, and he proposed possible dates.

97. The second defendant’s evidence, which I accept, was that he had no doubts about her ability to understand what was going on, that the deceased understood the issues involved in registering the power, and that she was strongly opposed to the third defendant being in control of her (the deceased’s) money and affairs. She was prepared for the objection to be taken up with the court. However, she also hoped that the proposed family meeting would resolve the family difficulties. To complete this part of the narrative, I add that the third defendant had also served notice of her intention to register enduring power of attorney on her mother’s cousin, Pat Phillips. She wrote to the third defendant on 10 January 2009, to tell her that she did not agree to the registration of the power.

98. Also in early January 2009 the deceased was unable to find her cheque-book. The second defendant wrote to the third defendant to ask if she had it. There was no response to this. In evidence, the claimant denied that he took it. I accept his evidence. The claimant attended the deceased’s bank twice in person. On the first occasion he went with a letter from the deceased authorising a transfer from the deposit account to

her current account. This was apparently inadequate. On the second occasion the claimant attended without any documentation in order to explain the situation to the bank manager. However it appears that the manager refused to speak to him. There was then a correspondence between the bank and Miles Farren at Burges Salmon (who reported to the third defendant) in which the attendance at the bank by a person (who can only have been the claimant) seeking to operate the deceased's bank account in some way was discussed. In her evidence, the third defendant said that this caused her to think that the deceased's bank account was at risk and that therefore she should seek to register the 1998 power. I do not think that this can be right, because she was preparing to register the power of attorney in her favour in late 2008, whereas the bank incident occurred in early 2009.

The family meeting in January 2009 and the Lasting Power of Attorney

99. The third defendant wrote back to the second defendant on 10 January 2009. The tone of the letter is rather aggressive, but it makes clear that she and the first defendant agreed to attend the "family meeting", and that they would tape-record it. The second defendant replied on 14 January 2009 confirming that he would attend the meeting, and that he agreed to the recording of the meeting on the basis that he would receive a copy of the recording. The meeting duly took place on 16 January 2009 at St Monica's. In addition to the deceased and the first to third defendants, Miles Farren of Burges Salmon attended at the first defendant's request, and Angela Neary accompanied the second defendant. The second defendant had suggested that it would be best if the claimant did not attend, and he did not do so. Unfortunately, although the first and third defendants attempted to record the meeting, the recording machine did not work, and no recording was made. But the second defendant made notes and a full attendance note was produced by him.

100. At the meeting the deceased stated that the "old" will no longer reflected her wishes, and that was why she had made a new one. She gave instructions for a grant of a lasting power of attorney to the first and third defendants jointly to be prepared for her, and it was agreed that Miles Farren of Burges Salmon should prepare this, though the draft should be submitted to the second defendant for approval before the deceased signed it. In addition, the enduring power of attorney of May 1998 in favour of the third defendant and the general power of attorney of September 2008 in favour of the first and second defendants were to be revoked. Mr Farren asked the deceased if she knew the extent of her assets, but she said no. Then the third defendant reminded the deceased that in July 2008 she had prepared and given to the deceased a synopsis of her assets, and the deceased confirmed that this was so.

101. Mr Farren said that he found the deceased to be bright and alert, and had no reservations about preparing a lasting power of attorney for her. The second defendant also found that the deceased was capable of giving such instructions. The evidence of the third defendant about the state of the deceased at this meeting is much darker, suggesting serious mental confusion on her part. I think the third defendant is remembering what she would like to have happened, and prefer the account of the second defendant. On 21 January 2009, after having visited and discussed the matter with the deceased, the second defendant wrote to Miles Farren at Burges Salmon to summarise the points agreed at the meeting on 16 January 2009.

102. Although Miles Farren had expressed himself at the meeting as content to draft a lasting power of attorney, once he had returned to his office he realised that, since the deceased was represented by another solicitor, he could not do so. He wrote to the third defendant to this effect by letter dated 21 January 2009, suggesting to the third defendant that, if the deceased were to give him express instructions, he would then be able to act. Accordingly, the first and third defendants (without telling either the claimant or the second defendant) visited the deceased at St Monica's on 1 February 2009 in order to explain the situation and to obtain her signature to a written authority to Mr Farren. The deceased however misunderstood what was happening, and thought she was being invited to sign a substantive lasting power, rather than confirmatory instructions for what had been agreed at the family meeting. She told them that she had promised the claimant that she would not sign anything unless both the claimant and the second defendant had seen it. When the first and third defendants tried to persuade the deceased to sign, on the basis that this had all been agreed and that these instructions were standard, the deceased became agitated, and indeed upset the third defendant so much that she left the deceased's room and went to sit in her car.

103. The first defendant tried to discuss the matter further with the deceased, but became sidetracked into a discussion about whether the first and third defendants had excluded the claimant from the family meeting. The deceased then attempted to telephone the claimant to discuss the matter with him. She was unable to dial the correct number and had to be assisted by the first defendant. The ensuing conversation between the first defendant and the claimant was fruitless, and eventually the first defendant left the room with the letter of instruction still unsigned. Given the mutual suspicion between the first and third defendants on the one hand and the claimant on the other, as well as the weakened state of the deceased herself, it is clear that the procedure adopted for obtaining signed instructions to Mr Farren was at best unwise. The first and third defendants never saw the deceased alive again.

104. The claimant telephoned the second defendant to tell him of what had happened. The second defendant wrote on 2 February 2009 to Mr Farren to say that the first and third defendants had visited and sought to persuade her to sign a new lasting power. He asked Mr Farren to confirm whether his firm had prepared such a power and, if so, why it had not first been sent to him for approval. Mr Farren replied on 4 February 2009 to say that after the family meeting he had realised that he could not prepare a lasting power for the deceased, as the client of another solicitor. He had so informed the third defendant, from whom he was awaiting further instructions. In other words, his firm had not prepared any lasting power. So the whole thing was a misunderstanding.

Revocation of the Enduring Power of Attorney

105. On 17 February 2009, the second defendant visited the deceased, who complained of being bullied by the third defendant into signing the power of attorney in her favour. She said she no longer wanted the third defendant or the first defendant to act as an attorney and wanted the second defendant to do so. The second defendant was concerned at the expense this would cause, but the deceased insisted. The deceased read to herself the prescribed information on the lasting power of attorney form. After a discussion, the deceased agreed that Dr Kershaw should be the certificate provider, and that the power should be registered as soon as it had been completed, so that it would come into force straightaway. She also agreed that the second defendant should

find another solicitor to act as a replacement attorney if anything should happen to him.

106. The second defendant visited the deceased again, but this time with Angela Neary, on 26 February 2009 to say that he had not heard either from the third defendant or Burges Salmon and that he was concerned that nothing was happening. He had therefore prepared the necessary documents to revoke the enduring power of attorney in favour of the third defendant and to grant a (temporary) general power of attorney in the second defendant's favour. He was still waiting to hear from the solicitor who he hoped would act as an alternative attorney and then he would deal with Dr Kershaw. In the meantime, however, he explained to the deceased the documents revoking the enduring power of attorney and granting a general power of attorney. The deceased accepted that there was no alternative, and signed them, Angela Neary acting as witness to both documents.

107. On 24 March 2009 Dr Kershaw certified that, in his opinion, at the time when the lasting power of attorney was made, the deceased understood the purpose of the power and the scope of the authority under it, that no fraud or undue pressure was being used to induce her to create it and there was nothing else to prevent it being created. The next day, 25 March 2009, Mr Timothy Howard Johnson, a solicitor, signed the power as replacement attorney. On 26 March 2009 the second defendant visited the deceased again, by prior telephone arrangement, to go through a number of letters which were to be sent out by him on behalf of the deceased. The deceased was happy to endorse her authority on those letters. The second defendant also told the deceased that there was no need for the claimant to have any third-party authority to sign on the deceased's bank account, because once the new cheque book had arrived, he (the second defendant) would be able to sign cheques. The deceased agreed.

108. One of them was a letter dated 27 March 2009 to Mr Farren at Burges Salmon, in which the second defendant informed Mr Farren that, after further discussions with the deceased and in the absence of any response from the third defendant or Burges Salmon, the deceased had revoked the enduring power of attorney and appointed the second defendant as general attorney and also as attorney under a lasting power of appointment which was in the process of being registered. Copies were enclosed. He asked Mr Farren to ask the third defendant to arrange to let his firm have all the deceased's papers. This elicited a short, formal response from Burges Salmon (signed in the firm's name, but bearing Mr Farren's reference) to the effect that they had no further instructions from the third defendant concerning the deceased, "and do not expect to receive any further instructions". Nevertheless they had passed on the letter and its enclosures to her.

Death and post-death

109. In the following days, the deceased's care home notes show that she was having episodes of breathlessness as well as looking tired and pale. The deceased died suddenly, on 6 April 2009. Dr Kershaw telephoned the third defendant on the morning of 7 April 2009 to inform her, saying that there would have to be a referral to the coroner, as the death was unexpected. He appears to have changed his mind subsequently, and to have certified the death as one from myocardial infarction; in lay terms, a heart attack. The third defendant was surprised at this as she had not been aware from her experience as the deceased's GP for many years that there was any

significant heart problem. She contacted the coroner's office, and requested a post-mortem examination. This was carried out, and the forensic pathologist carrying out the examination gave as the cause of death pulmonary embolism caused by deep-vein thrombosis as a result of her original fall causing subsequent immobility. An inquest was held into her death in July 2009, at which the coroner recorded the cause of death as a pulmonary embolism, as a result of deep-vein thrombosis, and a conclusion of "accident as a result of a fall in April 2008".

110. Solicitors Veale Wasbrough wrote to the second defendant by letter dated 26 June 2009. They said that they acted for the first and third defendants, and requested a *Larke v Nugus* statement about the instructions for and execution of the will of September 2008. The second defendant sent that statement to the solicitors by letter dated 25 July 2009. Further correspondence took place between them, though I do not think it matters for the purposes of the questions which I have to decide.

Expert evidence

111. As I have said, I heard expert evidence from two old age psychiatrists, Prof Robin Jacoby (for the third defendant) and Dr Andrew Barker (for the claimant). As is so often the case in this kind of litigation, they did not examine the deceased in life, and were obliged to express a view based on the witness statements and the medical records. I should therefore treat their evidence with some caution: see *Hawes v Burgess* [2013] EWCA Civ 94, [60]. Nevertheless, I will summarise their original conclusions below. But, as a general point, I observe that, although they tended to stick within their area of expertise (old age psychiatry) each strayed outside at certain points. I do not pay much attention to that, as judges are well used to disregarding that which is inadmissible.

112. Prof Robin Jacoby concluded that at the time the deceased made her 2008 will she was suffering from cerebral vascular disease and a mixed affective disorder. This made her vulnerable to delirium, although he considers it unlikely that she was delirious when she gave instructions to the second defendant and when she executed the will. This is because the second defendant would have seen that she was confused. In his opinion the deceased did not lack capacity to understand the general nature and consequences of the act of making a will at the relevant times, but that it is questionable whether she fully understood the consequences and implications of the will she did make.

113. For Prof Jacoby, there is a question as to whether the deceased knew the extent of her estate. With memory impairment as he has described, it is possible that she did not. On the other hand, it is clear that the deceased could identify those people with moral claims on her estate although he suggests that the court would need to explore whether a decision to alter a disposition from the previous will was "based on false beliefs, even delusional ones, about her daughter Elizabeth." If so, in his opinion her mental disorder "could have been responsible for a decision that she would not have made had she been mentally sound." He accepted that the MMSE test was focused on memory rather than executive functions, and therefore was not a particularly useful tool in contentious probate cases, when the court was considering the deceased's capacity to make a will. Nevertheless, he said that the deceased's score of 28/30 suggested only a mild or minimal cognitive disability.

114. Dr Barker concluded that the deceased did not lack of testamentary capacity for the 2008 will. He says it is likely that she understood the nature and effect of making her will, and that she understood her estate to consist of "a main asset of property" (*ie* West Winds) and savings and investments. Moreover she

> "appeared to be able to understand potential beneficiaries who might be expected to make a claim and expressed clear views on why she wanted to make the will in the way she did. Although she had intermittent delirium and probable underlying brain arterial disease, there is no evidence that she was suffering from confusion at the time of giving instructions for, and executing, the will."

115. The experts subsequently spoke together on the telephone, and as a result agreed on a number of matters, which they set out in a joint statement dated 7 May 2019, as follows:

> "1. We agree that the Deceased was subject to episodes of delirium in 2008, as detailed in our respective reports.
>
> 2. We agree that the Deceased did not show evidence of sufficient cognitive impairment to meet the criteria for a diagnosis of dementia.
>
> 3. We agree that the Deceased could have had some cognitive impairment due to arterial disease of the brain. AB considers it possible, whereas RJ considers it probable that she did.
>
> 4. We agree that Michael & Elizabeth Todd have had a poor relationship that has had an important bearing on this case. However the degree of antipathy between them and its relevance to the facts of the case are matters that only the Court may determine."

116. But they also disagreed on a number of other matters, which in their joint statement they summarised in this way:

> "5. Prof Robin Jacoby considers that the way in which Mr O'Hagan took instructions for the will was deficient in not ascertaining whether the Deceased knew the extent of her estate. He also considers that his request for an opinion on her testamentary capacity from Dr Kershaw was inadequate and resulted in an inadequate opinion. Dr Barker notes that there is some information missing that if present could have given him a more confident opinion on the Deceased's testamentary capacity.
>
> 6. RJ considers that there is quite strong evidence that the Deceased had an episode of hypomanic behaviour (bipolar disorder) as detailed in his report. AB considers that it is possible, but unlikely.
>
> 7. AB is of the opinion that, on the balance of probabilities, the medical and other documents he has seen do not provide enough evidence that the Deceased lacked testamentary capacity. RJ takes a less firm position either way on testamentary capacity, but considers that two issues call it into question and can be resolved only by the Court's further examination of the evidence. These two issues are:

> first, the possibility that the Deceased did not appreciate her estate and the consequences of the will on the alleged 'family commune'; and secondly, whether a mixture of bipolar disorder and cerebral vascular disease gave rise to false beliefs about Elizabeth that caused her to change her will in favour of Michael.
>
> 8. We consider that we have taken a somewhat different approach to judging the Deceased's capacity. RJ's approach is to give an opinion on whether or not she had a disorder of mind at the material time. AB takes a broader approach, including making interpretations on the Deceased's likely testamentary capacity based on her decision-making ability for other matters around the time."

117. Both experts were cross-examined before me. Prof Jacoby accepted that the deceased was highly unlikely to be in a delirious state at the time of taking her instructions or making her will. Nor was there anything to suggest a manic episode at that time. But she did have some cognitive impairment. He considered that the best explanation of this was a low cerebral reserve, so that hypoxaemia would tip the deceased over into delirium, but that this was reversible rather than permanent. He explained that the first kind of memory to be affected by dementia is the episodic, dealing with the recent past. Then the semantic memory (the meaning of things) is affected. The long-term memory is less affected in the earlier stages of dementia. He said that in the present case it was more likely than not that the deceased's long-term memory would have been preserved.

118. Dr Barker accepted that, because of her age and natural disease processes, the deceased had a much smaller cerebral reserve capacity than an ordinary, younger person would have. This meant that it took less to push her into a state of confusion. So, for example, in a frail person of 95 years, constipation could well tip the balance. It did not have to be as serious as vascular disease. He accepted that it was possible she had suffered from transient ischaemic attacks (TIAs), but thought it was more likely – indeed, probable – that she was suffering from an arterial disease of the brain which was reversible. He thought that the deceased's earlier confusion had been due to her small reserve capacity, set off by constipation and dehydration.

119. In broad terms, I prefer Dr Barker's evidence to that of Prof Jacoby. There were times when the deceased was confused, and times when she was not. During the non-confused periods, she would have been able to make a will. I do not consider that the deceased had an episode of hypomanic behaviour (bipolar disorder).

120. On the evidence before me, I find that, although the deceased had shown herself to be confused at certain times, at the time of actually giving instructions for and executing her will she was not suffering from any confusion. Moreover, partly because the arrangements giving rise to the "commune" had been entered into in the long term past, but also because she kept returning to it, I find that the deceased had not forgotten about her promise to leave West Winds to the third defendant's side of the family. I also find that the deceased knew that she was making a will, knew at least in general terms what her estate was, and how much it was worth, and also appreciated who had moral claims on her bounty. She was also aware of what would be the effect of her will. I return to the significance of this later.

121. Earlier I referred to the fact that the third defendant had consulted Prof Robert Howard on the deceased's mental capacity in 2011-12. His preliminary view (after four hours of reading the papers) was that the deceased *did* have capacity when she made the will of 2008. The third defendant's solicitors supplied further documents to Prof Howard at the third defendant's request, but they made no difference to his provisional opinion, and he was not asked to prepare a formal opinion in this case. Of course, none of this is put in as evidence of the deceased's mental capacity, and I do not rely on it in reaching my own conclusion. It is simply an aspect of the history of the preparation for and course of the litigation.

Proprietary estoppel

122. There appears to be no dispute between the parties as to the law relating to proprietary estoppel so far as it applies to the present case. In *Thorner v Major* [2009] 1 WLR 776, HL, Lord Walker put the matter in this way:

> "29. My Lords, this appeal is concerned with proprietary estoppel. An academic authority (Simon Gardner, *An Introduction to Land Law* (2007), p 101) has recently commented: 'There is no definition of proprietary estoppel that is both comprehensive and uncontroversial (and many attempts at one have been neither).' Nevertheless most scholars agree that the doctrine is based on three main elements, although they express them in slightly different terms: a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance: see *Megarry & Wade, The Law of Real Property*, 7th ed (2008), para 16–001; *Gray & Gray, Elements of Land Law*, 5th ed (2009), para 9.2.8; *Snell's Equity*, 31st ed (2005), paras 10–16 to 10–19; *Gardner, An Introduction to Land Law* (2007), para 7.1.1."

123. I have held on the evidence in this case that there was an informal arrangement between the deceased, her sister Violet Hicks, and the third defendant and her then husband when they bought Lynch Farm and divided it into three properties, that those individual properties should not be sold or given away outside the members of the "commune". Given the ages of the deceased and her sister, this was treated by the deceased and the third defendant as in effect a promise to leave West Winds to the third defendant or her daughter, the first defendant. In my judgment this is a sufficient, and sufficiently clear, promise to form the subject of a proprietary estoppel equity.

124. The second aspect of a claim to such an equity is the need to show that the promisee has relied on the promise or expectation created to her detriment. There must be a sufficient causative link between the promise relied on and the detriment. However, where promises are made, and there is conduct from which inducement to act in reliance may be inferred, there will be an evidential burden on the landowner to show that there was no reliance. In the present case, I have found that the third defendant relied on what was effectively a promise by the deceased to leave her or her daughter West Winds by entering into the "commune" arrangement in the first place, selling her own home in central Bristol, buying and selling the property at Ravenswood Road, and applying the proceeds and other monies in the purchase and redevelopment of Lynch Farm, as well as giving up her time and engaging in much physical effort to

obtain planning permission, project manage and otherwise achieve that redevelopment.

125. This is all a very significant detriment, both financial and non-financial, incurred in reliance on that promise or expectation. It is stronger, for example, then the detriment incurred in *Bradbury v Taylor* [2012] EWCA Civ 1208, [26]. (In this respect I do not need to place any weight on the many, creditable ways in which the third defendant looked after the deceased in her declining years up to 2008. It seems to me that, although these were facilitated by the Lynch Farm project, the same efforts would probably have been made, and the same costs incurred, by a dutiful daughter in the financial position of the third defendant doing her best for, and looking after, her elderly mother, wherever she was living. I am sure that the third defendant would not have refused to assist her mother, if she had been living in a flat in central Bristol near the third defendant and her then husband.) In the event, I hold that a proprietary estoppel equity did arise in favour of the third defendant which she is entitled to enforce in these proceedings.

126. The next question to consider is that of remedy. The third defendant seeks the making good of her expectation that either she or her daughter would receive West Winds, on the basis that this is a case where the parties reached a clear mutual understanding and she has fulfilled her side of the informal bargain. She relies on what Robert Walker LJ said in *Jennings v Rice* [2003] 1 FCR 501, CA:

> "50. To recapitulate: there is a category of case in which the benefactor and the claimant have reached a mutual understanding which is in reasonably clear terms but does not amount to a contract. I have already referred to the typical case of a carer who has the expectation of coming into the benefactor's house, either outright or for life. In such a case the court's natural response is to fulfil the claimant's expectations. But if the claimant's expectations are uncertain, or extravagant, or out of all proportion to the detriment which the claimant has suffered, the court can and should recognise that the claimant's equity should be satisfied in another (and generally more limited) way."

127. On behalf of the claimant, it is argued that, even if an equity is made out, it would not be right to satisfy it by requiring the estate to transfer the whole of West Winds to the third or first defendant. In this connection, the claimant *also* refers to *Jennings v Rice*, presumably meaning the second half of the paragraph set out above, where Robert Walker LJ describes circumstances in which it might not be right to award the making good of the expectation.

128. If I may quote what I said in *James v James* [2018] WTLR 1313, albeit *obiter*,

> "51. […] Proprietary estoppel is a doctrine which, like the law of contract, focuses on expectations created rather than losses suffered. So if A promises B some property right, intending B to rely on this, and B does rely on it to B's detriment, the natural impulse is (as with contract law) to require A to make good the expectation. Making the remedy proportionate to the detriment suffered would be to focus more on what B has lost, rather than on what B expected to obtain.

52. But of course proprietary estoppel is not as strict as contract law. It is also an *equitable* doctrine, and therefore tempered by conscience. So there may be exceptional cases where (as Robert Walker LJ said) it is just not right to require A to go the whole length of satisfying the expectation created. In those cases, there may be another way to satisfy the equity raised, without however necessarily requiring the remedy to be proportionate to the detriment. For myself I respectfully doubt how far a "sliding scale" approach would be useful. Just as a contract is either made and broken or not, either the promisor has created an expectation, on which the promisee has relied to his or her detriment, or not. […]"

129. In my judgment, this is a paradigm case in which the expectation of the third defendant created by the promise of the deceased should be made good. The third defendant has done everything that she agreed to do, in reliance on the performance of that promise. I respectfully do not consider that third defendant's expectations were "uncertain, or extravagant, or out of all proportion to the detriment which [she] has suffered". They were exactly what the deceased intended. There is no justification that I can see for not making good the expectation. I will therefore declare that West Winds is held by the estate of the deceased upon trust for the third defendant or her nominee.

The law on testamentary capacity

130. The traditional test for capacity is that laid down in *Banks v Goodfellow* (1870) LR 5 QB 549, 565, by Sir Alexander Cockburn CJ:

"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 ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made."

131. In *James v James* [2018] WTLR 1313, I held that the traditional test still applied, and had not been replaced by that contained in the Mental Capacity Act 2005. Neither party argued before me that the test should now be that contained in the 2005 Act, although the third defendant reserved the right to argue otherwise on appeal. It is clear on the authorities that the traditional test in *Banks v Goodfellow* does not mean that the law requires a perfectly balanced mind. Nor does it mean that a testator who is capricious or spiteful or mean cannot make a will. In principle, and subject only to the jurisdiction conferred upon the court by the Inheritance (Provision for Family and Dependents) Act 1975, a testator with testamentary capacity and free from undue influence is entitled to leave his property to whomsoever he wishes.

132. As to the burden of proof in relation to testamentary capacity, in *Re Key Deceased* [2010] 1 WLR 2020, Briggs J said:

"97. The burden of proof in relation to testamentary capacity is subject to the following rules:

> i) While the burden starts with the propounder of a will to establish capacity, where the will is duly executed and appears rational on its face, then the court will presume capacity.
>
> ii) In such a case the evidential burden then shifts to the objector to raise a real doubt about capacity.
>
> iii) If a real doubt is raised, the evidential burden shifts back to the propounder to establish capacity nonetheless.
>
> […].”

133. The third defendant submits that in the present case, where the deceased executed the will at the age of 95 years, in a nursing home, whilst suffering from an arterial disease of the brain, the claimant was involved in its preparation, and its terms represented a departure from previous wills, a real doubt about capacity has been raised. On the evidence, I do not agree that the claimant was involved in the preparation of the will. He certainly engaged the second defendant to attend upon the deceased and take her instructions, but this was done specifically at the deceased’s own request, and not at his instigation. Entirely properly, the second defendant excluded the claimant from any discussion that he had with the deceased. The second defendant excluded the claimant even from attendance at the execution of the will.

134. In the light of the expert evidence, the fact that the deceased was suffering from an arterial disease of the brain is not very significant. Great age in itself does not seem to me to be a matter of any great weight in this connection. And being in a nursing home, cared for by professionals, and away from the influence of her children, seems to point in the opposite direction. It is not like *Re Key Deceased*, where the deceased “had just suffered the very recent and unexpected loss of his wife after 65 years of marriage, upon whom he was wholly dependent for his domestic care”. Moreover, the new will was made in favour of the two persons who from his wife’s death until the making of the will shared responsibility for his daily care. So I doubt that a serious question as to capacity has been raised such as to return the evidential burden to the propounder of the will. Nevertheless, as will be seen, in this case I do not think it makes much difference who bears the evidential burden.

135. I will first deal with the so-called “golden rule”. In *Re Key Deceased* [2010] 1 WLR 2020, Briggs J said:

> “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…”

136. As I have already noted, this ‘rule’ was not complied with in the present case. There was no contemporaneous medical assessment, and Dr Kershaw’s letter does not state the basis upon which he gave his opinion. He was, after all, only just appointed as the deceased’s GP. But, as Briggs J made clear in *Re Key*,

> "8. Compliance with the Golden Rule does not, of course, operate as a touchstone of the validity of a will, nor does non-compliance demonstrate its invalidity. Its purpose, as has repeatedly been emphasised, is to assist in the avoidance of disputes, or at least in the minimisation of their scope. […]."

137. But it does not follow that compliance the golden rule must lead to a positive decision on capacity: see *Sharp v Adam* [2006] EWCA Civ 449, where May LJ, giving the judgment of the court, said:

> "27. […] Mr Cooper, on behalf of the appellants, came quite close to submitting that such meticulous compliance with the golden rule should in principle be determinative. In our view, this would go too far. The opinion of a general practitioner, unimpeachable in itself and supported by that of one or more solicitors, may nevertheless very occasionally be shown by other evidence to be wrong. The golden rule is a rule of solicitors' good practice, not a rule of law giving conclusive status to evidence obtained in compliance with the rule.".

138. In her closing submissions, the third defendant refers to the decision of the Court of Appeal in *Hawes v Burgess* [2013] EWCA Civ 94, in relation to the need for caution where experts did not examine the deceased. But also in that case (at [57]) Mummery LJ (with whom Patten LJ and Sir Scott Baker agreed) expressed the view that it was "a very strong thing" for a judge to find lack of testamentary capacity when the will had been prepared by an experienced and independent solicitor following a meeting with the testator, when it had been read through and explained to her and when the solicitor had formed the view that the testator was capable of understanding the will, the terms of which were not, on their face, inexplicable or irrational.

139. On the other hand, in *Ashkettle v Gwinnett* [2013] EWHC 2125 (Ch) Christopher Pymont QC, sitting as a deputy judge, referred to this case and (at [43]) accepted

> "the wisdom of these comments though I observe that they do not go so far as to suggest that, in every case, the evidence of an experienced and independent solicitor will, without more, be conclusive. Any view the solicitor may have formed as to the testator's capacity must be shown to be based on a proper assessment and accurate information or it is worthless; and (as Mummery LJ acknowledges) the terms of the will may themselves suggest that the solicitor's assessment was not soundly based."

140. I do not accept that the second defendant's assessment in the present case is worthless. He was an experienced will-maker, and aware of the relevant law. He saw her alone to take instructions, when he engaged her in detailed conversation. She was sensible and rational in the answers she gave. She explained what she owned and gave an approximate valuation. The information that she gave that was relevant concerning the extent of her estate and who she wished to benefit was generally correct. Her instructions were to divide it up in a rational way between her children and grandchild. His legal executive, who accompanied him to the execution of the will also paid attention to the deceased's behaviour, and did not flag any concerns at that time.

141. The third defendant argues that, as the claimant did not call Dr Kershaw, or indeed the nurse who witnessed the will, I should draw an inference adverse to his case, relying

on *Wisniewski v Central Manchester Health Authority* [1998] Lloyd's Rep Med 223, CA. I do not accept this. Dr Kershaw and the nurse are not obviously available to the claimant. The claimant has put in a witness statement from the other witness to this will, Angela Neary, and this was not challenged by the third defendant. Moreover there was little advantage in calling Dr Kershaw, a GP, when expert old age psychiatrists were being called to give oral evidence.

142. As noted earlier, the experts were agreed on some aspects of the question of mental capacity, but disagreed on others. On the second question, Prof Jacoby referred to the possibility that the deceased did not appreciate her estate and the consequences of the will on the alleged "family commune". I have already found on the evidence that the deceased in making the will of September 2008 understood the nature of her act and its effects: she knew very well she was making a will and that this will was different from her earlier ones. Indeed, that was the whole point. Secondly, I have found, with all respect to Prof Jacoby, that she understood the extent of the property of which she was disposing, at least in a general sense. In particular, she understood that her estate included both West Winds and a portfolio of investments and bank deposits. In my judgment there is no requirement that a testator or testatrix should have a detailed knowledge of her or his estate. Indeed, strictly speaking she or he does not need *actual knowledge* of any of it; what is needed is mental *capacity* to understand it.

143. Thus, in *Minns v Foster*, 13 December 2002, a case of a will disputed on grounds of lack of capacity, Mr Michael Briggs QC, sitting as a deputy judge said this:

> "115. Finally, I consider that [the deceased] had the capacity to understand the nature and extent of his property. It is in my judgment worth remembering that the question is not whether a person actually knows the nature and extent of his estate, but whether he has the mental capacity to be able to do so. No will is rendered invalid merely because a testator with the requisite capacity is mistaken about, or fails properly to ascertain, full details of his property."

And in *Simon v Byford* [2014] EWCA Civ 280, [40], Lewison LJ (with whom Sullivan and McFarlane LJJ agreed) pithily said:

> "In other words, capacity depends on the potential to understand. It is not to be equated with a test of memory."

144. So an inability to give the second defendant a complete description of her estate is nothing to that point. I am satisfied that at the time of making her will the deceased had at least a general idea, and in particular of its value, and had sufficient capacity to understand its extent.

145. The experts also differed on the third question. This is whether the deceased was able to appreciate the claims to which she ought to give effect. In the stern Victorian vernacular, there must be no disorder of the mind to poison her affections, pervert her sense of right, or prevent the exercise of her natural faculties, and no insane delusion should influence her will in disposing of her property and bring about a disposal of it which, if her mind had been sound, would not have been made. Prof Jacoby said there was a question whether a mixture of bipolar disorder and cerebral vascular disease gave rise to false beliefs about the third defendant that caused her to change her will in favour of the claimant.

146. First of all, as to the claims to which she ought to give effect, this is generally taken to refer to the natural heirs of the deceased. But in addition it may be argued that a promise to leave the property to a particular person or persons by will, intending that person or those persons to rely upon it, and which is relied upon, in general raises a moral claim which ought to be taken into account in making the will. If the deceased lacked the capacity to understand such a moral claim, then (it may be argued) he or she would not have the capacity to make a will.

147. However, on the facts of this case, the point does not arise for decision. I have found that the deceased referred to leaving West Winds to the first and/or third defendant in August, September and October 2008, while she was at St Monica's. This shows that she was well aware of her promise. She nevertheless made the new will. In my judgment, what she did in making the new will did not show that she had forgotten about it. On the contrary it showed that she was determined to break her promise, in order, as she saw it, to equalise the balance between her two children. This shows that she recognised the moral claims of her children in un-equal proportions. Even if at the time of giving instructions for, or at the execution of, the new will she had temporarily overlooked her promise, or forgotten about it, that would not mean that she did not have capacity to appreciate moral claims on her estate. That would just mean that she had made a mistake of fact: compare the observation of Lewison LJ in *Simon v Byford* [2014] EWCA Civ 280, [40], cited above in relation to awareness of the disposable estate.

148. The second aspect of this third point is whether there was any disorder of the mind that gave rise to false beliefs about the third defendant that caused her to change her will in favour of the claimant. The third defendant argues that the deceased was fundamentally mistaken about her ownership of the farmhouse, saying that it was bought, rather than inherited. I have already referred to this point in discussing the evidence. It is not clear whether the mistake was that of the deceased, or of the second defendant in recording the point in his attendance note. In any event even if it was the deceased's mistake, I do not consider that it makes much difference. The third defendant's moral claim was that she was promised West Winds, and that is resolved by the proprietary estoppel claim. But the "false belief about the third defendant" (if that is what it was) did not cause her to alter her will. What caused her to alter her will was her belief that the claimant needed more than the third defendant.

Want of knowledge and approval

149. In *Gill v Woodall* [2011] Ch 280, CA, Lord Neuberger MR (with whom Lloyd and Jackson LJJ agreed) said:

> "21. The Judge approached the issue of knowledge and approval on a two stage basis. He first asked whether Dr Gill had established sufficient facts to 'excite the suspicion of the court', which really amounts to establishing a prima facie case that Mrs Gill did not in fact know of and approve the contents of the Will. Secondly, having held that Dr Gill had excited the suspicion of the court, he then turned to consider whether or not those suspicions were allayed by the RSPCA, who were of course supporting the Will. This approach accords with Parke B's analysis in *Butlin* 2 Moo PC 480, quoted by Lindley LJ in *Tyrrell* [1894] P 151, 156-7, referred to above, and it is reflected in the approach in a number of other cases.

22. Where a judge has heard evidence of fact and expert opinion over a period of many days relating to the character and state of mind and likely desires of the testatrix and the circumstances in which the will was drafted and executed, and other relevant matters, the value of such a two-stage approach to deciding the issue of the testatrix's knowledge and approval appears to me to be questionable. In my view, the approach which it would, at least generally, be better to adopt is that summarised by Sachs J in the unreported case of *Crerar v. Crerar*, cited and followed by Latey J in *Morris* [1971] P 62, 78E-G, namely that the court should:

> 'consider all the relevant evidence available and then, drawing such inferences as it can from the totality of that material, it has to come to a conclusion whether or not those propounding the will have discharged the burden of establishing that the testatrix knew and approved the contents of the document which is put forward as a valid testamentary disposition. The fact that the testatrix read the document, and the fact that she executed it, must be given the full weight apposite in the circumstances, but in law those facts are not conclusive, nor do they raise a presumption'."

150. In the later decision of *Simon v Byford* [2014] EWCA Civ, [47], Lewison LJ (with whom Sullivan and McFarlane LJJ agreed) said:

> "When we move on to knowledge and approval what we are looking for is actual knowledge and approval of the contents of the will. But it is important to bear in mind that it is knowledge and approval of the actual will that count: not knowledge and approval of other potential dispositions. Testamentary capacity includes the ability to make choices, whereas knowledge and approval requires no more than the ability to understand and approve choices that have already been made. That is why knowledge and approval can be found even in a case in which the testator lacks testamentary capacity at the date when the will is executed. The reason for this requirement is the need for evidence to rebut suspicious circumstances: *Perrins v Holland* [2010] EWCA Civ 840; [2011] Ch 270 at [25]. Normally proof of instructions and reading over the will will suffice: ibid at [25]. The correct approach for the trial judge is clearly set out in *Gill v Woodall* [2010] EWCA Civ 1430; [2011] Ch 380. It is a holistic exercise based on the evaluation of all the evidence both factual and expert."

151. So the question for the court here is this: did the deceased understand what was in the will, and what was its effect when executed? The burden of proof lies on the claimant, because he is propounding the will.

152. In the present case the third defendant relies on (1) the physical infirmities of the deceased, including poor sight and poor hearing; (2) the fact that there is no reference in the will to West Winds; (3) the need for an explanation of the effect of the new will in departing from the terms of an earlier will. I do not accept that the deceased believed that the will only covered money and investments. However, first of all, the evidence of the second defendant and (separately) of Angela Neary is clear that the will was read through, that the deceased received an explanation of it, and that she understood it and agreed it. As to the second and third points, I have already found

that the deceased wanted to redress the imbalance (as she saw it) between her two children by giving the claimant 70% of her whole estate, thereby breaking her promise to the third defendant regarding West Winds. So there was no need to refer to West Winds in the will, and it was clear why her new will departed from the old. In my judgment there is nothing in the allegation that the deceased did not know or approve of the actual will that she executed. I am satisfied that she did.

Undue influence

153. In relation to undue influence, the third defendant relies on *Re Edwards* [2007] EWHC 1119 (Ch), [47], and *Schrader v Schrader* [2013] EWHC 466, [96]. In the former case, Lewison J (as he then was) said:

> "There is no serious dispute about the law. The approach that I should adopt may be summarised as follows:
>
> i) In a case of a testamentary disposition of assets, unlike a lifetime disposition, there is no presumption of undue influence;
>
> ii) Whether undue influence has procured the execution of a will is therefore a question of fact;
>
> iii) The burden of proving it lies on the person who asserts it. It is not enough to prove that the facts are consistent with the hypothesis of undue influence. What must be shown is that the facts are inconsistent with any other hypothesis. In the modern law this is, perhaps no more than a reminder of the high burden, even on the civil standard, that a claimant bears in proving undue influence as vitiating a testamentary disposition;
>
> iv) In this context undue influence means influence exercised either by coercion, in the sense that the testator's will must be overborne, or by fraud.
>
> v) Coercion is pressure that overpowers the volition without convincing the testator's judgment. It is to be distinguished from mere persuasion, appeals to ties of affection or pity for future destitution, all of which are legitimate. Pressure which causes a testator to succumb for the sake of a quiet life, if carried to an extent that overbears the testator's free judgment discretion or wishes, is enough to amount to coercion in this sense;
>
> vi) The physical and mental strength of the testator are relevant factors in determining how much pressure is necessary in order to overbear the will. The will of a weak and ill person may be more easily overborne than that of a hale and hearty one. As was said in one case simply to talk to a weak and feeble testator may so fatigue the brain that a sick person may be induced for quietness' sake to do anything. A "drip drip" approach may be highly effective in sapping the will;
>
> […]
>
> ix) The question is not whether the court considers that the testator's testamentary disposition is fair because, subject to statutory powers of

intervention, a testator may dispose of his estate as he wishes. The question, in the end, is whether in making his dispositions, the testator has acted as a free agent."

154. In *Schrader v Schrader*, Mann J cited the passage from *Re Edwards* set out above and continued:

> "96. It will be a common feature of a large number of undue influence cases that there is no direct evidence of the application of influence. It is of the nature of undue influence that it goes on when no-one is looking. That does not stop its being proved. The proof has to come, if at all, from more circumstantial evidence. The present case has those characteristics. The allegation is a serious one, so the evidence necessary to make out the case has to be commensurately stronger, on normal principles."

155. As the Court of Appeal said, the burden of proof on this issue lies on the third defendant. Looking at the facts of the present case, it is interesting that the making of the will and the changing of GP happened five months after the deceased stopped living at West Winds, in close proximity to all of the claimant and the first and third defendants. Nevertheless, the third defendant relies on a number of matters set out in the Defence at [52], which I can summarise as follows:

1. The claimant had both motive and opportunity. In particular, he had run out of money.

As to this, I respond that undue influence requires positive evidence, and this is not such evidence.

2. The third defendant's evidence that at the family meeting on 23 May 2008 the deceased said that the claimant had told her that the third defendant was up to "all sorts of tricks", and that she could no longer trust her.

I add that, in closing, the third defendant further says that the claimant accepted this in cross-examination. But my note says that the claimant said only "it may be so. My exclusion from the Frenchay discussions is an example of this". He said that he did not refuse to attend the meeting, but was simply not told about it. In my judgment, this is not evidence of the claimant poisoning the deceased's mind. Even if it were, the deceased already had issues with the third defendant, and I do not consider that it could have had any causative effect.

3. On 7 July 2008 the deceased had said that she did not want to change her GP. But by the 17 September 2008 she had evidently changed her mind, when she gave the instructions for her new will.

As to this, it does not follow at all that the claimant had anything to do with this, and indeed there is no evidence that he did. At all events, on the material before me, I find that he did not. The deceased changed her mind, as she was entitled to.

4. The third defendant says that the deceased told her she wished to alter her will because the claimant was not happy with it.

As to this, I am not satisfied that the deceased ever said this to the third defendant. But if I am wrong and she did, the reason might well be to deflect the third defendant's anger from herself, as I have suggested elsewhere. And even if it were true, it would not amount undue influence overbearing the deceased's will.

5. The third defendant says that the deceased told her the claimant arranged to have her two cats put down, and that the claimant would be angry if she did not do as he said.

Having seen the claimant in the witness box, where he denied arranging for the cats to be put down, I do not think that he did. In my judgment, either the deceased did not say this, or if she did, it was not true.

6. The third defendant said that in February 2009 the deceased told her on a visit by the first and third defendants that she must warn the claimant that they were there, as she could rely only on the claimant to tell her what to do, and her solicitor had told her not to talk to the first and third defendants.

As to this, even if this were true, it would not show undue influence. By this stage the deceased was clearly comfortable with the advice of the second defendant, and trusted him. On the other hand she did not trust the third defendant, and preferred to discuss matters with the claimant. This does not show that the claimant was exercising undue influence.

156. Even if any or all of these points were not challenged in cross-examination, in my judgment, for the reasons given they do not prove undue influence.

Fraudulent calumny

157. In *Re Edwards* [2007] EWHC 1119 (Ch), [47], Morgan J also said:

> "(vii) There is a separate ground for avoiding a testamentary disposition on the ground of fraud. The shorthand used to refer to this species of fraud is 'fraudulent calumny'. The basic idea is that if A poisons the testator's mind against B, who would otherwise be a natural beneficiary of the testator's bounty, by casting dishonest aspersions on his character, then the will is liable to be set aside;
>
> viii) The essence of fraudulent calumny is that the person alleged to have been poisoning the testator's mind must either know that the aspersions are false or not care whether they are true or false. In my judgment if a person believes that he is telling the truth about a potential beneficiary then even if what he tells the testator is objectively untrue, the will is not liable to be set aside on that ground alone…"

158. The burden must lie on the third defendant to prove this. I have already set out above the particulars given under paragraph [52] of the defence, dealing with both undue influence and fraudulent calumny. It seems to me that the only one of those particulars which goes to fraudulent calumny is at subparagraph (c). I have already dealt with this above.

159. A point which is relevant in relation to both undue influence and fraudulent calumny is that the deceased was in the Frenchay Hospital from April 2008 until 7 July 2008, when she moved to St Monica's, and in which she died. Her will was made on 25 September 2008, after she had been interviewed on her own and advised by the second defendant, an independent solicitor. I have found that there was no behaviour by the claimant amounting to undue influence to make a new will in his favour, but even if there were any such behaviour it would have been negatived by the independent advice of the second defendant. Although independent advice by a solicitor does not automatically mean that there cannot be any effective fraudulent calumny, it is obviously relevant in considering whether fraudulent calumny (if any existed) could have caused the new will to be made in the terms it was. In my judgment, not only was there no fraudulent calumny, but even if the conduct alleged to have amounted to this had done so, on the facts of this case any causative effect would have been taken away by the interposition of the second defendant as her solicitor.

Conclusion

160. In my judgment the 2008 will is valid, and the claim for a grant of probate in solemn form succeeds. However, the third defendant's counterclaim for a declaration of trust regarding West Winds also succeeds. The claimant also seeks an order removing the first and second defendants as personal representatives, and appointing a new personal representative. I did not hear any submissions directly on this point, but as it seems to me that the claimant and the third defendant do not see eye to eye, and the first and second defendants have given evidence on opposite sides of this case, it must be in the best interests of the beneficiaries of the estate to have someone independent to administer it. In any event, the second defendant is now living in France in retirement. I will accordingly hear the parties on the form of order to make to give effect to this judgment.