Neutral Citation Number: [2020] EWHC 2151 (Ch)

Case No: PT-2019-BRS-000082

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: 07/08/2020

Before :

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

- -

Between :

TERESA ANN COLES	**Claimant**
- and -	
(1) HEATHER CHRISTINE REYNOLDS	**Defendants**
(2) CHARLES WILLIAM REYNOLDS	

- -
- -

Christopher Jones (instructed by **FDC Law**) for the **Claimant**
The Defendants appeared in person

Hearing dates: 15-16 July 2020

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Approved Judgment

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

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII on the date shown at 10:30 am.

HHJ Paul Matthews :

Introduction

1. This is my judgment on the trial of a claim brought by the claimant against her sister and brother in law in relation to their mother's will and related affairs of her estate. In part it is a probate claim, for an order revoking the grant of probate made to the first defendant in respect of a will said to have been made by their mother at a time when she was subject to undue influence from the first defendant and/or neither knew nor approved of the contents. In part it is a derivative claim on behalf of the estate, seeking (i) in particular an order setting aside an assignment of a one half share of the beneficial interest in the house in which their mother lived to the defendants, said to have been procured by undue influence of the defendants, but also (ii) accounts in relation to rents received by the first defendant in respecting of the letting of the mother's house, and (iii) other relief. Because under the disputed will the first defendant takes the whole estate, the claimant needs to succeed on the will issue before she has standing to make any derivative claim (either on intestacy, or under a previous will).

Procedure

2. There was extensive correspondence before the proceedings were formally commenced, including an application by the now claimant to the court for a pre-action disclosure order, which was made by DJ Watson on 9 February 2018. I understand that the defendants complied with the order, save that they did not produce any copies of earlier wills, merely indicating the identity of the solicitors who had prepared a will for the deceased in 2002. The claimant made an application for third party disclosure and production of this will by these solicitors, which I ordered on 9 July 2020. Copies of the 2002 will were available at the trial.

3. The claim form was issued on 13 September 2019, and served on the defendants. The particulars of claim and a copy of the usual statement under CPR rule 57.5 were served on them under cover of a letter dated 16 October 2019. (For the sake of completeness, I should add that these documents were drafted by different counsel to that appearing for the claimant at trial.) The defendants did not file any acknowledgement of service, and neither did they file and serve any defences. On 3 February 2020, on the application of the claimant, I made an order under CPR rule 57.10 that, in circumstances where the defendants had not taken any part in the proceedings, the matter should proceed to trial on written evidence only, to be filed at court by 25 February 2020. That order was served on all parties. The only evidence filed was filed on behalf of the claimant. On 4 March 2020 the court sent out (again to all parties) notice of trial, to take place on 15-16 July 2020.

4. It appears that on 6 July 2020 the defendants consulted a firm of solicitors who informed them that they had a conflict of interest and could not act. The defendants consulted a direct access barrister on 9 July 2020, who wrote to the court on 10 July 2020 to explain that he was instructed to make an application on the first day of the trial for its adjournment, so that the defendants could put in evidence and participate

fully. I directed that any such application be made on the afternoon of 14 July 2020 (the day before the trial was due to begin), so that the position would be clear before the trial itself began. The application was made remotely, using the Microsoft Teams videoconferencing platform, on 14 July 2020, when I dismissed it for the reasons given at the time. The trial accordingly proceeded on 15 and 16 July 2020, again remotely, using Microsoft Teams. The defendants did not instruct counsel to appear at the trial, but represented themselves.

Background

5. The background to the matter (which I do not understand to be controversial) is as follows. The deceased was born Lillian Vera Hillard in 1928. She married Charles James, who was born in 1927. They had two daughters, the claimant, born in 1956, and the first defendant, born in 1959. The claimant married David Coles, and they have two children. The first defendant married the second defendant, Charles Reynolds, and they also have two children. These children are now all adults, and indeed some of them have children of their own.

6. Charles James had been a builder, in partnership with his brother David, and it appears that after suffering a heart attack in 1992 and having to recuperate, the business suffered a downturn and eventually Charles James was made bankrupt in December 2001. He had built the house in which he and the deceased lived, known as Lankard View ("the property"). It appears to have been built on land belonging to the building partnership. This land appears to have been vested in Charles James's trustees in bankruptcy by a court order of 3 April 2002. (According to the office copy entries in the bundle, it was first registered on 9 October 2003, presumably in the trustees' names.) But it was subject to a charge in favour of National Westminster Bank dating from 1991 for a debt which apparently exceeded its then market value and thus made it of no interest to his trustees. It appears that the trustees transferred Lankard View to Mr James in 2007, and he was registered proprietor on 5 March of that year. On 14 May 2007 he made a written declaration of trust of the property, so that thereafter he held it (subject to the bank's charge) on trust for himself and the deceased in equal shares absolutely.

7. Charles James died intestate in 2008, and letters of administration were granted to the first defendant, for the benefit of the deceased, in October 2011. The gross value of the estate was sworn not to exceed £312,000, and the net value at nil. At that date the so-called "statutory legacy" under section 46(1) of the Administration of Estates Act 1925 for a widow where the deceased left children or other issue was £125,000 (it was increased to £250,000 the following year). Anything over and above this (except for personal chattels, which went to the widow absolutely) would be held on trust, as to one half for the widow for life with remainder to the children, and as to the other half on trust for the children absolutely.

8. It would appear that Charles James's estate (including his remaining half share in the property) was worth less than the statutory legacy. If that were so, everything would have gone to his widow, the deceased, and the two daughters would not have benefitted directly from their father's intestacy. Accordingly, on the death of her husband, the deceased would have become the sole beneficial owner of the property (subject to the bank's charge), although the legal estate would have vested first in the Public Trustee and then (from October 2011) in the first defendant as administratrix.

The case in summary

9. In February 2010, by which time the debt owed to the bank (including interest) was more than £230,000, the bank wrote a letter addressed to Charles James (who by then had been dead for nearly 2 years) at the property, offering to redeem the charge for only £50,000. Subsequently the bank agreed to accept £20,000. The defendants paid the £20,000, in return for which the deceased by deed made on 15 October 2010 assigned to them 50% of her beneficial interest in the property. This transaction is attacked by the claimant, as having been made as a result of undue influence exerted by the defendants.

10. The deceased had made a will in 2002, by which she had left her estate to be divided equally between her daughters, and appointed them both executrices. The disputed second will was professionally made on 23 May 2012, under which the first defendant is sole beneficiary and sole executrix. The deceased moved from the property into rented accommodation in October 2012, and then into care, where she died in July 2013. The first defendant obtained a grant of probate of the second will in November 2016. The gross value of the deceased's estate was sworn not to exceed £325,000, and the net value £109,000. As I have said, the second will is attacked as the product of undue influence by the defendants, and is also attacked on the ground that the deceased did not know or approve of the contents. I shall come back to deal with some of these events in more detail later on.

What this case is about

11. Because of the poor relationship between the parties, it is important at the outset to make clear what this case is about and what it is *not* about. This case is not about the failure of the relationship between the claimant and the first defendant. It is not about why the claimant lost contact with the deceased, and whether it was anyone's fault. And it is in particular not about whether one or the other of the two sisters was a better daughter, or did more for the deceased during her last years. Instead, this case is simply about allegations by the claimant that the first defendant exercised undue influence on their mother, and procured the assignment of a half share in the family home to the defendants, and also the execution of a will in favour of the first defendant. It is also about allegations that the deceased did not know or approve of the contents of that will.

12. In *Wharton v Bancroft* [2011] EWHC 3250 (Ch), Norris J said:

> "9. The task of the probate court is to ascertain what (if anything) was the last true will of a free and capable testator. The focus of the enquiry is upon the process by which the document which it is sought to admit to proof was produced. Other matters are relevant only insofar as they illuminate some material part of that process. Probate actions become unnecessarily discursive and expensive and absorb disproportionate resources if this focus is lost."

13. This case is in large part a probate claim. But the same point can properly be made about the claim that the assignment is invalid. Family litigation about wills and other transactions carried out by the deceased shortly before death can easily become a proxy for disagreements between the parties about quite different matters occurring during the life of the deceased. As Von Clausewitz said, "War is the continuation of

politics by other means". So too probate litigation. And, as Norris J (more prosaically, but also more practically) observed, disproportionately expensive.

The evidence in the case

14. The evidence in this case is contained in three witness statements and in the documents in the trial bundle, many of which are the product of the pre-action disclosure application resulting in the order of 9 February 2018. The three statements are from the claimant herself, Jennifer Burrell (a former next-door neighbour of the defendants, who knew the deceased from when she was visiting or staying with the defendants), and Sarah Ashman (a former neighbour of the deceased for more than 20 years).

15. The last statement is however dated 27 February 2020 and is date-stamped as having been received at the court on 3 March 2020. This is out of time according to the order of 3 February 2020. Mr Jones for the claimant therefore applied for relief against sanctions so that the statement could be admitted. On instructions he told me that the witness concerned had had to cancel an earlier appointment with the claimant's solicitor through bereavement, and accordingly the statement was prepared very close to the deadline. It was filed with the court in draft (making this clear) before the deadline, and then the signed version (unchanged from the draft) was filed on 3 March. The defendants did not oppose the application, and for the reasons given at the time I allowed it.

16. I should make clear that the first defendant challenged in particular the evidence of Jennifer Burrell on the basis that she was not neutral. She explained to me that Ms Burrell and she had fallen out over an issue relating to a planning application for house to be constructed in their garden. As for the claimant herself, the parties have fallen out so badly that they have no relationship anymore. The claimant will have had first hand knowledge of earlier parts of the story in this case, but, given the loss of contact with the deceased from the end of 2009, her evidence of what happened later is largely circumstantial, and based on the evidence of others or the documents in the case. I will have some more to say about this aspect later. Sarah Ashman's evidence is focused on the earlier period too, as she moved away in 2011, and on her few visits to see the deceased after that she says there were no signs of tension in the family.

17. Because there was no cross-examination of the makers of the witness statements, I cannot *disbelieve* what they say, at all events unless what they say is incredible, in the context of the evidence as a whole. On the other hand, I am not obliged to *accept* what they say if the evidence as a whole persuades me to a different conclusion, so that they are mistaken or otherwise incorrect. During the course of the hearing, the defendants addressed me on the case made against them by the claimant. In doing so, the defendants understandably but repeatedly sought to give oral evidence of what they said had happened. As I explained to the defendants at the time, and record here, I can take into account all their comments and submissions on the evidence that was properly before me in the form of witness statements and trial bundle documents.

18. On the other hand, I cannot take into account the fresh oral evidence which they were seeking to adduce (unsworn) in addressing me. This is the consequence of their failure to participate in the preparation of this case at an earlier stage, and to comply with the rules of procedure and the orders of the court. At the same time, there are some

documents in the bundle which emanate from the defendants (for example a lengthy letter to the claimant's solicitors from the first defendant of 19 May 2018), and, as I say below, I am entitled to have regard to those. I add that Mr Jones, counsel for the claimant, had prepared and filed a full skeleton argument, of which the defendants also had a copy, to enable them to focus their submissions. The defendants did not themselves produce a skeleton argument, but of course I do not criticise them for that.

19. I should say something about the status of the documents in the bundle. Importantly, the bundle was prepared and lodged by the claimant, without input from the defendants. It contains material from the claimant herself, material from the defendants, obtained by the authority of the order for pre-action disclosure which I have mentioned, and other material volunteered by third parties. Under CPR rule 32.19,

> "(1) A party shall be deemed to admit the authenticity of a document disclosed to him under Part 31 (disclosure and inspection of documents) unless he serves notice that he wishes the document to be proved at trial.
>
> (2) A notice to prove a document must be served –
>
> (a) by the latest date for serving witness statements; or
>
> (b) within 7 days of disclosure of the document, whichever is later."

So far as I am aware, no notices to prove a document were served by any party. Accordingly all the documents disclosed in this case, whether under pre-action disclosure (under rule 31.16) or under standard disclosure (under rule 31.5) are deemed admitted authentic. As it happens, I do not think that the claimant gave standard disclosure, there being no defences from the defendants which would enable the identification of issues between the parties.

20. Under CPR PD 32, para 27.2,

> "27.1 The court may give directions requiring the parties to use their best endeavours to agree a bundle or bundles of documents for use at any hearing.
>
> 27.2 All documents contained in bundles which have been agreed for use at a hearing shall be admissible at that hearing as evidence of their contents, unless –
>
> (1) the court orders otherwise; or
>
> (2) a party gives written notice of objection to the admissibility of particular documents."

21. The order of 3 February 2020 directed that, in circumstances where the defendants had neither acknowledged service nor filed defences, this claim would be tried on written evidence only, and that the claimant lodge a trial bundle. There was no direction that the bundle be agreed, and in fact it was not agreed, with the defendants. Strictly, therefore, para 27.2 does not apply. Nevertheless, so far as the claimant is concerned, she put forward the bundle and the documents in it, but did not object to the admissibility of any of those documents. In these circumstances, I do not think she can assert that any of the documents is inadmissible (the more so if she herself relied

on them in her evidence or in submissions on her behalf). The defendants did not at the trial assert that any of the documents in the bundle was inadmissible. Indeed, they too relied on some of them (for example, the historic bank statements for the deceased and her late husband, dating back to 1994, and the first defendant's letters to the claimant's solicitors). Accordingly, I shall treat all of the documents in the trial bundle as admissible. The weight I should give them, of course, is another matter.

Factfinding

22. For the benefit of the lay parties in this case I will say something about how English judges decide civil cases like this one. I borrow the following words largely from other judgments of mine in which I have made similar comments. 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 material presented, and the arguments made to them, and then make up their minds. But there are a number of 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

23. The first is the question of the burden of proof. Where there is an issue in dispute between the parties in a civil case, as this case is, one party or the other will bear the burden of proving it. In general, the person who asserts something bears the burden of proving it. The importance of this is that, 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. I add that there are some special rules for probate cases, and I will come back to those later.

The standard of proof

24. 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 (say) medical experts might be used to. However, the more serious the allegation, the more cogent must be the evidence needed to persuade the court that a thing is more likely than not to have happened.

Oral evidence

25. Thirdly, in commercial cases where there are many documents available, and 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: see *Gestmin SGPS SPA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), [22]. In the present case there are witness statements which I

have read. But, unlike most cases of this kind, there was no oral evidence and no cross-examination. This deprives the court of certain advantages. First, the witness is not on oath in public (though there is a statement of truth). Second, the judge cannot observe the witnesses' demeanours. Third, no supplementary questions or explanations can be put to or sought of witnesses. So inevitably witness statement evidence in these circumstances may be of lesser weight compared with the case where the witnesses are tendered for cross-examination. I will therefore give appropriate weight to both the documentary evidence and the witness statement evidence, bearing in mind both the fallibility of memory and the relative objectivity of the documentary evidence available.

Reasons for judgment

26. Fourthly, a court must give reasons for its decisions. That is what I am doing now. 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

27. 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 the fallibility of memory. And, whilst judges give their reasons for their decisions, they cannot and do not explain every little detail or respond to every point made.

Facts found

Early years

28. On the evidence before me, I find the following facts (in addition to the background and summary material which I set out earlier). The claimant and the first defendant grew up in Farrington Gurney, where their father, a self-employed builder, built a house for the family to live in, Lankard View. The claimant left home at the age of 21, when she married and moved to Frome, where she still lives. This is a little over 12 miles to the south-east of Farrington Gurney. The claimant worked for the NHS for 42 years, retiring in 2017. The last 32 years were spent working as a maternity healthcare assistant on night shifts at Frome Community Hospital. Her husband was and is a full-time residential social worker in Frome. The first defendant worked and still works for The Post Office at Nailsea Post Office. The second defendant was and is a self-employed lorry driver. At all relevant times the defendants lived in East Harptree, about 6 miles to the west of Farrington Gurney.

29. I have already mentioned the heart-attack suffered by Mr Charles James in 1992, and the effect that this had on his business. By the beginning of 1994 he owed the bank over £120,000. This was secured by a charge on the partnership land (including the property) dated 19 August 1991 (see the deed of assignment of 10 October 2010). There was a meeting at the bank's branch in Nailsea at which Mr James, the deceased,

the claimant and her husband and the defendants were all present. It seems to have been agreed that the property would not be sold under the charge until both Mr James and the deceased had died. But there was nothing before me to indicate that this was a legally binding commitment on the part of the bank, or that, if it was so intended, what would be the consideration for it. I therefore proceed on the basis that there was nothing to stop the bank proceeding to sell the property as mortgagee at any time.

Mr James's bankruptcy

30. As I have said, Charles James was adjudicated bankrupt in late 2001. In the ordinary course of events, at that time he would have been automatically discharged three years later, that is, in 2004. There is no reason to think that that did not happen here. As I have also said, the property was vested in the trustees in bankruptcy in 2002, but appears not to have been realised in the bankruptcy, probably because of the bank's charge over the land, which at that date secured the debt (including accrued interest) to the bank of nearly £273,000. Charles James and the deceased were thus in a precarious position. It was no doubt this which prompted them to take legal advice.

31. On 21 November 2002 the deceased made a will with the firm of Davies and Partners Solicitors. This will did not mention her husband Charles James, but appointed the claimant and the first defendant as executors and trustees and divided her estate between the two of them in equal shares. There must have been some litigation undertaken in order to protect Mr and Mrs James's positions, because they received legal aid, and a 'legal aid' charge was placed on the property (no doubt as the asset 'recovered') in order to secure repayment of their contribution to that legal aid. (I understand that this charge was not in fact redeemed until the house was eventually sold after the deceased's death.) In addition, a class F land charge was registered on the title to the property on 9 October 2003 (which is when the freehold title was registered for the first time). It seems likely that that replaced an earlier class F land charge in the land charges register relating to unregistered land, but I have no information on that.

32. The bank sold some of the land in April 2004, reducing the debt (which then stood at over £318,000) to £145,000 odd. But, of course, with no other repayments, and interest being charged, the outstanding balance soon rose again. As I have already said, in 2007 the trustees in bankruptcy transferred the property to Mr James alone, and shortly thereafter he executed a declaration of trust saying that he held the property on trust for himself and deceased in equal shares absolutely. On 24 June 2008 Mr James died. By that date the debt including interest exceeded £213,000.

33. There is no valuation of the property as at that date. When the claimant's solicitors wrote to the defendant's then solicitors in August 2016 to ask what was the value of the property in October 2010, the reply was they did not know, but that it was "less than £250,000". I was told by the first defendant during the hearing that the property was sold after the deceased's death for about £236,000. On this basis, I am satisfied that Charles James's beneficial half share of the equity of redemption easily fell within the statutory legacy to the deceased.

After Mr James's death

34. After Charles James's death, there was a division of responsibility for looking after the deceased. She was still living alone in the property, but needed help, because she had osteoarthritis in her hips, which meant that she needed a stick to walk. The claimant (who worked night shifts, seven nights on and seven nights off) would go over to the property during three days of the seven day period when she was off, to do cooking and cleaning, and take her shopping and to the hairdressers. When the claimant was working, her husband would go over and see her. The first defendant (who worked full-time during the week) would have her to stay at her house every weekend.

35. In summer 2009, the deceased went into hospital to have a hip replacement operation. She was discharged in September 2009 and returned home, but had a fall, went back into hospital, and had a further replacement operation on the other hip in November or December 2009. When she was discharged from that, she became dependent upon carers coming into her home. After the first operation, there were arguments between the claimant and the first defendant as to how suitable the property was for the deceased to living on her own. During the time that the deceased was in hospital for the second operation, there was an incident when the claimant went to the property to feed the deceased's cat and found that her key would not work, as the locks had been changed. In a letter to the claimant's solicitor dated 28 January 2019 the first defendant explained that the door handle was changed from a round knob to a conventional handle, to accommodate the deceased's increasing arthritis, but that the key safe was still in use with the same code. I am in no position to resolve these arguments, and it is unnecessary for me to do so in order to decide this case. But it helps to explain what comes next.

The rift between the claimant and the deceased

36. By the end of 2009 the claimant's evidence was that she had decided that she

> "was happy to speak to [the deceased] any time but … was not going to call her … and … was not going to come round".

In her evidence she explained this as

> "the way to try and reduce some of the tension that there was with [the first defendant]".

37. On the other hand, in her letter to the claimant's solicitor dated 19 May 2018, the first defendant said that

> "on New Year's Eve 2009 [the claimant] telephoned [the deceased] saying she was cutting all ties and not to contact her again".

Again, it is not necessary for me to decide exactly what happened, or why. The fact remains that there was very little contact between the claimant and the deceased thereafter.

38. According to the attendance note made by the deceased's solicitor Caroline Fletcher on 23 May 2012, when asked why she did not want the claimant to receive anything, the deceased

> "said that she had not spoken to her daughter for over a year. She does not feel that her daughter has shown any interest since her husband died. [The deceased] has not spoken to her daughter and she will not take her calls."

And, in a written statement signed by the deceased on 23 May 2012, to accompany her will, she wrote:

> "I have not had any contact with my daughter [ie the claimant] since January 2011. My daughter refuses to ring me and has told me that if I want to speak to her then I must ring her".

The deceased's finances

39. After the death of her husband, the deceased was reliant on her state pension. She had no form of private pension arrangement. Apart from her one-half share of the property, she had an ISA with the Halifax. She had a current bank account with the Post Office. The first defendant, who worked at the post office in Nailsea, used to withdraw money from the deceased's account. According to the claimant's witness statement, the first defendant withdrew money from their mother's account and kept it for herself. In the letters from the first defendant in the trial bundle the first defendant agrees that she withdrew money from the account, but only on the basis that her mother had authorised her to do so, and on the basis that she handed over the money so withdrawn to her mother. The claimant refers to their mother receiving letters and telephone calls from debt collection agencies, and even threats of court action. However, she also says that the deceased "was in denial about this", insisting "that everything was paid". The first defendant in one of her letters says she does not recall seeing any of the debt collection and chasing letters.

40. In the trial bundle there are a number of copy documents, provided by the claimant (and in some cases annotated by her), showing failures to pay direct debits, debt collectors' letters, and overdue utility bills. The first five pages concern attempted direct debits from the account of the late Mr James of insurance premiums for the property, in the months following his death. Two debt collectors' letters in November and December 2008 for a debt to the Post Office in the total sum of £180.22 are addressed to the deceased. It is not clear what this was for. But it appears that by the time of the first letter £80 had already been paid, and the claimant paid the remaining £100 of this debt.

41. In February 2009 the deceased received an overdue electricity bill of £574.34. (In her letter to the claimant's solicitor dated 19 May 2018 the first defendant made the point that the deceased used to leave the heating on all the time, so that her heating bills were higher than average.) It would appear that subsequently the deceased joined the electricity company's payment plan scheme, because in April 2009 she received a letter saying she had not made the instalment payment of £92. In the same month, the deceased received a letter from the Post Office about an overdue bill in the sum of £98.95 for telecom services.

42. Also in April 2009 the water company wrote to the late Mr James (whose name presumably remained on the account) about an overdue amount of £499.38, and stating that if full payment was not paid in 10 days the company proposed to take court action or send the account to a debt collection agency. There is a debt collection

agency letter of 13 December 2012 in relation to an overdue gas bill of £112.42. There is also a further bill dated 22 December 2012 in the sum of £352.40 (though that is based on an estimated reading). Finally, there is also a chasing letter from Care South about non-payment of invoices for care between November 2012 to March 2013, amounting to £1545.71.

43. With the exception of the letter and bill of December 2012 and the letter from Care South, all of these letters and invoices relate to a period of approximately 10 months after the death of the deceased's husband. I do not understand how the claimant reaches the conclusion that the first defendant was stealing the deceased's money. If (as the first defendant says in her letter) she was withdrawing cash from the deceased's Post Office account as and when the deceased asked for it, and giving it to her, the fact that some bills are not paid, especially in the period following the deceased's husband's death, does not demonstrate that the reason the bills were not paid was because the money had been stolen from the deceased. I bear in mind that the standard of proof in a civil case such as this one is the balance of probabilities, but the allegations against the first defendant are serious ones, and therefore cogent evidence is required to persuade the court that on the balance of probabilities that is what happened.

44. I do not so find. In my judgment, it is far more likely that, given the deceased's limited income, the significant amounts that she was spending on utilities, and the fact of her bereavement, she simply became confused, and failed to pay some bills which she should have paid, or indeed did not have the money with which to do so. So far as concerns the invoices from Care South, the first defendant says in her letter of 14 November 2018 to the claimant's solicitor that these were paid by her after their mother's death. They were not her responsibility, but that of the deceased. She may have overlooked them, or not had the money to pay them at the time. I note that in relation to the care provided by Sirona Care and Health (who supplied care in 2012-13), they obtained a standing order from the deceased in November 2012.

45. It appears that the post office current account used by the deceased did not offer the facility of direct debit payments. The claimant's evidence is that she sought to persuade the deceased to open a regular bank account with the National Westminster Bank, in order to be able to set up direct debits for her utility bills. Her further evidence is that the deceased refused to do this, on the basis that the first defendant had reminded her that she (the deceased) obtained "points" for staying with the Post Office, and if she changed her bank she would lose them. I accept this evidence, as far as it goes. But there is nothing to show that this was not the decision of the deceased herself, even if informed by what the first defendant told her. Indeed, the claimant's further evidence (which I accept) is that, when the claimant complained about her sister's behaviour to their mother (presumably in her sister's absence), she "was in complete denial", and the claimant "was quite hurt because her response was that [the first defendant] had done nothing wrong and I was jealous of her". In my judgment this is a significant statement.

The bank's offer

46. On 10 February 2010 (by which time the debt exceeded £240,000) the bank wrote to Mr James, not knowing he had died, offering to settle the debt for £50,000. At that time the bank (which was part of the Royal Bank of Scotland group) was dealing with

the aftermath of the financial crisis of 2008 and of the near collapse of the whole group under the leadership of Fred Goodwin (who was replaced in early 2009). Mr Jones quite properly emphasises the fact that, at this time, the bank was not threatening any possession proceedings.

47. However, I have no doubt that, notwithstanding this, the deceased was very anxious to take advantage of this opportunity to provide herself with security in relation to her home that did not depend on the continued goodwill of the bank. The evidence put forward in the witness statement of Sarah Ashman on behalf of the claimant was that the claimant explained to her that the sum of £50,000 had to be paid to the bank, but

> "that [the claimant] felt that she was letting her mother down because she couldn't afford to contribute to that sum",

as she had other commitments, in particular to her own family and

> "she didn't have the money to spare".

48. That evidence is consistent with the attendance note made by Charlotte Matthews of Gould and Swain solicitors of the meeting with the deceased and the first defendant on 18 October 2011, and with the letters from the first defendant to the claimant's solicitor dated 19 May 2018 and 20 October 2018 (in the trial bundle) to the effect that the deceased consulted both her daughters asking for help to raise the £50,000, but that the claimant (for whatever reason) did not contribute. It is also consistent with the witness statement of Jennifer Burrell, although there it is clear that the source of the information was the first defendant herself. On the other hand, it is clear from that correspondence, taken together with the letters of the deceased's solicitor Mr Floris to the deceased dated 8 April 2010 and 4 May 2010, his attendance note of 18 August 2010, his letter of 3 September 2010 to the deceased and the deed of assignment of 15 October 2010 itself (all in the trial bundle), that the final sum paid to the bank was only £20,000, negotiated down from £50,000 by the first defendant, and that that sum was actually raised and paid by the defendants.

The assignment

49. It is also clear from those documents that the deceased had agreed to transfer to the defendants her own half share in the beneficial interest in the property that she had received from her husband under the deed of trust of 2007. It seems that transaction was structured in this way because the legal estate was still outstanding in the name of the deceased Charles James, and there was still difficulty (apparently arising from the existence of the charge in favour of the legal aid commission) with transferring the legal title into anyone else's name. What this means is that the defendants paid £20,000 to clear the title of the property of the charge of the value of about £240,000, which was probably more than the property was worth unencumbered at the time. If the bank had waited until the deceased died, and then sold the house as mortgagee, there would probably have been nothing for the deceased pass on under her will (even without all the additional interest that would have accrued in the meantime). But, then, the deceased did not want the house to be sold anyway, because her husband built it.

50. So the result of the transaction was that deceased ended up with an asset which was unencumbered (save for the small legal aid charge, which did not bear interest), and gave half of this asset to the defendants in recognition of their assistance. Accordingly, the transaction benefited her so that, instead of having something which had no value, and her tenure of which was precarious, she ended up with more or less the full value of half the property, and much greater security of tenure.

51. The deed of assignment recited the declaration of trust of 14 May 2007 by which the deceased became entitled to a 50% share in the property. It also recited that the deceased had agreed to assign and the defendants had agreed to take the deceased's 50% share in consideration of their paying £20,000 to the bank in full and final satisfaction of a legal charge dated 19 August 1991 registered against the property. It further recited that the trustee of the legal estate was the late Charles James, who died without leaving a will so that his interest in the property would pass to the deceased, who was in the process of making an application for probate, when the legal ownership of the property would be transferred to the deceased hold on trust for herself and the defendants in agreed proportions, *ie* 50% for the deceased and 50% for the defendants.

52. The operative clauses contained an assignment of the deceased's 50% interest to the defendants, and provided that any income obtained from the property would be divided 50-50 between the deceased and the defendants. The deed also provided as follows:

> "6.1. [The deceased] shall be entitled to exclusive occupation of the property for the remainder of her life without payment of rent or charge to the [defendants].
>
> 6.2. [The deceased] shall be responsible for any outgoings on the property during her occupation".

53. The claimant says that the deceased and her solicitors did not investigate alternative sources of finance, so that she would have kept 100% of the value of the property and incurred a debt of only £20,000. But the deceased tried her family, and only the defendants were willing to contribute. Indeed, it was the efforts of the defendants that resulted in the reduction of the price from £50,000 to £20,000. As for equity release schemes, the obvious problem was that the legal title was outstanding in the name of her deceased husband. That was not insuperable in law, but undoubtedly it complicated matters.

54. The deceased had the benefit of advice from solicitors on the transaction. It is correct that there is no reference in either the attendance note of 18 August 2010 or the letter of 3 September 2010 to advice on the merits of the transaction. But these documents set out the transaction and its effects very clearly, including what the deceased was giving up by entering into it. If the deceased had any doubts about it, or had not wished to go through with it she could have said so to her own solicitor, and that would have been that. Indeed, in the letter of 3 September 2010 Mr Floris the deceased's solicitor advised that the deceased's signature should be witnessed by her doctor, who would be able to confirm that when it was signed the deceased presented as having the capacity to do so. It was expressly stated that the solicitor considered this important as he wanted "to avoid any risk of challenge by [the claimant]".

55. The claimant attacks these documents on the basis that the reality was that the solicitor was acting for both the deceased and the first defendant, which would give rise to an obvious conflict of interest. Yet, in the letter from the deceased solicitor to her dated 8 April 2010, he had made clear that

> "I am unable to act for both you and your daughter in this matter as it could give rise to a conflict of interest. I must therefore advise that your daughter obtain independent legal advice and I shall be more than happy to suggest a couple of local firms."

It is clear from the subsequent correspondence that the first defendant was in fact not separately advised. The claimant argues from this that therefore the deceased's solicitor was acting for all parties. I do not think that this follows, and I do not so find. In my judgment, the deceased's solicitor was acting in the interests of the deceased, and not in the interests of any other party. The fact that the first defendant paid the sum required to discharge the mortgage to the bank, and indeed any other costs, does not alter the obligation of the solicitor to act in the interests of the solicitor's own client and no one else's. It is a daily occurrence that solicitors are retained to advise a particular client, but at the expense of some other person.

56. It is also right (as Mr Jones says) that the solicitors appear to have provided no advice to the deceased on any protection she might have against the defendants themselves. However, the legal estate was still outstanding in the name of the late Mr James, and his 50% share had passed to the deceased on intestacy. She occupied the property in right of that interest. In my judgment, given the assistance rendered by the defendants to the deceased so far, it seems very unlikely that the defendants would ever have made an application for sale of the property under the Trusts of Land and Appointment of Trustees Act 1996. Even if they had made such application, in the light of clause 6 of the deed of assignment, which the defendants themselves executed, any such application would be unlikely to succeed. So whilst it would no doubt have been better if the solicitors had pointed these matters out to the deceased, I do not think that the failure to do so makes this a case where the deceased was not advised professionally on the transaction.

57. Mr Jones fairly points out that the letters from the deceased's solicitor to her dated 3 September 2010 and 4 October 2010 are addressed to her at the first defendant's home address in East Harptree. Indeed, in the trial bundle there is a copy of the original letter dated 4 October 2010 (seeking further instructions, as the deadline for payment to the bank had passed) which has been endorsed in handwriting by the first defendant with the words "Sorry for delay in sending money but my husband has been in hospital due to accident," and signed "Heather". On the material before me it is clear that the deceased spent a lot of time at the first defendant's home after the death of her husband, generally at the weekends but also at Christmas and on other occasions. But I have no information as to why on these occasions letters were sent to the deceased at the first defendant's home rather than to the property.

The disputed will

58. Turning to the making of the disputed will, the first defendant took the deceased to Gould and Swayne solicitors on 18 October 2011, where they met Charlotte Matthews. The first defendant explained some of the background and then left the

room whilst there Ms Matthews interviewed the deceased. According to her attendance note of the meeting, the deceased told Ms Matthews that

> "she was adamant she did not want [the claimant] to inherit as she did nothing for her mother and no longer wants to see her, she said her daughter Heather [the first defendant] does everything for her".

59. The deceased did not wish to leave any specific legacies, or give money to charity. But she said

> "she would like to leave some money to [the claimant's] children … and I asked how much and she said to ask [the first defendant], I told [the deceased] it was her choice not [the first defendant's] and she said perhaps £2000 but she wanted me to talk to [the first defendant] about it."

The attendance note continues:

> "She said she wanted to leave the house and everything to [the first defendant] and I asked if she wanted to include [the claimant] and she said she did not. … "

60. When the first defendant returned Ms Matthews explained to her that the deceased wanted to discuss her will with her, and explained what the deceased wanted in her will. The first defendant asked the deceased where she would get the money to pay legacies to the claimant's children without selling the house, which she (the deceased) did not want to do. Ms Matthews

> "explained it was entirely up to [the deceased] about what she wanted in her will but she said she did not want the house to be sold, I suggested that she included all her grandchildren as a substitution if [the first defendant] died if she did not want to leave them a legacy and she agreed."

61. The note continues:

> "Mrs James is in her eighties but she knew exactly what she was doing when she made her will, she explained why she was not leaving her daughter anything in her will and she was sound of mind when writing her will.
>
> I explained that we should draw up a statement as evidence in case [the claimant] contests the will, I said it would not protect the will but it is evidence, [the deceased] said she would like me to do this. I asked what she would like me to include in the statement and she said that she has left her daughter out of the will because she does not see her and she does not even ring her.
>
> I also suggested that they may want to get a doctors note showing that [the deceased] knew what she was doing. I said I believed she knew what she was doing but if [the claimant] did contest the will it is more evidence. … "

62. The next day, Ms Matthews' colleague Caroline Fletcher dictated a letter to the deceased which was sent out on 20 October 2011. This referred in particular to the deceased's desire not to benefit the claimant under her will. Ms Fletcher said (in part):

> "I strongly advise that we obtain a medical opinion from your doctor confirming that you understand the nature and contents of your will. If there is a future claim this will then be evidence as to your capacity at the time of making your will.
>
> […]
>
> I would also recommend putting a statement with your will explaining why you have not left [the claimant] any part of your estate. Whilst the statement will not guarantee to stop any claim made by your daughter, it can again be used as evidence of your wishes and intentions at the time of making your will."

63. Ms Fletcher drafted a will for the deceased and sent her the draft by letter dated 27 October 2011. The letter set out the main terms of the draft will. It also enclosed a draft statement setting out the reasons why the will made no provision for the claimant. She further advised that a medical opinion be obtained from the deceased's doctor and asked for the details so that she could send the doctor a draft of the will. The deceased must have done this, because as Fletcher wrote to the deceased's GP, Dr Emily Gilbert on 31 October 2011 are which enclosed a copy of the draft will and sought an opinion as to the deceased's mental capacity to make it.

64. The will file contains a number of chasing letters, but a telephone attendance note by Ms Fletcher dated 25 April 2012 records that the deceased had seen Dr Gilbert

> "who has said that she is fine and understands what she is doing in relation to her will".

Mr Jones says that the attendance note shows the first defendant giving instructions to the solicitor about the will. In fact, there are no substantive instructions in the attendance note. What it does show is that the first defendant was acting as the agent of the deceased in passing information between the deceased and her solicitor. In my judgment, the first defendant was not independently giving instructions to the solicitor.

65. In the meantime, at Christmas 2011 the deceased was taken to hospital in Bath following a fall at home. She spent Christmas in hospital. After Christmas she was discharged back home.

66. Dr Gilbert wrote to as Fletcher by letter dated 10 May 2012 in which she said that the deceased

> "has been a patient of this practice for many years and I have known her for the last 10 years I have been working here. I saw her recently both with her daughter Heather and on her own and discussed at length the changes to her will. I fully understand that this will may be contentious but I can confirm that [the deceased] does have full mental capacity, although she is a little deaf, and is fully aware of her actions."

67. As Mr Jones says, this letter makes no reference to *Banks v Goodfellow*. However, the letter of instruction from the solicitors to Dr Gilbert dated 31 October 2011 sets out the main points of the test laid down in that case. I must therefore assume that the doctor took those points into account in rendering her opinion. It is also true that the

letter does not refer to the deceased's wishes as such. But it does say that the doctor discussed the changes to her will which the deceased wished to make, which must have included her wishes.

68. In her witness statement, Jennifer Burrell gives evidence that she was present when the first defendant took the deceased to the solicitors for her will to be executed, and that the deceased expressed a refusal to go. At the hearing the first defendant challenged this evidence, on the basis that she took the deceased to the solicitor's office from the property (that is, the deceased's own home) and not from her own home. Yet Jennifer Burrell was the next-door neighbour of the first defendant, and not of the deceased. More significant, in my view, is the solicitor's attendance note of the meeting which she had at her office with the deceased, in the absence of the first defendant. This note (and the accompanying checklists) indicate that the deceased was happy to deal with the terms of her will with the solicitor, and to execute it, and she "did not appear agitated", as one might have expected if she really was reluctant to make this will. I doubt that the deceased refused in any meaningful sense to go to the solicitors' office. If there was any such reluctance, then I would attribute that to the deceased's being comfortable where she was, talking to Ms Burrell, in preference to going out to meet the solicitor. I certainly do not accept that any such reluctance indicated that the deceased did not wish to make the new will.

69. Ms Fletcher met the deceased for the first time, together with the first defendant, on 23 May 2012, when she attended the offices of her solicitors to execute her will. Ms Fletcher saw the deceased, who was in a wheelchair, on her own. But she had left her glasses at home, and asked Ms Fletcher to read it out aloud, which Ms Fletcher did. She then asked the deceased whether her funeral wishes were correct and explained what happened to her estate according to the draft will. She asked the deceased about her assets, and in particular whether she owned the house outright. Mr Jones says that it is not clear whether the deceased appreciated that she only owned half the property. I agree that the attendance note does not make this clear. But it does not say that she did not. The checklists attached to the attendance note mention the *Banks v Goodfellow* test about the extent of the property of the person making a will. The solicitor has written next to this "discussed with client". A second list states "discussed assets". On this basis, I find that the deceased did not think she owned the whole property, as if she had this would surely have been recorded.

70. Ms Fletcher asked about the first defendant having paid money towards the house, and the deceased told her that

> "there were some debts after her husband had died and that [the first defendant] had sorted it out. She now lived in the house on her own and wanted [the first defendant] to have the whole house when she died."

71. The attendance note goes on:

> "[The deceased] said that she had another daughter [the claimant] but she had not been included in the will as she did not want her to have anything I asked why she did not want her daughter [the claimant] to receive anything. [The deceased] said that she had not spoken to her daughter for over a year. She does not feel that her daughter has shown any interest since her husband died.

> [The deceased] has not spoken to her daughter and she will not take her calls.
>
> [The deceased] then said that her daughter [the first defendant] has been very helpful since her husband's death and has cared for her and she therefore wants to make sure that she gets everything.
>
> […]
>
> I also explained that we had prepared a statement for [the deceased] to sign setting out the reason why she had not included her daughter [the claimant] in her will.
>
> I then read through the statement that had been prepared. The contents of the statement repeated what [the deceased] had just told me [the deceased] had not seen the statement whilst in my company.
>
> Having read through the will and the statement I asked [the deceased] whether she was happy to sign them both. She confirmed that she was."

72. Ms Fletcher went to find a second witness. When she arrived, Ms Fletcher asked the deceased again whether she was happy to sign and she confirmed that she was. She then signed her name, apologising for its being shaky. Ms Fletcher and the other witness witnessed her signature. The deceased then signed the additional statement. This additional statement is also dated 23 May 2012 and sets out in summary form the effect of the will that the deceased had just made. Then it continues:

> "At the time of making my will I was advised to write a short statement as to why I have not given my daughter [the claimant] any share of my estate
>
> I have not had any contact with my daughter since January 2011. My daughter refuses to ring me and has told me that if I want to speak to her then I must ring her
>
> I no longer have a relationship with my daughter and I therefore do not intend her to benefit from a share in my estate".

73. I have already mentioned the checklists attached to the attendance note of the solicitor. They deal with a number of matters, including testamentary capacity. But the solicitor also notes that the deceased "seemed relaxed", and "answered all questions put to her". Moreover, in a section headed "Undue Influence," the solicitor is asked the following questions:

> "Would you consider the client to be vulnerable to undue influence? Does anything in the discussion raise any suspicions of undue influence in your mind? Is there anything in the proposed gifts in the will or disclosed lifetime gifts that gives rise to a concern about undue influence?"

74. The answers given by the solicitor are as follows:

> "Client of a certain age with certain requirements who is cared for by one daughter over another. Asked daughter to leave meeting which she was happy to

> do and client was happy to see [solicitor] alone also. Noted that [earlier solicitor] also asked daughter to leave during initial meeting."

From this, I infer that the only circumstance which the solicitor thought worth noting was the fact that the deceased's needs were being met by one daughter rather than another, but that there was nothing else. I add only that I am entirely satisfied on the basis of this material that the deceased had capacity to make it, and that it was duly executed.

Subsequent events

75. Between November 2009 and October 2012 the deceased was receiving care from Care South whilst living in the property. In October 2012, the deceased moved from the property to a council bungalow in East Harptree, near the first defendant, where she received care from Sirona Care and Health. She lived there until May 2013, when she was admitted to hospital in Bath with gallbladder issues. A safeguarding alert had however been raised for the deceased on 4 June 2013, based on a referral by the claimant, who (to quote from the minutes of a Safeguarding Adults Strategy Meeting held on 10 June 2013)

> "believes her mother's finances are being used inappropriately and she felt her mother was at risk of financial abuse from her sister [the first defendant]. [The claimant] is going to provide some paperwork which will probably be quite old because she has not had contact with her mother for a few years … ".

76. It appears from the minutes of the meeting that, by the time of this meeting, the deceased had been discharged from hospital and had moved to Clare Hall Nursing Home, as she was unable to return home. It is also clear that her health was deteriorating, and that (whether or not those around her appreciated this) she was in fact dying. According to the documents in the trial bundle, the first defendant visited her every day. The claimant visited the deceased at the nursing home with her son on one occasion before she died, apparently at the deceased's own request.

77. The claimant's evidence (which is supported by other documents in the file, and which I accept) was that in April 2013 she had received a letter saying that the deceased owed about £1545 for unpaid care invoices. She contacted social services, and subsequently had a meeting with the social worker, Jenny Wilmot. The social services database records the sending of this letter on 11 April 2013. It also records the claimant's telephone conversation with social services on 12 April 2013 as follows:

> "[The claimant] rang and advised that she has nothing to do with [the deceased] or her sister [the defendant] now for over three years. [The deceased] has apparently signed over POA and the house to [the first defendant] who has since cut [the claimant] out of any inheritance. [The claimant] advised that [the first defendant] is a rip off merchant and does not deal with her mother's accounts. Apparently there have been various occasions of court action being threatened due to bills not being paid. [The first defendant's] contact details have now been obtained to liaise with."

78. At the meeting on 10 June, Jenny Wilmot is noted as having

> "further reported a concern that there was a second property, Lancar View [sic], which [the first defendant] had previously disclosed that [the deceased] and she owned. Then she said this was not the case and that she owns 50% of the property in the bank and the other half. In October 2012 [the first defendant] fraudulently signed documentation to BANES Council Finance Team. The concern now is that the property is being privately rented."

No details are given of where this concern came from. No further details are given of the apparently inconsistent statements by the first defendant about the ownership of the property. No detail is given of the documentation which it is said the first defendant "fraudulently signed", or why, if she did sign it, it was fraudulent of her to do so.

79. Jenny Wilmot also stated that the first defendant

> "informed her sister that she had POA for her mother then she retracted the statement when she spoke to [Jenny Wilmot]. [The first defendant] keeps presenting conflicting views."

No further details of the "conflicting views" was given. She further reported

> "that [the claimant] contacted the Duty Desk at Keynsham Health Centre regarding concerns that care fees to Care South had not been paid. Also previously her daughter [the claimant] expressed her concerns to her mother in 2009 in respect of post office statements and bills not being paid. [The deceased] was spoken to by [the claimant] regarding this but she disregarded concerns".

80. In parenthesis at this point, I note that in paragraph 43 of the particulars of claim, it is pleaded:

> "At around this time, [the first defendant] dishonestly represented to [the claimant] that [the first defendant held a power of attorney on behalf of [the deceased]. This representation was not true: [the first defendant] did not hold the power of attorney on behalf of [the defendant]."

So far as I can see, there is no evidence in any of the witness statements before the court to support this pleading. Certainly the claimant does not say this in her witness statement. In the minutes to the meeting of the safeguarding adults review held on 10 June 2013, there is a reference to the claimants having told social services that the first defendant received a power of attorney from the deceased, but that is simply an unsupported assertion of the claimant. In the first defendant's letter to the claimant's solicitor dated 19 May 2018 she denied having any power of attorney. My conclusion is that the allegation in paragraph 43 of misrepresentation is not made out.

81. Turning back to the meeting of 10 June 2020, the minutes say that it was also informed that there was an outstanding debt to Social Services of some £2000, and fees outstanding to Care South of £1545.71. It was

> "further reported that possibly [the deceased] was in receipt of housing benefits and had her council tax paid for her. The meeting discussed the issue that if [the

> deceased] is in receipt of benefits, then the property at Lancar View [sic] should not be rented out."

Jenny Wilmot was asked

> "to double check if [the deceased] is in fact in receipt of housing benefits".

82. Later in the meeting,

> "Representatives discussed unexplained withdrawals from [the deceased]'s account in 2009. [The assistant team manager] informed representatives that the monetary funds would be put into the account and then this would be withdrawn as cash. [The chair] noted that cash withdrawals are harder to trace. [The assistant team manager] further reported that [the claimant] had stated that the cash withdrawals were made close by [the first defendant]'s place of work. [The chair] stated there maybe a need for the police to be informed. It is unclear if [the deceased] was aware of this act and/or consented to it.
>
> [The chair] informed representatives in regards to the Lancar View [sic] property, financial documentation needs to be ascertained and reviewed. [Jenny Wilmot] confirmed that the Land Registry was consulted. Lancar View was registered under Mr James's name. No will was in place. When Mr James died the property would pass to [the deceased]."

83. A further reference to the property was this:

> "Representatives discussed Lancar View [sic] was available to rent from 20.01.2013, monthly rental costs recorded as £850. The need to double check if the property is still up for rent."

The meeting recorded the summary of risks as follows:

> "[The deceased] owing outstanding debts to Care South, Social Services, and Clarehall Nursing Home.
>
> Deprivation of Assets.
>
> [The first defendant] using her mother's monetary fund's inappropriately and her placement at Clarehall Nursing Home put at risk".

84. It appears from the minutes of a subsequent meeting held on 3 July 2013 that a significant concern (according to the minutes which were in the trial bundle) was that it was suspected that the property was being let and that therefore the deceased was not eligible for council funding for her care. The second meeting was told

> "[The claimant] has stated that she now thinks the property in Farrington Gurney is being rented out. [A team leader at the meeting] provided evidence to the meeting that the property has been prepared for rental and is currently being marketed as a rental property by Andrews Estate Agents".

The detail of the evidence presented was however not recorded.

85. At the same time, allegations were also recorded that "inconsistencies" had been made in the statements made by the first defendant, for example that

> "we have no evidence that [the first defendant] has in fact ever paid the £50,000 (that [the first defendant] claims) to give [the first defendant] a stake in the property at Farringdon Gurney. [The first defendant] has also stated that [Charles James] had been bankrupt and that [the deceased] was also in financial trouble but we have no evidence to prove this."

These are not in fact inconsistencies. And a lack of written or other evidence to substantiate what the first defendant said is not in itself proof of anything.

86. The meeting was also told:

> "The seriousness of [the deceased's] condition fluctuates day-to-day but in general she has deteriorated. It has been established that [the deceased] does not have capacity to manage her financial affairs and counsel will make an application for deputyship due to the concerns raised about [the first defendant's] handling of her mother's finances e.g. unpaid care bills to Care South and B&NES Council."

87. The review safeguarding plan included the following:

> "An urgent interim order is to be applied for to the Court of Protection and [the assistant team manager] has been in touch with the police about any possible fraud."

88. In addition, the assistant team manager

> "stated that [the first defendant] has not yet been confronted about our concerns. She has been questioned but not asked directly about the money owed. A direct debit was set up in October for the money to be paid to B&NES Council. We are not aware that [the first defendant] has offered an explanation as to why she has not paid her mother's care bills."

89. Finally, in the section dealing with the views of the adult at risk and other family members, it is stated:

> "[The claimant] wants her mother's money protected and wants us to take action to protect her mother's assets and remove her sister's right to manage [the deceased]'s money."

90. The deceased died at Clare Hall Nursing Home on 18 July 2013. She was then aged 84 years and eight months. The attending doctor certified the cause of death as "1(a) Frailty of Old Age". The informant for registration was the first defendant. Three days prior to her death, the paperwork for an application for an interim deputyship order had been filed with the Court of Protection. The application had not been heard by 18 July, and so it lapsed. The claimant says that she was informed of her mother's death only by the nursing home, and not by the first defendant. She also says that the first defendant told her she would not be welcome at the funeral. It is not necessary for me

to decide whether this is true or not. In the event she did not attend, but her son Christopher did.

91. There was a further safeguarding adults review meeting on 16 August 2013. In the light of the deceased's death,

> "It was agreed that the case no longer needs to be a Safeguarding matter and is closed as of 16 August 2013. The allegations are not substantiated because we never got to the conclusion of an investigation. [The deceased] died while the Council was in the process of applying for a Deputyship so we could not access the information that could have provided evidence of any financial mismanagement."

It is also clear from this meeting that they were concerned to ensure that they had done all that they should, because it is recorded that the claimant had threatened to sue the local authority for failing in their duty to the deceased.

Law

92. The relevant law concerns the doctrines of undue influence and want of knowledge and approval in relation to wills, and the doctrine of undue influence, in relation to *inter vivos* transactions. Logically, we only reach the question of undue influence in relation to *inter vivos* transactions once the will is established to be invalid. This is because, if the will is valid, the claimant is not entitled to share in the estate of the deceased, and cannot complain of the inter vivos transactions in right of the estate. It is only if the will is invalid, and the earlier will is valid, or the deceased died intestate, that the claimant benefits from the deceased's estate. Accordingly, I begin with the doctrine of want of knowledge and approval in relation to wills.

Want of knowledge and approval

93. Mr Jones cited to me the well-known statement of Norris J in *Wharton v Bancroft* [2011] EWHC 3250 (Ch):

> "28. The Daughters in their Re-Re-Re-Amended Defence and Counterclaim assert that Mr Wharton [their father, the testator] did not know or approve the contents of the 2008 Will. My approach to that issue (informed by the familiar authorities as reviewed and commented upon by the Court of Appeal in *Gill v Woodall* [2010] EWCA Civ 1430) is as follows:-
>
> > (a) The assertion that Mr Wharton did not 'know and approve' of the 2008 Will requires the Court, before admitting it to proof, to be satisfied that Mr Wharton understood what he was doing and its effect (that is to say that he was making a will containing certain dispositive provisions) so that the document represents his testamentary intentions.
> >
> > (b) The burden lies on Maureen [the beneficiary of the disputed will] to show that Mr Wharton knew and approved of the 2008 Will in that sense.
> >
> > (c) The Court can infer knowledge and approval from proof of capacity and proof of due execution (neither of which the Daughters now dispute).

> (d) It is not in issue that the 2008 Will was read over to Mr Wharton. The Court of Appeal observed in *Gill v Woodall* at paragraph [14], that, 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 testator, raises a very strong presumption that it represents the testator's intentions at the relevant time.
>
> (e) But proof of the reading over of a will does not *necessarily* establish 'knowledge and approval'. Whether more is required in a particular case depends upon the circumstances in which the vigilance of the Court is aroused and the terms (including the complexity) of the Will itself.
>
> (f) So the Daughters must produce evidence of circumstances which arouse the suspicion of the Court as to whether the usual strong inference arising from the manner of signature may properly be drawn.
>
> (g) It is not for them positively to prove that he had some other specific testamentary intention: but only to lead such evidence as leaves the court not satisfied on the balance of probabilities that the testator understood the nature and effect of and sanctioned the dispositions in the will he actually made. But this evidence itself must usually be of weight, because in general the Court is cautious about accepting a contention that a will executed in the circumstances described is open to challenge.
>
> (h) Attention to the legal and evidential burden can be decisive where the evidence is in short supply. But in other circumstances identifying the legal and evidential burden is simply a tool to enable the probate judge to identify and weigh the relevant elements within the evidence, the ultimate task being to consider all the relevant evidence available and, drawing such inferences as the judge can from the totality of that material, to come to a conclusion as to whether or not those propounding the will have discharged the burden of establishing that the document represents the testamentary intentions of the testator."

94. The judge further said in that case:

> "29. A challenge on the grounds of want of knowledge and approval is not precluded by the Daughters' admission of testamentary capacity. There are plainly cases in which the Court will accept that the testator was *able* to understand what he was doing and its effect at the time when he signed the document but needs to be satisfied (by something other than inference from the fact of capacity and due execution of the will) that he did *in fact* know and approve the contents, *ie* understand what he was doing and its effect: see *Hoff v Atherton* [2004] EWCA Civ 1554 at [64]."

95. In the present case, as I have already said, there is no challenge to the testamentary capacity of the deceased. Nor is there any challenge to the due execution of the will. I have found both that there was capacity and that the will was duly executed. The court is therefore able to infer knowledge and approval. But as Peter Gibson LJ said in *Fuller v Strum* [2001] EWCA Civ 1879, [33],

> "in a case where the circumstances are such as to arouse the suspicion of the court the propounder must prove affirmatively that knowledge and approval so as to satisfy the court that the will represents the wishes of the deceased."

I will come back to this point in due course.

96. This is a claim where the claimant has brought the claim, seeking revocation of the grant of probate to the first defendant. However so far as concerns the question whether the deceased knew and approved of the contents of her will, I am satisfied that the burden lies on the first defendant to show knowledge and approval, rather than for the claimant to show a lack of such knowledge and approval. This is because the first defendant is propounding the will. If she had brought the claim for probate in solemn form, there could be no doubt that she would bear this burden. I do not think it can be different if she obtains probate in common form and then in these revocation proceedings the question is raised as to whether the will is valid. Of course, a case will turn on the burden of proof only rarely, where the evidence is not otherwise sufficient to allow the court to make a positive finding.

Undue influence: testamentary gifts

97. In relation to undue influence in respect of wills, Norris J in *Wharton v Bancroft* went on to say:

> "30. The Daughters have from the outset asserted that the execution of the 2008 Will was obtained by the undue influence of Maureen so that Mr Wharton executed a document that was contrary to his wishes. The relevant principles have recently been summarised by Lewison J in *Edwards v Edwards* [2007] WTLR 1387 and by Morgan J in *Cowderoy v Cranfield* [2011] EWHC 1616, and it may be taken that I have their summaries well in mind. In the instant case I have had particular regard to the following:-
>
> > (a) Execution of a will as a result of undue influence is a fact that must be proved by those who assert it.
> >
> > (b) They must establish that there was coercion, pressure that has overpowered the freedom of action of the testator without having convinced the will of the testator. If the evidence only establishes persuasion, then a case of undue influence will not be made out.
> >
> > (c) Where the line between 'persuasion' and 'coercion' is to be drawn will in each case depend in part upon the physical and mental strength of the testator at the time when the instructions for the will are given. Was the testator then free and able to express his own wishes? Or was the testator then in such a condition that he felt compelled to express the wishes of another?
> >
> > (d) In many cases the fact of undue influence cannot be proved by the direct evidence of witnesses but is an inference to be drawn from other proven facts. It is sometimes said that an inference of undue influence should not be drawn unless the facts are inconsistent with any other hypothesis. The danger of that formulation is that it may cause one to lose sight of the

relevant standard of proof: so I have paid particular attention to what was said by Morgan J at paragraph [141] of *Cowderoy*:-

> 'The requisite standard is proof on the balance of probabilities but as the allegation of undue influence is a serious one, the evidence required must be sufficiently cogent to persuade the Court that the explanation for what has occurred is that the testator's will has been overborne by coercion rather than there being some other explanation.'

(e) The fact of undue influence is in truth a complex of facts involving the establishment (by proof or inference) of the opportunity to exercise influence, the actual exercise of influence, the actual exercise of influence in relation to the will, the demonstration that the influence was 'undue' (*ie* went beyond persuasion), and that the will before the Court was brought about by these means."

(See also *Schomberg v Taylor* [2013] EWHC 2269 (Ch), [29]-[31].)

98. Mr Jones also referred me to comments by Lewison J in *Edwards v Edwards* [2007] WTLR 1387, [47], but most of these are in fact summarised above. I would, however, emphasise the following particular comments of Lewison J, namely:

> "(i) in the case of the testamentary disposition of assets, unlike a lifetime disposition, there is no presumption of undue influence;
>
> […]
>
> (vi) The physical and mental strength of the testator are relevant factors in determining how much pressure is necessary to overbear the will. …
>
> […]
>
> (ix) The question is not whether the court considers that the 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".

99. In *Schrader v Schrader* [2013] EWHC 466 (Ch), Mann J held that:

> "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."

(See also *Carapeto v Good* [2002] EWHC 640 (Ch), [126].)

100. I referred above to the special rule regarding the burden of proof in relation to want of knowledge and approval of the contents of a will. As the cases make clear, undue

influence is different. In the case of a will, it is never presumed, but has always to be proved, by the person who alleges it. In the present case, that means that it is the claimant who must prove that the will was procured by undue influence.

Undue influence: inter vivos transactions

101. The law on undue influence in *inter vivos* transactions is not the same as in relation to wills. The leading case on such undue influence is *Royal bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773. In that case Lord Nicholls (whose speech, as Lord Bingham said at [3], "commands the unqualified support of all members of the House") said:

> "13. Whether a transaction was brought about by the exercise of undue influence is a question of fact. Here, as elsewhere, the general principle is that he who asserts a wrong has been committed must prove it. The burden of proving an allegation of undue influence rests upon the person who claims to have been wronged. This is the general rule. The evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship, and all the circumstances of the case.
>
> 14. Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof. On proof of these two matters the stage is set for the court to infer that, in the absence of a satisfactory explanation, the transaction can only have been procured by undue influence. …
>
> […]
>
> 16. Generations of equity lawyers have conventionally described this situation as one in which a presumption of undue influence arises. This use of the term 'presumption' is descriptive of a shift in the evidential onus on a question of fact. When a plaintiff succeeds by this route he does so because he has succeeded in establishing a case of undue influence.
>
> […]
>
> 18. The evidential presumption discussed above is to be distinguished sharply from a different form of presumption which arises in some cases. The law has adopted a sternly protective attitude towards certain types of relationship in which one party acquires influence over another who is vulnerable and dependent and where, moreover, substantial gifts by the influenced or vulnerable person are not normally to be expected. Examples of relationships within this special class are parent and child, guardian and ward, trustee and beneficiary, solicitor and client, and medical adviser and patient. In these cases the law presumes, irrebuttably, that one party had influence over the other. The complainant need not prove he actually reposed trust and confidence in the other party. It is sufficient for him to prove the existence of the type of relationship.

> 19. It is now well established that husband and wife is not one of the relationships to which this latter principle applies. In *Yerkey v Jones* (1939) 63 CLR 649, 675 Dixon J explained the reason. The Court of Chancery was not blind to the opportunities of obtaining and unfairly using influence over a wife which a husband often possesses. But there is nothing unusual or strange in a wife, from motives of affection or for other reasons, conferring substantial financial benefits on her husband. Although there is no presumption, the court will nevertheless note, as a matter of fact, the opportunities for abuse which flow from a wife's confidence in her husband. The court will take this into account with all the other evidence in the case. …
>
> 20. Proof that the complainant received advice from a third party before entering into the impugned transaction is one of the matters a court takes into account when weighing all the evidence. The weight, or importance, to be attached to such advice depends on all the circumstances. In the normal course, advice from a solicitor or other outside adviser can be expected to bring home to a complainant a proper understanding of what he or she is about to do. But a person may understand fully the implications of a proposed transaction, for instance, a substantial gift, and yet still be acting under the undue influence of another. Proof of outside advice does not, of itself, necessarily show that the subsequent completion of the transaction was free from the exercise of undue influence. Whether it will be proper to infer that outside advice had an emancipating effect, so that the transaction was not brought about by the exercise of undue influence, is a question of fact to be decided having regard to all the evidence in the case."

102. So if the claimant proves (i) *either* (a) that the relationship between the deceased and the first defendant was one of those protected by the law, *or* (b) that the deceased reposed trust and confidence in the first defendant, *and* (ii) that the transaction is one which calls for explanation (in Lord Nicholls' words "the transaction is not readily explicable by the relationship of the parties"), the court may infer, in the absence of satisfactory evidence to the contrary, that the transaction was procured by undue influence. Mr Jones argues that where the relationship is a protected one it automatically gives rise to a presumption of *undue* influence. I cannot accept this. Although it is consistent with the old cases referred to by Mr Jones (*Hunter v Atkins* (1834) 3 My & K 113; *Plowright v Lambert* (1885) 52 LT 646), it is inconsistent with the speech of Lord Nicholls in *Etridge (No 2)*, now the leading case.

103. Lord Nicholls dealt with this very point when he said:

> "21. As already noted, there are two prerequisites to the evidential shift in the burden of proof from the complainant to the other party. First, that the complainant reposed trust and confidence in the other party, or the other party acquired ascendancy over the complainant. Second, that the transaction is not readily explicable by the relationship of the parties.
>
> 22. Lindley LJ summarised this second prerequisite in the leading authority of *Allcard v Skinner* 36 Ch D 145 , where the donor parted with almost all her property. Lindley LJ pointed out that where a gift of a small amount is made to a person standing in a confidential relationship to the donor, some proof of the exercise of the influence of the donee must be given. The mere existence of the influence is not enough. He continued, at p 185 'But if the gift is so large as not to

> be reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act, the burden is upon the donee to support the gift.' In *Bank of Montreal v Stuart* [1911] AC 120, 137 Lord Macnaghten used the phrase 'immoderate and irrational' to describe this concept.
>
> 23. The need for this second prerequisite has recently been questioned: see Nourse LJ in *Barclays Bank plc v Coleman* [2001] QB, 20, 30-32 , one of the cases under appeal before your Lordships' House. Mr Sher invited your Lordships to depart from the decision of the House on this point in *National Westminster Bank plc v Morgan* [1985] AC 686.
>
> 24. My Lords, this is not an invitation I would accept. The second prerequisite, as expressed by Lindley LJ, is good sense. It is a necessary limitation upon the width of the first prerequisite. It would be absurd for the law to presume that every gift by a child to a parent, or every transaction between a client and his solicitor or between a patient and his doctor, was brought about by undue influence unless the contrary is affirmatively proved. Such a presumption would be too far-reaching. The law would be out of touch with everyday life if the presumption were to apply to every Christmas or birthday gift by a child to a parent, or to an agreement whereby a client or patient agrees to be responsible for the reasonable fees of his legal or medical adviser. The law would be rightly open to ridicule, for transactions such as these are unexceptionable. They do not suggest that something may be amiss. So something more is needed before the law reverses the burden of proof, something which calls for an explanation. When that something more is present, the greater the disadvantage to the vulnerable person, the more cogent must be the explanation before the presumption will be regarded as rebutted."

The claimant's submissions

Want of knowledge and approval

104. The claimant says that, although the court can infer knowledge and approval from proof of capacity and proof of due execution,

> "where there are suspicious circumstances … knowledge and approval is not presumed and must be proved".

I accept this. The claimant then says that the suspicious circumstances in the present case

> "relate to the first defendant's involvement in procuring the preparation of the disputed will, the significant departure from the deceased's previous wish to leave her estate equally to the claimant and the first defendant, and the deceased's unwillingness to go to the solicitors' office to execute the disputed will".

105. The claimant says that

> "the evidence required to affirmatively prove knowledge and approval must be sufficiently strong to satisfy the court, in the circumstances of that particular case,

> that the testatrix knew and approved of the contents of that will. The greater the suspicion, the stronger that the evidence must be to persuade the court."

Accordingly, the claimant says that there is insufficient evidence to be satisfied that the deceased and approved the contents of the disputed will.

106. In my judgment, however, there *is* sufficient evidence in this case to satisfy the court positively that the deceased knew and approved of the contents of the will. It is true that the first defendant assisted the deceased in obtaining the services of solicitors. But the first defendant did not draft the will, and the solicitors interviewed the deceased on her own. I see nothing suspicious in this. I agree that the deceased in making this world was departing from her wishes expressed in a will some 10 years earlier. But there is an explanation for this, which is given in the statement which the deceased signed contemporaneously with her will, again in the absence of the first defendant. That raises no suspicion either. Lastly there is the so-called unwillingness to go to the solicitors' office to execute the will. I have already found as a fact that any slight reluctance there may have been was not attributable to a refusal to make the new will. This is not suspicious either.

107. In these circumstances, I could simply rely on the presumption that arises from proof of testamentary capacity and due execution. But in any event the solicitors' attendance notes and letters make it perfectly clear that the deceased knew very well what she was doing, and that she knew and approved the contents of the will that she executed. The will was read over to the deceased by an independent solicitor in the absence of the first defendant, and she was happy to sign it. I am quite satisfied that the will represented the deceased's testamentary wishes. In my judgment, this head of challenge to the will fails.

Undue influence

108. Following the approach in *Schrader v Schrader*, the claimant says that there is "strong circumstantial evidence" of undue influence in the making of the will in this case. She relies on the following:

a. The deceased was in her 80s and there were questions over her mental capacity;

b. The deceased very frail and vulnerable, suffering from various health problems which impacted upon her eyesight, hearing and mobility;

c. The deceased was heavily reliant upon the first defendant;

d. Mrs Burrell will say that the deceased was "terrified" of the first defendant and that the first defendant treated her roughly, shouted at her and demeaned her;

e. The declaration of trust was a one-sided transaction which calls out for an explanation, suggesting a willingness to defer to the first defendant and/or wish to please her;

f. There is evidence that the first defendant financially abused the deceased – certainly the local authority was sufficiently concerned to convene meetings issue Court of Protection proceedings and to consider police involvement;

g. The deceased did not want to attend the appointment to execute the disputed will but the first defendant forced her to do so;

h. The first defendant freely told friends and neighbours that the claimant had broken off contact with the deceased, which the claimant denies, and it is likely that the first defendant told the deceased the same sorts of things;

i. The first defendant was heavily involved in the preparation of the disputed will;

j. During the appointment where instructions were given the first defendant persuaded the deceased not to make pecuniary legacy is to her grandchildren, despite her wish to do so, to the benefit of the first defendant;

k. The disputed will marks a departure from the deceased's settled pattern of testamentary wishes, where her estate was to be divided equally between her two children;

l. The deceased was unable to read the disputed will as she had forgotten her glasses, so it was read to her – her hearing was poor and she wore hearing aids;

m. It appears that by the date of the execution of the disputed will the deceased was unaware that the defendants owned half of Lancard View – see attendance note of 23 May 2012.

109. I deal with these points in the same order, and using the same numbering:

a. The deceased was indeed elderly, but at the time of the execution of the will there were no questions over her mental capacity, and no challenge has been made in these proceedings;

b. The deceased was certainly frail and vulnerable, and she did have various health problems which impacted upon her eyesight, hearing and mobility, but frail and vulnerable people with such problems can still make valid wills;

c. The deceased did indeed rely upon the first defendant, though she had other help too;

d. If the deceased really was "terrified" of the first defendant, and the first defendant really did treat her roughly, shout at her and demean her, I cannot believe that she would not have indicated this in some way to some third party; in particular, she said nothing at all to the solicitors when she was interviewed by them on her own; on the contrary, they thought she looked relaxed;

e. The declaration of trust was not one-sided at all, as the defendants were supplying the money necessary to pay off the bank, which the deceased did not have; given that the encumbered property was probably worth nothing once the debt was deducted from the value, the defendants' payment gave the deceased something of real value, to say nothing of the security value to her;

f. In my judgment there is no credible evidence that the first defendant financially abused the deceased; the local authority acted on the claimant's complaint to convene meetings because that was its duty when a complaint of this kind was made; the local

authority's decision to issue Court of Protection proceedings appears to have been based merely on the assertions by the claimant and not on any credible independent evidence;

g. I do not accept that the deceased did not want to attend the appointment to execute the disputed will and that the first defendant forced her to do so;

h. The deceased herself wrote in the statement signed contemporaneously with her will that the claimant had broken off contact with her, and that was why she would not benefit under her will; the claimant herself said the deceased told that the first defendant had done nothing wring and that she (the claimant) was jealous of her sister;

i. The first defendant was not involved in the preparation of the disputed will in any meaningful sense; the deceased was independently advised on her own by her solicitors, who then drafted the will to give effect to her wishes as so expressed.

j. I agree that the first defendant persuaded the deceased not to make pecuniary legacies to her grandchildren, despite her wish (provisionally expressed in the absence of the first defendant) to do so; but persuasion is not undue influence;

k. The disputed will undoubtedly marked a departure from the deceased's earlier expressed testamentary wishes, where her estate was to be divided equally between her two children, but she had a reason for doing so, as expressed in her contemporaneous statement;

l. The facts that the deceased's will was read to her and that her hearing was poor does not mean that she did not hear and understand what was being read out to her; the executing solicitor was satisfied that she did, and I accept that she did;

m. I am satisfied that by the date of the execution of the disputed will the deceased was aware that the defendants owned half of Lankard View.

110. My conclusion is that the allegation of undue influence in the making of the will is not made out. The deceased was independently advised by her solicitors, who were not acting for anyone else and who interviewed her on her own, and she satisfied them that she wished to make the will in the form that she executed. Given the breakdown in relations which I have found between the deceased and the claimant, the change in the deceased's testamentary wishes is quite understandable, and, on that basis, it is hard to see what more she could have done to put it into effect. That the claimant does not like this is evident. But that does not mean that there must have been undue influence.

111. Strictly speaking, that is the end of the case. If the claimant cannot upset the will, the remaining aspects of the claim, being derivative claims on behalf of the estate, fall way. But in case this matter goes further I will comment on the remaining parts, albeit briefly.

Derivative claims: assignment

112. The claimant alleges that the deed of assignment was procured by undue influence. The primary contention is one of presumed undue influence, but there is an alternative argument for actual undue influence. The claimant argues that the relationship between the deceased and the first defendant was one which automatically gave rise to a presumption of undue influence, or that alternatively a relationship of trust and confidence arose *de facto*, and that gave rise to a presumption of undue influence. She relies in particular on the following as giving rise to a relationship of trust and confidence:

a. The deceased was at the material time a vulnerable lady;

b. The first defendant dealt with the legal and financial matters. The deceased was entirely reliant upon her in that regard;

c. the deceased's affairs were under the first defendant's control or influence;

d. There was sufficient evidence of financial abuse of the deceased that the local authority began an investigation and issued deputyship proceedings in the Court of Protection.

In the context of the alleged relationship of trust and confidence, the claimant says that the size of the transaction "strongly indicates that it was not the product of the deceased's free and informed consent".

113. Alternatively, the claimant says the transaction is one which calls out for an explanation. The deceased transferred her share in the property to the defendants for £20,000. She should have been advised to deal with the matter in a different way. The defendants have offered no explanation. Accordingly the presumption of undue influence is not rebutted. The claimant also relies on the following:

a. Both sides of the transaction used the same solicitor – despite the fact that the solicitor was alive to the fact that he should not be acting for both and warned them to that effect;

b. The deceased received nothing from the transaction – for example, she was under no threat of possession proceedings by the National Westminster Bank – but gave away half her home;

c. The deceased did not obtain independent legal advice;

d. The defendants paid the solicitors' bill;

e. In acting for both the deceased and the defendants the solicitors were in a position of conflict, and neither party received independent legal advice.

The claimant accordingly argues that the transaction is void or alternatively voidable, not only against the first defendant, but also as against the second defendant.

114. I deal first with the question of whether the relationship between the deceased and the first defendant was one of trust and confidence. I respond to the points made by the claimant in the same order and using the same numbering:

a. I agree that the deceased was at the material time a vulnerable lady;

b. I agree that the first defendant dealt with some of the legal and financial matters, but only at the direction of the deceased. The deceased was not entirely reliant upon her in that regard, because she had contacts with others, including (for example) her neighbour Jennifer Burrell; however, she certainly relied on the first defendant, because she was her daughter, and she came and helped her on a daily basis;

c. I do not accept that the deceased's affairs were under the first defendant's control; it is clear on the facts that the deceased gave instructions to the first defendant as to what to do; but I do accept that the deceased took advice from the first defendant;

d. I do not accept that there was any sufficient evidence before me of financial abuse of the deceased by the first defendant; I accept that the local authority began an investigation and issued deputyship proceedings in the Court of Protection, although more because it considered it its duty to do so rather than because there existed the evidence that would be needed.

Overall, I do not consider that the relationship between the deceased and the first defendant was one of trust and confidence for the purposes of the doctrine of undue influence. It is not enough in itself to create such a relationship that a vulnerable person relies on another person for assistance or advice.

115. Secondly, looking at the matter in the round, I do not consider that the relationship between the deceased and the first defendant was a protected relationship of the kind referred to by Lord Nicholls. There are authorities declining to give that status to the relationships between siblings (*Pesticcio v Huet* (2003) 73 BMLR 57, [80]), between nephew and aunt (*Randall v Randall* [2004] EWHC 2258 (Ch), [43]), and indeed between spouses (*Etridge (No 2)*, [19]). I see no good reason to extend that status to (adult) child and parent. Where a parent is vulnerable that is a factor which (with others) may lead to the conclusion that that person reposed trust and confidence in the child, or even that actual undue influence was practised on him or her. But it does not apply to all cases.

116. As to the further matters put forward by the claimant:

a. I do not accept that both sides of the transaction used the same solicitor, as it is clear that the solicitors considered that they were acting for the deceased alone, and did so act;

b. I do not accept that the deceased received nothing from the transaction, and in particular I consider that she did not "give away" half her home; as I have already said, she started with an encumbered asset worth nothing, and ended up with an asset which was unencumbered (save for the small legal aid charge, which did not bear interest); thus she ended up with more or less the full value of half the property, and much greater security of tenure;

c. I do not agree that the deceased did not obtain independent legal advice;

d. I accept that the defendants paid the solicitors' bill, but that by itself takes the claimant nowhere;

e. The solicitors did not act for both the deceased and the defendants.

117. In any event, therefore, I consider that in all the circumstances, including (i) the assistance rendered by the defendants in paying off the bank, (ii) the breakdown in relations between the deceased and the claimant, and (iii) the deceased having independent advice on the assignment from the solicitor, the transaction has been satisfactorily explained. Any suggestion of undue influence has been overcome. In reaching that conclusion, I bear in mind the strictures of the courts in cases such as *Niermans v Pesticcio* [2004] EWCA Civ 372, where Mummery LJ (with whom Pill and Jacob LJJ agreed) that

> "23 … The participation of a solicitor is not, however, a precaution which is guaranteed to work in every case. It is necessary for the court to be satisfied that the advice and explanation by, for example, a solicitor, was relevant and effective to free the donor from the impairment of the influence on his free will and to give him the necessary independence of judgment and freedom to make choices with a full appreciation of what he was doing. …"

In my judgment, however, in the present case the advice and explanation given by the solicitor *was* sufficient to free the deceased from any influence that might have been exercised by the first defendant. In my judgment the claim in relation to the assignment based on presumed undue influence fails.

118. As I have said, there is a secondary case based on *actual* undue influence. This is maintained, but not further addressed, in the claimant's skeleton argument. I cannot see how that can succeed on the facts I have found.

Derivative claims: claim to rent

119. The other aspect of the derivative claim is one for reimbursement to the estate of the deceased of rent received by the first defendant on the letting of the property. The particulars of claim assert that tenants moved into the property before the deceased's death in 2013, and continued to occupy it prior to the sale of the property to third parties in 2017. The only direct evidence that supports this allegation is in the claimant's witness statement:

> "99. In terms of Lankard View we subsequently found out that when [the deceased] moved out [the first defendant] rented it out from January 2013. She rented it out initially for a month and then afterwards on a much longer term let."

120. The basis upon which the claimant makes these assertions (direct observation, enquiry of tenants, or whatever) is not stated. No documents are exhibited which support it. In the minutes of the safeguarding review meetings, there are references to the property being advertised for that by a local firm of estate agents at £850 per month. There is no evidence there or elsewhere however that any letting was actually concluded. On the material before me, I am not persuaded that the property was actually let at any time. Accordingly, even if the claimant had succeeded in setting aside the will, this aspect of the derivative claim would have failed too.

Conclusion

121. In my judgment, the claimant's attacks on the will of the deceased fail on the facts, with the result that the claim must be dismissed. Even if the will were set aside, however, the derivative claim aspects would separately have failed on the facts in any event. I am nevertheless very grateful for the helpful and measured submissions made on behalf of the claimant by Mr Jones, who put his client's case fully and properly.