Neutral Citation Number: [2016] EWHC 3199 (Ch)

Case No: HC-2014-001256

**IN THE HIGH COURT OF JUSTICE**
**CHANCERY DIVISION**

**In the estate of Jack Hayward deceased (Probate)**

Royal Courts of Justice,
Rolls Building,
Fetter Lane,
London, EC4A 1NL.

Date: 16/12/2016

**Before:**

**MR. JONATHAN KLEIN**
(sitting as a Deputy Judge of the Chancery Division)

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**Between:**

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|---|---|
| **(1) JAN KUNICKI**<br>**(2) FIONA KUNICKI** | **Claimants** |
| **- and -** | |
| **IAIN HAYWARD** | **Defendant** |

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**Edward Hewitt** (instructed by **Lodders Solicitors LLP**) for the **Claimants**
**Owen Curry** (instructed by **Pitmans LLP**) for the **Defendant**

Hearing dates: 8 – 10 November 2016

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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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MR. JONATHAN KLEIN

**Mr. Jonathan Klein:**

1. This is the judgment following the trial of a claim principally as to the substantial validity of a will dated 22 August 2013 ("the 2013 Will") of Mr. Jack Hayward deceased ("Mr. Hayward").

2. Mr. Hayward was born on 27 November 1932. He married Patricia ("Mrs. Hayward"), who died in 2008 having developed dementia towards the end of her life. Mr. and Mrs. Hayward had two children, Fiona, the Second Claimant ("Fiona") and Iain, the Defendant ("Iain"). Fiona is married to Jan Kunicki, the First Claimant ("Jan"). They have 3 daughters; Lauren, Amy and Hannah. Iain was married to Renate Tomek but they are now divorced. They have two daughters; Yasmin and Sarah.

3. Prior to his death Mr. Hayward made a number of wills. It is only the last of those wills the validity of which is contested.

4. By a will dated 31 December 1978, subject to minor legacies Mr. Hayward gave the whole of his estate to Mrs. Hayward or, in the event that she predeceased him, to Fiona and Iain in equal shares.

5. By a will dated 5 December 2005 (i) Mr. Hayward appointed Fiona and Iain his executors, (ii) Mr. Hayward gave all his interest in his business known as Jack Hayward Harps to Iain and (iii) Mr. Hayward gave his residuary estate, as to 90%, to Fiona and Iain in equal shares and, as to 10%, to his granddaughters in equal shares.

6. By a will dated 26 August 2008 ("the 2008 Will") (i) Mr. Hayward appointed Fiona and Iain his executors, (ii) Mr. Hayward gave all his interest in the business known as Jack Hayward Harps to Iain and (iii) Mr. Hayward gave his residuary estate, as to 50%, to his granddaughters in equal shares, as to 25%, to Fiona and, as to 25%, to Iain.

7. By the 2013 Will (i) Mr. Hayward appointed Fiona and Jan his executors, (ii) Mr. Hayward gave his chattels, as defined by section 55(1)(x) of the Administration of Estates Act 1925 to Fiona and Jan as trustees, expressing the wish that they distribute the chattels according to a letter of wishes and otherwise as if forming part of his residuary estate and (iii) Mr. Hayward gave his residuary estate, as to 50%, to Fiona and, as to 50%, to his granddaughters in equal shares.

8. Mr. Hayward made a letter of wishes on the same day. By it Mr. Hayward expressed the wish that Iain should receive (i) an Erard Harp number 1387, (ii) "all my Harp music business, which includes several first and only published editions on harps…" and (iii) Mr. Hayward's autographed pictures of famous harpists of the 20th century. (Mr. Hayward expressed further wishes in the letter but they are not relevant to the present dispute).

9. Mr. Hayward died on 9 January 2014. Jan and Fiona seek to have proved the 2013 Will in solemn form. Iain contends that the 2013 Will is not valid and seeks to have proved the 2008 Will in solemn form. He seeks, alternatively, a declaration that he and Fiona have contracted to share Mr. Hayward's estate equally and specific performance of that alleged contract.

10. Iain challenges the validity of the 2013 Will on 3 grounds; namely, that (i) Mr. Hayward did not have capacity to make it, (ii) Mr. Hayward did not know and approve its terms and (iii) (by way of an amendment which I permitted at the beginning of the trial) it was procured by what Iain alleges is Fiona's fraudulent calumny.

11. By paragraph 34 of the Amended Defence & Counterclaim Iain alleges that Mr. Hayward lacked testamentary capacity at the time of the execution of the 2013 Will because (in summary):

    i) Mr. Hayward was unwell. In early 2012 he had a heart attack. He was diagnosed with colon cancer in November 2012 which, by the summer of 2013, was terminal;

    ii) Mr. Hayward was taking prescription drugs which were capable of affecting his capacity;

    iii) Mr. Hayward's behaviour was erratic and unreasonable;

    iv) Of his conduct, on 5 July 2013, when he met with Emma McCarthy of Clifton Ingram, solicitors, who took instructions for and drafted his will;

    v) Mr. Hayward said, in a letter dated 4 July 2013 which he gave to Ms. McCarthy, that he wished to cancel his will made on 8 August 2008 when, in fact, the 2008 Will was dated 26 August 2008;

    vi) Mr. Hayward believed, at the time he gave instructions for the 2013 Will, that, by his previous wills, he had treated Fiona and Iain equally when, in fact, he had favoured Iain.

12. It is to be noted that, whilst the matters I have summarized in paragraph 11(iii)-(vi) may be symptoms of a disease which causes testamentary incapacity, they cannot, of themselves, be said to be causes of that incapacity. It follows therefore that Iain's case, as pleaded, must be that Mr. Hayward lacked testamentary capacity as a result of the heart attack he had suffered, the colon cancer he was suffering from and/or prescription drugs. In closing, Mr. Curry, who appeared for Iain, relied, in support of this plea, on the fact that, by July 2013, Mr. Hayward was anaemic which, it is not disputed, was probably because his cancer had metastasised. By 19 July 2013 Mr. Hayward had been prescribed iron tablets to treat the anaemia.

13. By paragraph 35 of the Amended Defence & Counterclaim Iain alleges that Mr. Hayward did not know and approve the contents of the 2013 Will because:

    i) Mr. Hayward was unwell. In early 2012 he had a heart attack. He was diagnosed with colon cancer in November 2012 which, by the summer of 2013, was terminal;

    ii) Mr. Hayward was taking prescription drugs which were capable of affecting his capacity;

    iii) Mr. Hayward's behaviour was erratic and unreasonable;

iv) Of his conduct, on 5 July 2013, when he met with Emma McCarthy of Clifton Ingram Solicitors who took instructions for and drafted his will;

v) Mr. Hayward said, in his 4 July 2013 letter (to which I also make further reference below), that he wished to cancel his will made on 8 August 2008 when, in fact, the 2008 Will was dated 26 August 2008;

vi) Mr. Hayward believed, at the time he gave instructions for the 2013 Will, that, by his previous wills, he had treated Fiona and Iain equally when, in fact, he had favoured Iain;

vii) The 2013 Will represented a significant change when compared with Mr. Hayward's previous testamentary dispositions;

viii) Prior to the making of the 2013 Will, Mr. Hayward had discussed with Fiona that he intended to make a new will;

ix) Prior to the making of the 2013 Will, Mr. Hayward had discussed with Fiona the terms of his proposed new will;

x) Fiona wrote the correspondence, purportedly written by Mr. Hayward, which was given or sent to Ms. McCarthy;

xi) The 2013 Will, as drafted by Ms. McCarthy, did not actually reflect Mr. Hayward's instructions. It did not contain a gift of Mr. Hayward's harp business(es) to Iain. Instead that intended gift was dealt with (or purportedly dealt with) by the letter of wishes.

14. By paragraph 35A of the Amended Defence & Counterclaim Iain alleges that the 2013 Will was procured by Fiona's fraudulent calumny; that is, a false assertion, which she knew to be untrue or as to the truth of which she was reckless, that Iain "could not be trusted and had behaved dishonestly regarding Mrs. Hayward's estate". Because Iain's claim is based on an email exchange between Fiona and Mr. Hayward, before turning to the particular words on which Iain relies to support his claim that Fiona made such an assertion, I need to set out, in a little detail, that (and the salient parts of a further) email exchange.

15. On 1 April 2013 Mr. Hayward sent an email (timed at 15:49) to Fiona and Jan. In it he asked them principally whether Iain, as Mrs. Hayward's personal representative, had given them a list showing Mrs. Hayward's assets, the value of each of them for probate purposes, the amount received on the sale of each asset and the amount, if any, of inheritance tax paid. He continued:

> "I also have to ask why he's not realised all the assets as I am still receiving dividends through the post which I hand on to him. I don't understand why he had not done this, because until all assets have been sold or disposed of the financial side of mummy's estate cannot be closed down!...

> "Because of the above it makes me unsure to ask Iain to be an executor of my estate! I don't want him not finishing the distribution of my will because he can't be bothered!"

16. On the same day Fiona replied, by an email timed at 18:08:

> "With regard to the disposal of mummy's assets I have never received any paperwork from Iain he has just sent me cheques at various times. As far as I was aware there were no assets left. With hindsight I believe I may have trusted Iain too much and think that making Jan executor of your will is the best thing. Whether you leave Iain as an executor is up to you but it sounds as if he hasn't done the complete job on mummy's estate."

17. On 2 April 2013 Mr. Hayward sent an email in reply (timed at 14:07). He said:

> "…A few days ago, 30th March, I passed another dividend cheque over to him!
>
> "As I said in my letter Iain has not realised all the assets as I am still receiving dividend cheques made out in mummy's name which I pass on to Iain. As I said previously I can't understand why he has not realised these assets, it's very annoying to me having to remember to keep on passing the dividends over to him! It makes no sense to me!
>
> "…it is important there are two executors that can be trusted. At this moment in time I feel that at the very least Iain should have let you know the total value of all mummy's assets in writing before he started distributing the assets…
>
> "At the moment I am not inclined to accept Iain as an executor of my estate, as I feel he has not provided even a minimum standard on distribution of assets! And there were only two people involved."

18. On the same day, Fiona replied, by an email timed at 14:33:

> "I tend to agree with you. I am concerned that you are passing dividend cheques to Iain but I am not receiving any money however small.
>
> "Jan and I would be happy to act as executors…
>
> "It is, of course, up to you what you decide to do and I will go along with whatever you decide."

19. It is to be noted that Iain had sent a cheque, dated 5 March 2013, to Fiona which was cashed on 18 March 2013, in the sum of £74.52 in relation to Mrs. Hayward's estate.

20. On 12 April 2013, Mr. Hayward emailed Fiona:

> "I have thought about Iain's lax attitude regarding dispensing bequests of mummy's will. He should of course produced a list of her assets and their values at the time of her death…You must insist that he gives you a copy…
>
> "You must also bring up with him why is Pa receiving cheques made payable to mummy when you thought he had sold all her assets, and why have you not received any of this extra income?"

21. Mr. Hayward sent Fiona a second email (timed at 14:39) the same day:

> "One thing I would say is if you contact Iain like asking for the list assets for probate will I am sure upset him. He will realise that you are checking up on him…I will be interested in his reaction. I am sure he will be furious, but it is his own fault!"

22. Fiona responded the same day, by an email timed at 20:51:

> "…I am not going to query anything about ma's will with Iain…Even if I found out he had done something dodgy the ill feeling is not worth the effort."

23. The next day Mr. Hayward sent Fiona a further email (timed at 10:27):

> "…I think your decision is correct if only to keep our family together. It crosses my mind that how could Iain do such a thing? And be oblivious to the distress he causes you and me! I have lost sleep over this!
>
> "I say to myself has Iain got a problem?
>
> "He does not seem to know right from wrong i.e. that £700 he charged me in exchange for an iPad that was almost unsaleable and missing the keyboard etc...."

24. Fiona replied the same day, by an email timed at 11:01:

> "I think you got it right in an earlier letter – he just doesn't think small amounts of money are important. He also isn't someone who is interested in detail so with hindsight I should have been executor on ma's will as admin and detail is what I am good at.
>
> "Try not to lose sleep over this as I don't believe Iain is truly bad. He seems to me to be a bit of a chancer who given the opportunity may take more than he is entitled to.
>
> "I am sorry we have both realised this quite late but now we know we just have to be careful.

> "Hope this makes you feel better but if you are still worried don't hesitate to come over and have a chat."

25. This email exchange makes reference to an iPad. I deal with the dispute relating to the iPad in more detail below. At this point, however, it is helpful to set out an email exchange, relating to the iPad, which took place. To put the exchange in context, I should set out what Jan said in cross-examination was its genesis. Jan told me that Mr. Hayward contacted him, saying he had a problem with his iPad. He asked Jan for help. Jan visited him and resolved the problem. Mr. Hayward then said that he was pleased the problem had been resolved because he had paid £700 for the iPad. Jan expressed surprise at that. Soon afterwards Mr. Hayward sent Jan and Fiona a copy of the invoice for the purchase of the iPad.

26. On 9 February 2013, Fiona emailed Mr. Hayward:

> "I am contacting you about the invoice you sent Jan for the iPad Iain bought for you. Both Jan and I are surprised that Iain bought you an iPad with such a large memory. I am sure you did not need this capacity and it will have cost you over a £100 more than a smaller memory version. There may have been good reasons and Jan will talk to you about this next weekend. I would not mention this to Iain until you have spoken to Jan."

27. Although Iain was not copied into this email, he responded to it, on 13 February 2013, by an email to Fiona and Mr. Hayward. I deal below with how come Iain was able to read an email sent from Fiona to Mr. Hayward. Iain responded:

> "Well well well. This morning I read an alert on my computer regarding the number of unread email messages in Pa account (part of a heath robinson warning system I put in place following Pa's long stay in hospital).
>
> "From the outside it appears very much like you two (and I guess I have to include Jan at the same time, so three) are cooking up something here. What exactly I don't know. But what I do know is that I am angry and hurt by the implication of where you are taking this. And quite frankly the lack of respect for me is outstanding…
>
> "For the record and I will NEVER explain myself to you again [Iain then explained, in 8 bullet points, why he had bought Mr. Hayward the iPad in question].
>
> "Now I have explained myself, now I want you two to explain yourselves.
>
> "Why are you conducting this in such underhand and suspicious fashion?
>
> "Do you both lack respect for me?

> "Do you really think I had no reasoning, therefore you really think I would diddle my own father out of £100?
>
> "Do you really think it helps ANYTHING NOT TO TALK TO ME?
>
> "I invite you both over to my house…to explain yourselves."

28. Mr. Hayward responded to Iain on the same day:

> "I am astonished by your email…I cannot understand your unfortunate way you have reacted to a query over the cost of the iPad…It disappoints me that you could say what you did in your memo…
>
> "Where are the unread emails I have not seen?..."

29. The next day Mr. Hayward emailed Fiona:

> "…I am horrified by Iain letter, I can't believe he sent it…I have refused to go over on Friday, as I feel Iain is not in a mood to be reasoned with so I will wait until he has calmed down."

30. Iain emailed Mr. Hayward on 14 February 2013:

> "…With regard to the unread messages the computer doesn't tell me which messages are unread, it just tells me the total. I use it as a very passive way of making sure you're OK without calling you all the time or coming over…I put it in, in the first place just after you left hospital as you were much weaker and I was fearful you might fall and be unable to raise an alarm. It is also probably about time I decommissioned it."

31. On 21 February 2013, following an email from Mr. Hayward to Iain, Iain replied:

> "[Having explained that he discovered Mr. Hayward's iPad was not working] I could have taken it back to Apple and got them to repair it. However, I had already replaced my iPad with a Surface…so instead of spending any money I simply reconfigured my iPad to become your and swapped the units over. I probably should have told you at the time, but quite frankly a lot else was going on and this was trivial…"

32. On 23 February 2013 Mr. Hayward emailed Fiona:

> "…I think [Iain] is a little cross with me as he has deleted my old email address already, can't believe it. It is as though he is out to destroy the little business I have left…I have to question what has happened to him?...Something has happened and he can't handle it! MONEY perhaps.

> "I thought when he bought those helicopters, it was strange for a man of his age to buy toys! He should have been out trying to increase business. He has got the spare time! And he is used to spending lots of money so he needs to increase earnings."

33. On the same day Iain emailed Mr. Hayward, in response to Mr. Hayward's request to him to explain why he had disconnected Mr. Hayward's email address and for the return of the iPad, saying:

> "Why are you amazed? You have no contact with me whatsoever regarding your continuing needs for an email account and you had clearly created a new one…
>
> [Iain then explained how Mr. Hayward might get access again to his old email address].
>
> With regard to your broken iPad, I'm sorry to say that as with all things broken, I threw it away…"

34. On the same day Jan prepared a note which called into question (i) Iain's explanation for the purchase of the particular model of Mr. Hayward's iPad in the first place, (ii) Iain's explanation for what became of the iPad after its purchase and (iii) Iain's explanation for how come he had read Fiona's first email relating to the iPad. At some point thereafter, a copy of the note was given to Mr. Hayward.

35. On 3 March 2013 Mr. Hayward emailed Jan:

> "Dear Jan and Fiona,
>
> "Thank you for your notes on Iain's actions. It is devastating reading…What a foolish person he is to think I would never find out. Perhaps, [having heard the risks involved in an operation Mr. Hayward had, by this time, undergone, Iain] thought he would then see exactly what I had and what he could gain access to, to Fiona's disadvantage…Perhaps he thought that with the iPad I was stupid enough not to know about costs of equipment…"

36. On 15 April 2013 Mr. Hayward emailed Iain:

> "…I have to return to the credit card payment I made to Apple computers = £700…on your behalf. As you know I paid for a top of the range iPad but received from you an old well used iPad…I need to be refunded the money…I look forward to hearing from you…"

37. There is no email in response from Iain. Within a couple of weeks, however, Mr. Hayward had asked Iain about the whereabouts of other of his items which he believed Iain had. Iain says that he thought it was sensible to visit Mr. Hayward to discuss this. Iain says that, when he arrived at Mr. Hayward's house, Mr. Hayward accused him of stealing those items. Iain and Mr. Hayward then argued and,

according to Iain, shouted at each other. Iain says: "I became frustrated by [Mr. Hayward's] intransigence so I returned his key and walked out".

38. On 3 May 2013 Mr. Hayward emailed Iain:

> "…I have felt for some considerable time I have been a source of irritation to you. I think in the circumstances that we not see each other for some considerable time…"

39. I should record that Iain was not challenged in cross-examination about his case as to (i) why the particular model of iPad was originally purchased or (ii) what became of it thereafter and why.

40. In support of his plea of fraudulent calumny Iain relies on the following statements in the following emails:

i) The statement "As far as I was aware there were no assets left" in Fiona's 1 April 2013 email timed at 18:08;

ii) The statement "I am concerned that you are passing dividend cheques to Iain but I am not receiving any money however small" in Fiona's 2 April 2013 email timed at 14:07;

iii) The statements "I think you got it right in an earlier letter – he just doesn't think small amounts of money are important" and "He seems to me to be a bit of a chancer who given the opportunity may take more than he is entitled to" in Fiona's 13 April 2013 email timed at 11:01.

41. Iain's alternative contract claim is set out in paragraphs 4 to 7 of the Amended Defence & Counterclaim. Iain alleges that, following a dispute between Fiona and Mr. Hayward in about November 2007, Fiona and Iain had a conversation in which Fiona said that she was concerned that she might be cut out of Mr. Hayward's will and that she and Iain should agree to divide their inheritance from Mr. Hayward equally, to which Iain agreed. Iain alleges that there was a further discussion, on Christmas Day 2007, between Fiona and him when it was agreed that such inheritance as either of them received from their father would be divided equally between them. Iain alleges that the agreement was reiterated on at least a further 3 occasions.

42. The week after Mr. Hayward died Iain telephoned Fiona. He recorded the telephone conversation. Fiona did not know that he was doing so. There is a transcript of the conversation. Iain asked what thoughts Fiona had about "the agreement regarding the will". Fiona said:

> "I think we're going to leave it for the time being…I'm not really going to be able to give you an answer on that really until I [know] what we're dealing with…"

43. The agreement was discussed further but there was no discussion as to its terms.

44. Iain telephoned Fiona again, on 30 January 2014, to discuss the agreement. He recorded the telephone conversation. Fiona did not know he was doing so. There is a transcript of the conversation. Fiona indicated that she did not want to discuss the

matter, expressing the view that she felt she was being put under pressure by Iain. The conversation continued:

> "Iain: …We had an agreement to split the inheritance 50/50.
>
> "Fiona: We had an agreement before I believe you did something very dodgy with an iPad and we had an agreement before…"

45. I turn now to consider the witness evidence.

Fiona

46. Fiona expressed the view that Mr. Hayward was completely of sound mind. She holds this view because she observed Mrs. Hayward suffer from Alzheimer's Disease and because she saw Mr. Hayward virtually weekly after May/June 2013. She said that he could hold a conversation on any topic and could recall recent and distant conversations. She described him as lucid, opinionated and a man of detail. She said he showed no signs of any change in his personality and he remained alert. She pointed out that, throughout his life, Mr. Hayward lived independently and even enrolled on a computer course in May/June 2013. She said that he often discussed with her what he had learnt on the course.

47. She said that Mr. Hayward wanted to discuss his proposal to change his will with her but she asked him not to do so and she also made clear that she would not accompany him to a solicitor for this purpose. Nevertheless, Mr. Hayward insisted on telling her that he wanted to make Iain "work for his money".

48. Fiona gave evidence about the agreement contended for by Iain in his alternative claim. She said:

> "The agreement…refers to a conversation we held at some point in the past. [The conversation] took place after I had fallen out with my father and he would get unreasonably angry and suggest he never wanted to see me again. My memory of the conversation is that I asked my brother that if my father ever cut me out of his will my brother would "look after me". My brother said he would and that I should do the same for him. There were no discussions as to what this meant and it was never discussed again."

49. She also said that, at the time of these discussions she did not know about her father's then existing or prior testamentary intentions.

50. Fiona was cross-examined about the circumstances surrounding the making of the 2013 Will. She said, according to my note:

> "I never tried to encourage my father to change his will. I never suggested that Jan should be his executor. I knew my father was planning to make a will. Neither I nor any member of my family helped with the correspondence. My father told me what

> he was planning to do. He gave me lots of reasons for why he wanted to change his will. One reason was the way Iain spent money on cars and toy helicopters. I don't recall him mentioning as a reason Iain's administration of our mother's estate."

51. She was cross-examined about why she did not mention, in her 2 April 2013 email timed at 14:33, her receipt a few weeks before of a cheque from Iain. She said:

> "I didn't check whether I'd received a cheque. My memory was that between 2009 and 2013 I had not received any money. When I wrote the email I believed what I said was true."

52. She continued:

> "I said my brother is a chancer…I was saying that there was a bit of money he kept. I believed that there was a small amount of money which my brother had not passed to me. My father had said that he had got a dividend cheque on 30 March and this was after I had received the cheque from my brother. I didn't receive any further money from my mother's estate after the 5 March cheque."

53. Fiona was cross-examined about whether Mr. Hayward had given Iain £60,000 to assist Iain in his divorce from Renate Tomek. She said that Iain had said that he had received £30-40,000 not £60,000 as Mr. Hayward had suggested.

54. Fiona was cross-examined about the circumstances which led to a falling out between her and Mr. Hayward in 2007. She said:

> "My daughter had applied to be a leisure assistant in a park. I asked my father for a reference for her. Reading Council said that she needed another reference because a relative could not be a referee. I rang my father and asked him how Reading had found out that he was my daughter's grandfather. He did not admit that he had said he was her grandfather. I knew that a family referee was not allowed. I expected it never to come to light that he was her grandfather."

55. She was cross-examined about Iain's access to Mr. Hayward's emails. She said that Mr. Hayward was surprised that Iain was reading his emails.

56. Of the second of the recorded conversations, Fiona said: "I wanted to get off the phone. I was fed up with Iain's phone calls".

Jan

57. Jan said that Mr. Hayward discussed with him the reason he, Mr. Hayward, gave Iain the insurance part of his business (which he did in about 2009). Mr. Hayward said that he wanted to give Iain the opportunity to have a regular income. He could not understand how Iain maintained his lifestyle.

58. Jan said, in cross-examination, that Mr. Hayward was upset that Iain had been reading his emails.

59. Jan and Fiona also relied on the lay evidence of 2 of their daughters, and Margaret and Michael Dennett and the solicitor who drafted the 2013 Will. They also relied on the expert evidence of Professor Robin Jacoby.

Lauren Kunicki ("Lauren")

60. Lauren said that she discussed her work in the theatre with Mr. Hayward in early summer 2013. She never considered him not to be of sound mind. He always spoke with her in detail.

Amy Kunicki ("Amy")

61. Amy said that she saw Mr. Hayward most weekends in 2013. Mr. Hayward talked to her about his will. He expressed the view that Iain had taken advantage of him. He said that he was thinking about changing his will because he regarded Iain as a spendthrift and as someone who did not look after his money properly. In her witness statement she said that her grandfather "also questioned where it was that Iain seemed to be getting all of his money and suggested that my mother look into the handling of my grandmother's will". Mr. Hayward told Amy, she says, that he wanted to leave Iain a couple of potentially valuable items.

62. In cross-examination Amy said:

> "Grandfather said that he was changing his will because he didn't think Iain looked after money very well. Grandfather brought up changing his will on a number of occasions and did so when he was discussing Iain and Iain's money."

63. Amy said in her witness statement:

> "…Until the day my grandfather died, he was in possession of all his mental faculties and I was able to have meaningful conversations with him regarding the material I was covering in my [medical] degree."

64. Amy said that Fiona told her, apparently some time ago, that Iain had told Fiona that Mr. Hayward had given him £30,000 at the time of his divorce from Renate Tomek.

65. Amy and Lauren said they are familiar with mental incapacity because they observed Mrs. Hayward suffering from Alzheimer's Disease.

Margaret Dennett

66. Mrs. Dennett, a retired nurse, met Mr. Hayward in 2010. Mr. Hayward was a professional harpist and he provided lessons. Mrs. Dennett began to take lessons from him. She believes that she saw Mr. Hayward on 18 July, 2 August and 30 August 2013. She said:

> "...I saw no sign that he was not clear of mind. I believe he had a full understanding of what was going on around him and remained as sharp as I had known him..."

Michael Dennett

67. Dr. Dennett (a retired agricultural meteorologist) visited Mr. Hayward on 18 July and 26 September 2013. He said that, on those occasions he found Mr. Hayward to be as "logical, rational and amusing as he had been all the time I knew him".

Emma McCarthy

68. Emma McCarthy was the solicitor at Clifton Ingram who drafted the 2013 Will. She has been a private client lawyer since qualifying in 2001 and, when she was at Clifton Ingram (she has since changed practices), she drafted many hundreds of wills each year. By 2013, she had received training on the issue of testamentary capacity as a result of becoming a full member of the Society of Trust and Estate Practitioners in about 2010 and having completed a course run by the Association of Contentious Trust and Probate Specialists. By 2013 she was also a member of Solicitors for the Elderly although she did not attend many of the lectures arranged by the local branch. She told me, when I asked her what "the golden rule" was, that a testator must be aware of the extent of his estate and the objects of his bounty. She also told me that, in her view, it was good practice, in the case of an elderly client proposing to make a will, for a GP's report on capacity to be obtained.

69. Ms. McCarthy effectively produced the will file for the 2013 Will. I therefore deal with relevant documents from the file here.

70. As I have indicated, Mr. Hayward had written a letter, dated 4 July 2013, which he gave to Ms. McCarthy when they met the following day when she took his will instructions. That letter made the following points:

    i) Mr. Hayward wished to revoke his will of 8 August 2008. (It is to be noted that the 2008 Will was made on 26 August 2008);

    ii) Mr. Hayward wanted to give his interest in the business known as Jack Hayward Harps to Iain and identified a harp which he said was part of that business. He also wanted to give Iain his harp advertising business, harp spares business, harp strings business and harp music business which included a number of books (later referred to in the letter of wishes) and he wanted to give Iain certain autographed pictures (also later referred to in the letter of wishes);

    iii) He wanted to give the balance of his estate, as to 50% to Fiona and, as to 10% each to each of his granddaughters.

71. Ms. McCarthy wrote an attendance note of the 5 July 2013 meeting in which, amongst other matters, it is recorded that:

    i) Mr. Hayward thought that his estate was worth about £800,000;

    ii) He wanted to leave a harp and certain memorabilia to Iain;

iii) He had given Iain his business in 2006/7 and from it Iain was receiving £30-40,000 p.a. (It is not disputed that, in fact, Mr. Hayward had given Iain only the insurance part of his business and he had done so in about 2009);

iv) He wanted to amend his will because of the way Iain spent money and because he was a spendthrift. He did not want Iain to receive any part of his property or investments because he would just spend the money frivolously.

72. Ms. McCarthy wrote to Mr. Hayward on 26 July 2013. With her letter she sent a draft will. In the letter she explained that she enclosed a "precedent" letter of wishes intended to deal with the "personal possessions". She explained that a letter of wishes is not legally binding. She also explained, in some detail, the will provisions. She also said, in the letter:

> "...Of course, you and I both know that you are perfectly mentally capable of making your new will and know exactly what you are doing..."

73. On 8 August 2013 Mr. Hayward's GP wrote to Clifton Ingram. He said that he had known Mr. Hayward for over 10 years and that he saw him on a regular basis. He said that, in his opinion, Mr. Hayward had full capacity and understood (i) that he was giving his property to persons of his choice on his death, (ii) the extent of his property and (iii) the nature and extent of his obligation to relatives and others. In his opinion "Mr. Hayward is mentally full *(sic)* capable of making these decisions with full understanding".

74. On 10 August 2013 Mr. Hayward wrote to Ms. McCarthy correcting an error in her draft letter of wishes.

75. There is an attendance note, dated 22 August 2013, which records Mr. Hayward's attendance with one of Ms. McCarthy's colleagues when she read through the draft will with him and, Mr. Hayward having no questions, it was executed.

76. In cross-examination Ms. McCarthy said that, in her meeting with Mr. Hayward at which she took his will instructions, there was no mention about the way Iain had administered Mrs. Hayward's estate. She also said that, at the meeting, Mr. Hayward was very clear and did not appear confused. In relation to Mr. Hayward's harp business(es), Ms. McCarthy said that Mr. Hayward explained that he had given the harp business(es) to Iain but that he, Mr. Hayward, had retained some artefacts from the business which he wanted Iain to have. She also said, in answer to questions from me, that she understood the harp referred to in the letter of wishes to be a personal chattel and that, although Mr. Hayward said that he had given the harp business(es) to Iain, he nevertheless believed that the harp was his to do with as he wanted.

77. Although I comment further below on Ms. McCarthy as a witness, it is convenient to make the following point here. It is reasonable to suppose that Ms. McCarthy's evidence was based on her attendance note. She has drafted many hundreds of wills since 2013 and it is not suggested that Mr. Hayward was a particularly unusual client. I am satisfied that her attendance note was made contemporaneously and is accurate. Having heard her giving evidence, there is no reason for me to doubt that this is so and the attendance note is consistent with handwritten annotations she made on the 4

July 2013 letter. The note is also a full attendance note and I have concluded that, if Mr. Hayward had commented, in particular, negatively about Iain's administration of Mrs. Hayward's estate, it is inherently probable that Ms. McCarthy would have recorded that in her attendance note. I have concluded, therefore, that he did not make any such comment.

Professor Jacoby

78. Prof. Jacoby is emeritus professor of old age psychiatry at the University of Oxford. He has been a psychiatrist since 1974 and is a well-known expert witness in testamentary capacity cases. He has given evidence in 27 reported cases. He has also published extensively on testamentary capacity and has contributed to the chapter on the topic in Williams, Mortimer & Sunnucks: Executors, Administrators and Probate (20th ed).

79. In his report Prof. Jacoby said:

> "In my opinion, there is insufficient evidence in the medical records to justify a diagnosis of dementia. On the contrary the testator's performance [in certain tests] suggest that he was not demented…
>
> "In my opinion it is quite possible that the testator did have a degree of MCI [mild cognitive impairment]. There is little evidence of it in the medical records…
>
> "In my opinion, at the time he gave instructions for the 2013 Will the testator with either not suffering from any mental disorder that could have affected his testamentary capacity, or was showing MCI that was not severe enough to impair his capacity to make a will.
>
> "It is clear that he did understand the nature and consequences of the act of making a will in general and of the will he actually did make. It is up to the court to decide whether he had sufficient understanding of his estate…
>
> "With regard to the moral claims of those who might be expected to benefit from the testator's bounty, in my opinion, if the court were to determine that he did not properly appreciate Iain's claim, it was not because of a disorder of the mind…
>
> "In my opinion, the testator did not reduce Iain's inheritance because of any insane delusion…
>
> "At the time he made the 2013 Will Jack Hayward was not suffering from any disorder of mind that could have impaired his testamentary capacity."

80. In cross-examination Prof. Jacoby said:

> "The symptoms of anaemia are fatigue, breathlessness and generalised physical weakness…It is theoretically possible that a symptom of anaemia is confusion. In this case Mr. Hayward's anaemia would probably have been gradually getting worse slowly. Sudden anaemia from a haemorrhage is more likely to cause confusion than slow onset anaemia caused by malignancy…If a person is fatigued he may be unable to act with his customary clarity."

81. He continued, in answer to a question from me:

> "Mr. Hayward may have been mistaken as to whether he had given his business to Iain in 2006/7 but I do not think that that mistake is attributable to a disease of the mind."

Iain

82. In his witness statement, referring to the agreement on which he bases his alternative claim, Iain said:

> "…My sister contacted me by phone…[S]he felt that [Mr. Hayward] would write her out of his will. To this end she asked me if I would agree to equally share whatever we inherited. I was happy to agree…This initial phone discussion was followed up by a more complete conversation when we met over Christmas that year."

83. Iain said that he and Fiona checked, over the following years, that the agreement was still in place.

84. Iain said in cross-examination:

> "I was in the car when Fiona and I had the initial discussion. She telephoned me. I can't recall who mentioned equal shares…It was a very brief conversation about making an agreement. Exactly what terms were talked about I can't be precise on. I said perhaps we would talk through this later. We then had a conversation at Christmas. We discussed various options. One option was that we would look after each other. I said I was only comfortable with a simple agreement that we would equally share."

85. In answer to a question from me, Iain said:

> "I can't recall who said we should look after each other in the Christmas conversation."

86. Iain was cross-examined as to Mr. Hayward's capacity. He said:

> "I accept from my observation that in the summer of 2013 my father understood that he was giving his property to persons of his choice on his death and that he understood the nature and

> extent of his obligations to relatives and others. I query whether he understood the extent of his property."

87. In cross-examination Iain said that Mr. Hayward had not given him any money in relation to his divorce from Renate Tomek.

88. Iain was cross-examined about how he came to read Fiona's 9 February 2013 email to Mr. Hayward. Iain had said, in his witness statement:

> "…I…had permission from my father to access his email…His email account was therefore configured onto my version of Outlook and I was able to see the number of unread messages in his inbox…"

89. In answer to questions from me he said:

> "I set up father's email service so I could read his emails. I did this in 2011. He knew about this. I could check my father's unread emails by clicking on his email folders. After his stay in hospital in 2012 I did this more frequently…It would be more accurate to say that I had opened my father's inbox and Fiona's email appeared."

He acknowledged that the explanation he had given to Mr. Hayward, in the emails I have referred to above, as to how he came to read Mr. Hayward's emails was not accurate but, he said, he gave the inaccurate explanation because that was the simplest way of explaining to his father, who, he said, was largely computer illiterate, how he had come to read his father's emails.

90. Iain also relied on the evidence of 3 further witnesses.

Renate Tomek

91. Ms. Tomek is Iain's ex-wife. Mr. Hewitt, who appeared for Fiona and Jan, did not want to cross-examine her. I permitted Iain to adduce her evidence in writing. She said that she had not received any money from Mr. Hayward at any time.

Judith Toal

92. Mrs. Toal, a friend of Mr. Hayward, did not attend court. Her evidence was admitted as hearsay evidence. Whilst I have read and considered her witness statement it does not say anything which, to my mind, assists me to determine this dispute; particularly because I formed the clear impression, from reading the statement, that Mrs. Toal was focusing on the period up to the end of 2012.

Jennifer Dove

93. Mr. Hewitt did not want to cross-examine Mrs. Dove, who was a friend of Mr. Hayward. I permitted Iain to adduce her evidence in writing. She said that Mr. Hayward never had a bad word to say about Iain although, sometimes, he got a bit frustrated with Iain. She said that Mr. Hayward was devoted to his grandchildren and

wanted to make sure they were provided for so that they would have a good start in life.

Assessment of witnesses of fact who gave oral evidence

94. I was struck by the frank and dispassionate way in which Fiona gave evidence in court. As I have set out, she was cross-examined about the circumstances which caused a rift between her and Mr. Hayward in 2007. This was very much a peripheral issue. More than that, that she sought to procure for her daughter a reference from someone she knew ought not to give one, with the expectation that its recipient would not discover the truth, did not reflect well on her. It might have been thought probable therefore that she would have sought to present herself in the best possible light when cross-examined on the issue. Nevertheless, Fiona responded on the issue in an open and detached way, freely admitting what she had done and that she knew the reference she had procured from her father was not an acceptable reference.

95. Nevertheless, I do not accept Fiona's evidence unreservedly or without a degree of caution. It is not inherently probable that, having received and cashed a cheque from Iain relating to Mrs. Hayward's estate just a few weeks before, Fiona had forgotten about it when she sent her 2 April 2013 email to Mr. Hayward. Fiona's evidence was to the effect that she had forgotten about the cheque.

96. I am afraid that I found Iain to be a less impressive witness than Fiona.

97. I have concluded that Iain is not a good historian.

98. In my view it is notable that his recollection, in cross-examination, of the discussions which he contends took place relating to the agreement on which he bases his alternative claim was different to his recollection as set down in his witness statement. In his witness statement he specifically recalls that, during the first telephone conversation on the matter, Fiona suggested that there should be an equal division of inheritances. In cross-examination he was unable to recall that such a suggestion was made by Fiona.

99. Nor do I accept Iain's evidence that he had received no money from Mr. Hayward (whether £30,000 or £60,000) in connection with his divorce from Renate Tomek. It is inherently improbable that he received no significant sum of money. There is a cheque book stub, dated 19 October 2004, recording a payment from Mr. Hayward's account to Iain for £60,000. There is an undated letter apparently written by Mr. Hayward which corroborates the payment. Further, I accept Amy's evidence (as corroborated by Fiona) that Iain had confirmed to Fiona that he had received a significant amount (he said £30,000) from Mr. Hayward.

100. Not only did I not find Iain to be a good historian, I have also concluded that he was not always a frank witness.

101. I have already set out what Iain said about the agreement between him and Fiona. To my mind the only reasonable conclusion to draw from Iain's evidence in cross-examination, despite his response to a question from me, was that he was asserting that, during the Christmas conversation, Fiona had suggested that she and he should agree that each would look after each other. It is inherently improbable, on Iain's

case, that this suggestion came from him because he told me that he was only comfortable with an agreement by which their inheritances were shared equally. If, as Iain contended in his witness statement, Fiona had suggested earlier an equal division of inheritances, it is inherently improbable that she would have suggested a less specific agreement during the Christmas conversation. I do not believe that the different versions of events given by Iain on this subject are reconcilable.

102. More significantly, in my view, I did not find Iain to be a frank witness when he sought to explain how he had come to read Fiona's 9 February 2013 email. The explanation given by Iain to Mr. Hayward, in his 13 February 2013 email (and repeated in his 14 February 2013 email to Mr. Hayward), was not true. Nor is it clear to me that the explanation Iain gives in his witness statement (part of which I have already quoted) is entirely consistent with (or at least it is not as complete as) his eventual explanation to me. More than this, to my mind the reason he gave me for not telling Mr. Hayward the truth is not credible. It would have been simple enough for Iain to say to Mr. Hayward: Father, you will remember that, in 2011, you allowed me to read your emails and, by chance, I came across an email from Fiona to you. Iain's explanation, that Mr. Hayward would not have understood the truth, is even more troubling when it is borne in mind that he gave Mr. Hayward not obviously straightforward instructions, in his 23 February 2013 email, about how Mr. Hayward might re-access his old email address. I am compelled to add that it took some repeated questioning to elicit Iain's final explanation on the subject of how he had come to read Fiona's email. When I also take into account that, as Jan (whose evidence I accept) told me, Mr. Hayward was upset that Iain had read the email (which was, to a degree, corroborated by Fiona), I am left to doubt whether Mr. Hayward ever gave Iain permission to read his emails and I am left to wonder whether that is why Iain did not tell Mr. Hayward the truth in February 2013.

103. My assessment of the other witnesses can be briefer.

104. I found Jan and Amy to be witnesses who gave evidence in a measured way and who were trying to assist me to establish the truth. Lauren was a hesitant witness. I cannot be certain that her answers were not coloured (even if only sub-consciously) by her (perhaps understandable) wish to support her mother.

105. Dr. and Mrs. Dennett were impressive witnesses. They have no interest in the outcome of the claim and, from my observation of them, I have no doubt that they recounted to me accurately and fairly what they observed.

106. It is right to note that Emma McCarthy did not properly explain to me the "golden rule". In *Kenward v. Adams*, The Times, 29 November 1975, Templeman J had said that, the "golden if tactless rule", was that, if a solicitor was drawing up a will for an elderly testator, it should be witnessed or approved by a doctor who ought then to make a record of his examination of the testator. It may also be that Ms. McCarthy did not appreciate why certain steps private client solicitors are encouraged to take are good practice. Nevertheless, I am satisfied, having heard her give evidence, that Ms. McCarthy, when she met Mr. Hayward, was alive to questions of testamentary capacity and, in this case, did actually consider whether Mr. Hayward was displaying any signs of incapacity. I am satisfied, in particular, that she was aware that, to have testamentary capacity, a testator must be capable of knowing the extent of his estate.

Testamentary Capacity

107. Both parties prayed in aid Cockburn CJ's famous dictum in *Banks v. Goodfellow* (1870) LR 5 QB 549, 576:

> "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 his mind had been sound, would not have been made."

108. The parties also agree that, in relation to the second factor identified by Cockburn CJ, in this case it was enough that Mr. Hayward was capable of understanding the extent of his estate (see per Lewison LJ in *Simons v. Byford* [2014] WTLR 1097 at [40]).

109. Mr. Hewitt placed significant weight on *Hawes v. Burgess* [2013] WTLR 453. At [13] Mummery LJ said:

> "…Although talk of presumptions and their rebuttal is not regarded as specially helpful nowadays, the courts realistically recognise that, for example, if a properly executed will has been professionally prepared on instructions and then explained by an independent and experienced solicitor to the maker of the will, it will be markedly more difficult to challenge its validity on the grounds of either lack of mental capacity or want of knowledge and approval than in a case where those prudent procedures have not been followed."

110. At [54] Mummery LJ explained that, in these circumstances, there arises a "strong prima facie case for the validity of [the] will". Mummery LJ continued at [57], [60]:

> "…it is, in my opinion, a very strong thing for the judge to find that the Deceased was not mentally capable of making the…Will, when it had been prepared by an experienced and independent solicitor following a meeting with her; when it was executed by her after the solicitor had read through it and explained it; and when the solicitor considered that she was capable of understanding the will, the terms of which were not, on their face, inexplicable or irrational.
>
> "…My concern is that the courts should not too readily upset, on the grounds of lack of mental capacity, a will that has been drafted by an experienced independent lawyer. If, as here, an experienced lawyer has been instructed and has formed the opinion from a meeting or meetings that the testatrix understands what she is doing, the will so drafted and executed

> should only be set aside on the clearest evidence of lack of mental capacity. The court should be cautious about acting on the basis of evidence of lack of capacity given by a medical expert after the event, particularly when that expert has neither met nor medically examined the testatrix, and particularly in circumstances when that expert accepts that the testatrix understood that she was making a will and also understood the extent of her property."

111. Sir Scott Baker's judgment was to similar effect.

Knowledge and Approval

112. Both parties referred me to *Gill v. Woodall* [2011] Ch 380 where Lord Neuberger said at [14], [21] – [22]:

> "Knowing and approving of the contents of one's will is traditional language for saying that the will "represented [one's] testamentary intentions" see per Chadwick LJ in *Fuller v. Strum* [2002] 1 WLR 1097, para.59. The proposition that Mrs. Gill knew and approved of the contents of the will appears, at first sight, very hard indeed to resist. As a matter of common sense and authority, the fact that a will has been properly executed, after being prepared by a solicitor and read over to the testatrix, raises a very strong presumption that it represents the testatrix's intentions at the relevant time, namely the moment she executes the will…
>
> "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…
>
> "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 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."

113. Lord Neuberger continued at [64]:

> "...Particularly in a case with a large number of witnesses, heard over many days, it does not seem to me wise to consider an issue in two stages, when those stages ultimately involve the same question, namely, given the effect of the factual and expert evidence, did Mrs. Gill appreciate what was in the will when she signed it? To be fair to the judge, the approach which he adopted can be derived from earlier cases, and was supported by both counsel."

114. In the context of this plea, there is a matter, arising from submissions of Mr. Curry who represented Iain, which I can conveniently address here. In my view, it is not a requirement of the plea, in all cases, that it must be established that the testator must have appreciated the legal effect of the words used in the document in issue. Suppose that a solicitor drafts a will believing it accords with her client's instructions but, through a drafting error which may be rectified by the court, the legal effect of the words is to divert a gift from its intended recipient to a third party. Suppose too that the solicitor advises or otherwise leads her client to believe that the effect of her drafting is that the intended recipient of the gift will receive it. Suppose too that the client fully and freely considers that advice or information and then approves the words used. I am of the view that it cannot be said, in these circumstances, that, solely because of the drafting error and its legal effect, the testator did not know and approve the contents of his will.

115. There is perhaps support for this conclusion from what Lord Neuberger said in *Gill* where, for example, he referred to a testatrix's "likely desires" (see also what Lord Neuberger said at [64], quoted above). There is support for this conclusion from what Lloyd LJ said in the same case at [71]:

> "...the testator [must know] what is in the document and...he [must approve] of it in the sense of accepting it as setting out the testamentary intentions to which he wishes to give effect by execution..."

116. In any event, there is further support for this conclusion from what Lewison LJ said in *Simon v. Byford* (supra) at [47]:

> "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…Normally proof of instructions and reading over the will will suffice…The judge's starting point in our case was one of "initial suspicion", given that the disputed will was prepared and executed without a solicitor and without Mrs. Simon having been medically examined. But having heard the evidence he held that his initial suspicion had been dispelled. He found it clear that Mrs. Simon knew that she was making a will, took a conscious decision to make it and approved its terms…"

117. There is also academic support for my conclusion. The authors of Williams, Mortimer & Sunnucks (supra) say, at paragraphs 13-41 – 13-43:

> "The fact that words or dispositions have been inserted in a will by mistake does not necessarily mean that the testator must be taken not to have known and approved of them…:
>
> > "The jurisdiction of the Court of Probate to grant probate of a will textually different to the actual document signed by the testator is a strictly limited one. If the testator himself approved the words to which he put his signature (and the presumption is that he approved them), those words must stand. If the words were selected by the draftsman to whom the testator confided the task of drafting his will, similarly the words so selected must stand, even if the testator was ignorant of the actual words used. The mistake of the testator or of the drafter employed by him as to the legal effect of the words used is immaterial. The jurisdiction, where it exists, is admittedly confined to the exclusion of words, since the insertion of words would run counter to the provisions of the Wills Act."
>
> "…If a testator approves the words used in his will those words must stand, even if they do not have the legal effect that the testator intends. A testator cannot be understood to be saying that he approves the words he uses if, and only if, they have the meaning he desires…
>
> "Words selected by a drafter cannot be omitted from probate merely because he or the testator mistakes or forgets their legal effect.
>
> "If the drafter inserts a provision in the will not fully carrying out the testator's instructions, or even if he inserts it without any instructions at all and without reason, that alone will not be a ground for omitting words. Even if the testator objects to the words being inserted but is persuaded to agree to this by entirely wrong advice as to their effect, the mistake must stand.

> "But the testator must know of the words used…The reading by the testator of his will must be a proper one and where it is read to him the will must be properly read, but subject to this and to the circumstances being such as to raise the question of want of knowledge and approval or where there is fraud, a testator who has read his will or to whom it has been read must be presumed to have known and approved of it, even though the court finds it impossible to suppose that he had any intelligent appreciation of the effect of the words at all…"

118. Mr. Curry drew my attention to the decision of Rimer J in *Re Good dec'd* [2002] EWHC 640 (Ch) and, in particular, [117] where the Judge said:

> "…I accept that, in an appropriate case…proof of requisite knowledge and approval can and will also require proof that the testator understood not just the nature of the testamentary provision he was proposing to make, but also its effect…"

119. I do not understand Rimer J, in that case, to be suggesting that a testator must appreciate the legal effect of the terms of his will. Rather the point the Judge was making, it seems to me, is that, in an "appropriate" case, the testator will not be taken to have known and approved the contents of his will when he did not appreciate the financial consequences of the gifts purportedly made by his will. It is axiomatic that, if a testator does not appreciate the financial consequences of such gifts, depending on the other facts that can be an indication that he may not, in fact, have approved the contents of his will. There is support for this conclusion from [120] of the judgment itself, where the Judge said: "…is it, or is it not, probable that…Miss Good understood not just the contents of her will, but also the financial effect of the gift of residue?" There is further support for this conclusion from the case on which Rimer J based his dictum; *Wintle v. Nye* [1959] 1 WLR 284 in which Lord Simonds said at pp.292 – 293:

> "…What was in issue was whether she understood and approved the contents of the will she executed. To this issue the quality of her understanding was relevant. So at least thought the Respondent, who led evidence designed to show that she was able to understand and approve the contents of a very complicated will – not, of course, the language of art in which it was couched, but the character of the disposition that she was making…
>
> "…In more than one passage of his summing-up the learned judge encouraged the jury to treat the will and codicil as standing or falling together. That might be unobjectionable if he had then gone on to point out how fraught with suspicion was the codicil. He failed to do so. Counsel for the respondent, who, I take this opportunity of saying, conducted his case with great ability and proper candour, was constrained to admit that the effect of the codicil can hardly have been explained to the testatrix. It is very certain that the jury did not understand that its effect in the likeliest contingency was to benefit the

> respondent by several thousand pounds. Had they done so they might have found it more difficult to believe that the testatrix understood and approved its contents. Who can say what repercussion this might have had upon their view of her understanding and approval of the contents of the will also?
>
> "I referred at an earlier stage of this opinion to the annuity of £260 given by the first draft of the will to a cousin of the testatrix, Marjorie Wintle, with whom she lived on terms of intimate affection, and to its reduction by the final will to the income of a sum of £1,000 with a power of appointment over £300 part of that capital sum. There was, I think, room for grave criticism of the Respondent in his dealings with this matter. He was singularly evasive in his letters to Marjorie and in his evidence about it. I will not repeat what Sellers LJ said upon this aspect of the case, but will call particular attention to the fact that according to the Respondent's own story it was on April 28, 1937, that the testatrix told him that he could increase her annuity to £120 if there was money available. This was at a time when (again according to his own story) figures had already been placed before her which, had she understood them, could have left her in no doubt that ample money would be available to meet the increased annuity. Such a circumstance must create the gravest suspicion that the testatrix had little idea of the extent of the benefit she was conferring on the respondent. I am not suggesting that it would be necessary that she should know the precise amount: that in the case of a residuary gift would not be possible. But, if it is a legitimate inference that she thought that the residue was of a measure which might or might not support the increase of an annuity of £40 to £120, then it is clear that she was unaware that she was conferring on him a substantial fortune. Having myself read the pages of complicated figures which were said to have been put before her, and studied what appeared to me to be the very uncandid answers given by the Respondent upon this part of the case, I cannot think that the jury were directed to view the transaction with the vigilance and jealousy which the law requires…"

Fraudulent Calumny

120. The parties referred me to *Re Edwards dec'd* [2007] WTLR 1387. In that case Lewison LJ 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;

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;

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."

121. Mr. Hewitt also relied on *Boyse v. Rossborough* (1857) 6 HL Cas 2, from which case, it is reasonable to suppose, Lewison J set out the principles I have quoted.

122. It seems to me that, to succeed on this plea, Iain must satisfy the following to a sufficient degree; namely, (i) that Fiona made a false representation (ii) to Mr. Hayward (iii) about Iain's character (iv) for the purpose of inducing Mr. Hayward to alter his testamentary dispositions and (v) that Fiona made such a representation knowing it to be untrue or being reckless as to its truth and (vi) that the 2013 Will was made only because of the fraudulent calumny.

123. The degree to which Iain must satisfy these requirements is not in dispute. The standard of proof is the civil standard but a high degree of proof is needed to meet that standard (see Williams, Mortimer & Sunnucks (supra); paragraph 13-64 and the cases cited there).

Discussion

124. In closing Mr. Curry, properly in the light of the evidence, put Iain's case on testamentary capacity in this way. He said that it was possible that Mr. Hayward lacked capacity, in that he was not capable of understanding the extent of his estate, because (i) he was anaemic, (ii) anaemia is capable of causing fatigue and (iii) fatigue is capable of causing a testator to be unable to understand the extent of his estate.

125. Mr. Hayward does not appear to have known the extent of his estate (in particular, the extent of his retained business) when he met Ms. McCarthy on 5 July 2013 and I have been taken to no evidence that Mr. Hayward knew more accurately the extent of his estate when he executed the 2013 Will. This is not a case where Mr. Hayward did not apparently know accurately merely the value of his estate. On 5 July 2013 he had apparently forgotten what he had apparently remembered only the day before; namely, that he retained a significant part of his business. Mr. Hewitt pointed out that, for example, in *Blackman v. Kim Sing Man* [2007] EWHC 3162 (Ch), the court accepted that, to have testamentary capacity, a testator does not need to know the actual value of his estate. In the circumstances of this case however, because Mr. Hayward did not apparently know, on 5 July 2013, the extent of his retained business, I do not find that case to be of assistance.

126. Whilst that Mr. Hayward had apparently forgotten the extent of his retained business within a day of his 4 July 2013 letter is a matter which, to my mind, is capable of raising questions as to Mr. Hayward's testamentary capacity, the issue I must resolve is whether, because of a mental impairment, Mr. Hayward was incapable of understanding the extent of his estate.

127. I have come to the conclusion that Mr. Hayward was capable, when he gave Ms. McCarthy instructions for the 2013 Will and when he executed the 2013 Will, of understanding the extent of his estate and that he did not then suffer from a mental impairment which made him incapable of understanding the extent of his estate (or

which otherwise made him incapacitous). I have come to this conclusion for the following reasons:

i) The 2013 Will is rational on its face and properly executed;

ii) Significantly, to my mind, the 2013 Will was prepared by a solicitor who, I have found, was alive to questions of capacity, who considered whether Mr. Hayward was capacitous and who was satisfied that he was;

iii) All the witnesses of fact from whom I heard, except for Iain, were consistent in their evidence which was (in more or less detail) to the effect (or, at least, consistent with the proposition) that Mr. Hayward had capacity;

iv) Iain did not point to anything specific which suggested that Mr. Hayward was incapable, because of mental impairment, of understanding the extent of his estate;

v) Prof. Jacoby expressed the opinion, to the extent he was able to express an opinion, that Mr. Hayward had capacity. He was cross-examined about the effect of anaemia generally and in this case. He was effectively of the opinion that anaemia would not have impaired Mr. Hayward's capacity.

128. I turn to consider Iain's claim of fraudulent calumny. I do so before considering questions of knowledge and approval because the parties' investigation, at trial, into the reasons for the making of the 2013 Will was directed principally to the plea of fraudulent calumny and because my conclusions as to the reasons for the making of the 2013 Will are also relevant to the knowledge and approval issue.

129. It will be recalled that Iain's case is that, on the proper construction of the statements on which he relies, Fiona represented to Mr. Hayward that Iain could not be trusted and had behaved dishonestly regarding Mrs. Hayward's estate (which, it will be recalled, Iain administered).

130. Taking into account the background against which those statements were made, I have concluded that those statements do not bear the meaning contended for by Iain and that Mr. Hayward did not understand them to amount to a representation that Iain could not be trusted and had behaved dishonestly regarding Mrs. Hayward's estate. Whatever Fiona subjectively believed she was asserting, to my mind the impression she conveyed, in her 12 April 2013 email timed at 20:51 and in her 13 April 2013 email timed at 11:01 (where she said "Iain…may take more than he is entitled to", a somewhat equivocal statement), was that she was expressing no concluded view about Iain's trustworthiness or honesty.

131. I do think that the statements relied on by Iain, properly construed, amounted to a representation by Fiona that Iain had not efficiently and correctly administered Mrs. Hayward's estate. I am not satisfied that such a representation was (or is) untrue. It is to be remembered that Mrs. Hayward had died in 2008. Whilst there is evidence that, in its initial stages, the administration of her estate was not entirely straightforward, there was no evidence before me to establish that, if Mrs. Hayward's estate had been administered efficiently, the administration would have been likely to have continued into 2013, 5 years after she had died. Further, Fiona gave evidence that she had never

received any money from Iain relating to the dividend cheque which Mr. Hayward had given Iain on 30 March 2013. I accept that evidence. At trial I was taken to no evidence which indicated (i) that Mr. Hayward had not given Iain a dividend cheque on or about 30 March 2013 or (ii) that Fiona had received any money in relation to it. Iain could have produced estate accounts or similar documents to show that he had efficiently and correctly administered Mrs. Hayward's estate. He did not do so.

132. If I am wrong, and because of the proper construction of the statements on which Iain relies, Fiona is taken to have represented that Iain could not be trusted and had behaved dishonestly regarding Mrs. Hayward's estate, that is likely to be because of the final statement on which Iain relies; namely: "He seems a bit of a chancer who given the opportunity may take more than he is entitled to". If, by this statement, and contrary to the conclusion I have already reached, Fiona is taken to have represented that Iain could not be trusted and was dishonest in relation to Mrs. Hayward's estate, Iain has not satisfied me to a sufficient degree that such a representation was made by Fiona knowing it to be untrue or being reckless as to its truth. In other words, Iain has not satisfied me to a sufficient degree that, on 13 April 2013, Fiona did not have an honest belief as to the truth of such a representation. The statement was made almost 2 weeks after Mr. Hayward had given Iain a dividend cheque and when Iain had not sent any money (or cheque) to Fiona in relation to the dividend. I do not know how efficiently Iain had dealt with previous receipts of money so I cannot conclude that the two week delay in this case was not unusual or concerning.

133. I have also concluded that Iain's administration of or other dealings with Mrs. Hayward's estate was not a factor in Mr. Hayward's decision to make the 2013 Will.

134. It is possible that the immediate impetus to the eventual making of the 2013 Will was Iain's argument with Mr. Hayward which caused Mr. Hayward to write his 3 May 2013 email suggesting that he and Iain should not meet "for some considerable time". Although Mr. Hayward's written instructions for a new will to Mr. Banky of his previous solicitors are dated 22 April 2013, those instructions were not posted until 7 May 2013 and were received by Mr. Banky, according to an annotation on the instructions, the following day.

135. I have come to the conclusion that the principal reason, at least, for Mr. Hayward's wish to change his testamentary dispositions and make the 2013 Will was because he had become critical of the way Iain had spent his own money after Mr. Hayward had transferred part of his business to Iain, in 2009; that is, after the 2008 Will. Ms. McCarthy's evidence was that Mr. Hayward wanted to change his will because he was unhappy about the way Iain spent money. She also said that Mr. Hayward did not suggest that his decision was influenced by the way Iain had administered Mrs. Hayward's estate. Fiona's evidence was to similar effect. This is also borne out by Mr. Hayward's 23 February 2013 email (part of the email exchange about Mr. Hayward's iPad). It is helpful to quote it here again:

> "…I think [Iain] is a little cross with me as he has deleted my old email address already, can't believe it. It is as though he is out to destroy the little business I have left…I have to question what has happened to him?...Something has happened and he can't handle it! MONEY perhaps.

> "I thought when he bought those helicopters, it was strange for a man of his age to buy toys! He should have been out trying to increase business. He has got the spare time! And he is used to spending lots of money so he needs to increase earnings."

136. I am conscious that, in her witness statement, Amy may be taken to have suggested that one reason Mr. Hayward wanted to change his will was because he was suspicious as to the source of Iain's money and he thought that Iain was wrongly using Mrs. Hayward's estate. However, it is to be remembered that Amy was cross-examined on this matter and she did not make a similar assertion then. In any event, the weight of the other evidence in support of the conclusion I have reached is more than sufficient, in my view, to justify that conclusion.

137. I have concluded, on balance, that a subsidiary reason for Mr. Hayward's decision to change his will was that he was annoyed with Iain about Iain's dealings with Mr. Hayward's iPad. Although the emails about the iPad are largely limited to February 2013, on 15 April 2013, shortly after the email exchange about Mrs. Hayward's estate, Mr. Hayward raised the subject of his iPad again in an email to Iain and, on 13 April 2013, Mr. Hayward had emailed Fiona: "...He does not seem to know right from wrong i.e. that £700 he charged me in exchange for an iPad that was almost unsaleable and missing the keyboard etc....". To my mind those and his 3 March 2013 emails show that Mr. Hayward was angry about the amount he had paid out for the iPad. I also bear in mind that, as I have shown, Mr. Hayward's view about Iain's spending habits was linked, in fact, to Iain's dealings with Mr. Hayward's iPad.

138. For all these reasons, Iain's case based on fraudulent calumny fails.

139. Mr. Curry put Iain's case on knowledge and approval in this way.

140. He contended that this was a case in which the court should be careful before being satisfied that Mr. Hayward knew and approved the 2013 Will because Fiona was instrumental in the preparation of Mr. Hayward's initial written instructions to solicitors, including Mr. Hayward's 4 July 2013 letter.

141. I can deal with this suggestion briefly. There is no evidence that Fiona was instrumental in the preparation of Mr. Hayward's written instructions to solicitors. I have concluded that she was not instrumental in their preparation. Fiona's evidence was that she positively distanced herself from the arrangements for, and more general discussions about, a new will. I accept that evidence. To my mind this evidence is consistent with two matters:

i) Whilst Iain suggested that Mr. Hayward was largely computer illiterate (so that it was probable, he suggested, that Mr. Hayward was assisted in drafting the initial written instructions) this was not borne out by Mr. Hayward's frequent use of email;

ii) Mr. Hayward himself confirmed, in an email to Fiona dated 6 July 2013, that he had located Clifton Ingram from their advertisement in the Yellow Pages.

142. It may be said that I should be careful before concluding that Mr. Hayward knew and approved the contents of the 2013 Will (i) because I have found his decision to make

a new will was driven in part by his annoyance about Iain's conduct in relation to his iPad, which was something on which Fiona had commented in her 9 February 2013 email and (ii) because Iain was not cross-examined about his version of events on the matter. Whilst I do bear these matters in mind on this issue, I do not believe that they weigh heavily against a finding that Mr. Hayward knew and approved the contents of the 2013 Will.

143. Mr. Curry further contended that Mr. Hayward did not know and approve the contents of the 2013 Will because he did not appreciate that (i) a letter of wishes is not binding (so that the gift, to Iain, of the "Harp music business" was not a binding gift as Mr. Hayward intended) and (ii) by the clause of the 2013 Will to which the letter of wishes related, Mr. Hayward had only given to his trustees his personal chattels and so they could not deal with the Harp music business, in any event, under the terms of the letter of wishes.

144. I have already found that Mr. Hayward was capacitous and there is no suggestion that the 2013 Will was not properly executed. Whilst the 2013 Will represented a departure from Mr. Hayward's previous wills, as I have already found, Mr. Hayward chose to exclude Iain from any interest in his residuary estate principally because of the way Iain handled his own money even after Mr. Hayward had given Iain part of his business. Most importantly:

i) As I have already indicated, I am satisfied that Mr. Hayward gave instructions to Ms. McCarthy as to his testamentary intentions;

ii) The 2013 Will is a short and relatively straightforward will;

iii) Ms. McCarthy, in her 26 July 2013 letter, explained to Mr. Hayward the terms of the 2013 Will in some detail and the non-binding effect of a letter of wishes;

iv) I have concluded that Mr. Hayward read Ms. McCarthy's letter and the draft letter of wishes which accompanied her letter, because he replied to Ms. McCarthy's letter suggesting corrections to the draft will and draft letter of wishes. Because of this response from Mr. Hayward, I have concluded that the draft letter of wishes sent to him was in equivalent terms to the final version;

v) There is an attendance note recording that, before Mr. Hayward executed the 2013 Will, it was read to him. It was not asserted that this note was inaccurate or that there was not a proper reading to him of the 2013 Will.

Taking all these matters into account, and recognising that the circumstances relating to Mr. Hayward's iPad are capable, at least, of weighing against a finding that Mr. Hayward knew and approved the contents of the 2013 Will, I am satisfied, subject to Mr. Curry's further contentions to which I have referred, that Mr. Hayward knew and approved the contents of the 2013 Will.

145. Do Mr. Curry's further contentions mean that Mr. Hayward did not know and approve of the contents of the 2013 Will? I have concluded that they do not.

146. The first of Mr. Curry's further contentions can be dealt with briefly. Ms. McCarthy's 26 July 2013 letter explained, clearly and concisely, that a letter of wishes is not

binding. As I have said, I have concluded that Mr. Hayward read the letter. It is incredible to suppose that he did not understand Ms. McCarthy's explanation. The only reasonable conclusion to reach is that, when Mr. Hayward made the 2013 Will, he intended to make only a non-binding gift of the Harp music business to Iain.

147. As to Mr. Curry's second further contention, a probate court is not a court of documentary construction. It would not be appropriate therefore for me to express any concluded view about whether Mr. Curry is right that the Harp music business did not pass to Mr. Hayward's trustees to deal with in accordance with the letter of wishes. However, even if Mr. Curry is right as to the proper construction of the 2013 Will, that would not affect my conclusion that Mr. Hayward knew and approved its contents. It seems to me that Mr. Curry's complaint is no more than that, because of a drafting error, the legal effect of the 2013 Will is not to make a gift of the Harp music business to Iain. In the context of this case, that is not enough, I have concluded, to call into question the validity of the 2013 Will. The only reasonable inference which can be drawn from a combination of (i) Mr. Hayward's instructions to Ms. McCarthy, (ii) the terms of her 26 July 2013 letter, (iii) his receipt of her 26 July 2013 letter together with the draft letter of wishes in the terms, (iv) his consideration of Ms. McCarthy's letter and that draft letter of wishes and (v) his execution of the 2013 Will and his signing of the letter of wishes, is that he knew what was in those documents and he freely accepted them as representing and giving effect to his testamentary wishes. For the reasons I have already given, that is enough to satisfy the knowledge and approval requirements in this context.

148. I turn, finally, to consider Iain's alternative claim based on his agreement with Fiona.

149. I prefer Fiona's evidence on this matter to Iain's evidence. I accept Fiona's evidence that she did not know what Mr. Hayward's testamentary intentions were in 2007. There is no evidence that, in 2007, Fiona knew what Mr. Hayward's then existing will said. That she did not know, is consistent with her not wanting to know Mr. Hayward's testamentary intentions in 2013. It strikes me that Fiona's concern in 2007 was to ensure that, out of pique, Mr. Hayward did not change his will so stopping her inheriting what he had left her in his then existing will. Because she did not know what was in that will, Fiona's version of what was discussed in 2007 is more inherently probable than Iain's version. Because (i) as I have already explained, I have concluded that, in cross-examination Iain effectively asserted that Fiona had suggested that they should look after each other and (ii) I prefer Fiona's evidence to Iain's for the reasons I have already given, I find that, in 2007, Fiona and Iain agreed that, if Mr. Hayward cut Fiona out of his will, Iain would look after her and vice versa. Bearing in mind in particular, that, as I have found, Fiona did not know what Mr. Hayward's then existing will provided, I also do not accept Mr. Curry's submission in closing that, properly construed, the agreement was nevertheless an agreement to share inheritances equally.

150. I do not believe, contrary to Mr. Curry's contention, that Fiona admitted that there was an agreement for an equal division of inheritances when she spoke with Iain on 30 January 2014. I accept her evidence that she was fed up with Iain's continued pressing about the agreement. By 30 January 2014, within 3 weeks of Mr. Hayward's death, Iain had raised the subject 3 times. That Fiona was fed up, strikes me as an entirely natural reaction and is entirely consistent with her telling Iain, during the 30 January 2014 conversation, that she felt that he was putting her under pressure. To my

mind, all Fiona was saying on 30 January 2014 was that she and Iain had an agreement. This she does not dispute. She was not accepting Iain's version of the terms of the agreement.

151. Mr. Hewitt advanced a number of reasons why the agreement was not a contract including (i) that the agreement was too uncertain to be a contract and (ii) that Fiona and Iain did not intend to create legal relations.

152. In relation to Mr. Hewitt's certainty point, the authors of Chitty on Contracts (32nd ed) say, at paragraph 2-147:

> "An agreement may lack contractual force because it is so vague or uncertain that no definite meaning can be given to it without adding further terms. For example, in *G. Scammell & Nephew Ltd v. Ouston*, the House of Lords held that an agreement to acquire goods "on hire-purchase" was too vague to be enforced since there were many kinds of hire-purchase agreements in widely different terms, so that it was impossible to specify the terms on which the parties had agreed."

153. In relation to the assertion that Fiona and Iain did not intend to create legal relations, Chitty (supra) says, at paragraph 2-194:

> "Another factor relevant to the issue of contractual intention is the degree of precision with which the agreement is expressed. In one case it was held that a husband's promise to let his deserted wife stay in the matrimonial home had no contractual force because it was not "intended by him, or understood by her, to have any contractual basis or effect". The promise was too vague: it did not state for how long or on what terms the wife could stay in the house. So, too, the use of deliberately vague language was held to negative contractual intention where a property developer reached an "understanding" with a firm of solicitors to employ them in connection with a proposed development, but neither side entered into a definite commitment. For the same reason, "letters of intent" or "letters of comfort" may lack the force of legally binding contracts. The assumption in all these cases was that the parties had reached agreement, and in them lack of contractual intention prevented that agreement from having legal effect…"

154. Whether because the agreement between Fiona and Iain was, in the light of the conclusions I have already reached, too uncertain to be a contract (so that, to be clear, none of the exceptions to the general rule I have summarised above applies) or whether because Fiona and Iain, by the agreement, did not intend to create legal relations, I have concluded that the agreement is not an enforceable contract.

Disposal

155. It follows therefore that I decree probate of the 2013 Will in solemn form of law and I dismiss the Amended Counterclaim.