Neutral Citation Number: [2021] EWHC 1102 (Ch)

Case No: CH-2020-000154

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)
ON APPEAL FROM THE ORDER OF DEPUTY MASTER LINWOOD ON 21 MAY 2020

IN THE MATTER OF JEAN MARY CLITHEROE DECEASED (PROBATE)

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

Date: 04/05/2021

Before:

MRS JUSTICE FALK

- -

Between:

JOHN KEITH CLITHEROE	**Claimant/ Appellant**
- and –	
SUSAN JANE BOND	**Defendant/ Respondent**

- -

Vikram Sachdeva QC, Jack Anderson and **Ruth Hughes** (instructed by **Irwin Mitchell LLP**) for the **Appellant**
Thomas Dumont QC and **Edward Hicks** (instructed by **Birkett Long LLP**) for the **Respondent**

Hearing dates: 23 and 24 March 2021

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Approved Judgment

I direct that 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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MRS JUSTICE FALK

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.30 am on Tuesday 4 May 2021.

Mrs Justice Falk:

Introduction

1. This is an appeal against a decision of Deputy Master Linwood on 21 May 2020 in a bitter probate dispute (the "Decision"). By the Decision the Deputy Master refused to admit to probate two wills executed by the deceased, Mrs Jean Mary Clitheroe, on 21 May 2010 and 3 December 2013 (the "2010 will" and "2013 will" respectively) on grounds of incapacity. I granted permission to appeal on 27 November 2020.

2. On 15 January 2021 the Defendant and Respondent to the appeal, Mrs Susan Bond, filed a Respondent's notice and made an application to adduce further evidence from the Respondent and from another witness (the "*Ladd v Marshall* application"). On 3 March 2021 the Appellant filed witness statements from the Appellant and two further witnesses in response and, on 16 March 2021, made an application which sought either a) a stay of the *Ladd v Marshall* application pending a determination as to whether there had been an error of law in the Decision, or b) cross-examination of the witnesses and a doubling of the two day time estimate for the appeal. A further application was made by the Appellant on 19 March that, if the Respondent's application to admit evidence was allowed, then the Appellant should also be able to rely on further evidence, in the form of a transcript of a conversation between the Respondent and a Ms Josephine Walsh, who is the Appellant's current partner.

3. By the time of the hearing the parties had agreed that the *Ladd v Marshall* application could not be dealt with in the time available, and that I should proceed to hear submissions on the grounds of appeal and defer determining that application (and associated applications by the Appellant) at this stage.

4. The trial judge was told that the estate is worth some £350,000. The figure that I was given was around £400,000. The sum genuinely in dispute is materially less than that. The dispute is essentially as between intestacy, where the Appellant and Respondent would share equally, and the validity of wills either of which would leave the entire residuary estate (after certain legacies) to the Appellant. I expressed concern at the hearing about the cost of the litigation by reference to the amount in dispute, as well as the broader impact of the dispute on the family. My concerns have not abated.

Background facts

5. The Appellant, Mr John Clitheroe, and the Respondent are brother and sister. They are the surviving children of the late Mrs Jean Clitheroe by her former husband Mr Keith Clitheroe. The couple's eldest child, Debra (known as "Debs"), died on 19 December 2009. I will refer to the family members by their first names, without intending any disrespect.

6. Jean was born in 1941 and married Keith in 1961. Debs was born in 1963, Susan ("Sue") in 1967 and John in 1968. In around 1980 Jean discovered that Keith had been sexually abusing Sue and divorced him.

7. Debs was a primary school teacher who became a deputy head. She never married and had no children. She was initially diagnosed with skin cancer in 1989. The cancer returned in 2007, and the diagnosis was terminal.

8. Sue married Peter Bond in 1999. They have one daughter, Charlotte, born in 2003. John married Zoe Reed in August 2010. They have two children, Holly and Sophia. They divorced in 2015.

9. In his reserved judgment dated 21 May 2020 (the "Judgment", [2020] EWHC 1185(Ch)) the Deputy Master found that prior to her death Debs was very close to Jean, Sue and Charlotte (Judgment at [6]).

10. Shortly before Debs' death there was a distressing incident which the judge accepted marked the turning point of Sue's relationship with her mother (Judgment at [186]). This involved a disagreement between Sue and Jean about obtaining morphine to alleviate Debs' excruciating pain, which the judge found that Jean deliberately and repeatedly delayed. Sue had called the Macmillan nurse to obtain morphine against Jean's wishes, in circumstances where Jean had threatened that she would not forgive her or speak to her again if she did (Judgment at [178] and [222]).

11. No will of Debs was found, and following the execution by Keith of a deed of variation the vast majority of Debs' estate passed to Jean, including her bungalow in Clacton-on-Sea (the "Bungalow").

12. The judge found that Debs' death had a profound effect on Jean, who was already in ill-health. Following Debs' death she "took to her bed" and remained bed-ridden until she died on 11 September 2017, the primary cause of death being sepsis (Judgment at [9]).

13. Prior to and immediately following Debs' death Jean had been living at the old family home in Little Clacton ("Conifers"). Following a prolonged stay in hospital between May and July 2010, which started just after the 2010 will was executed, Jean was discharged to the Bungalow, where she lived until her death.

14. Sue visited Jean in hospital in 2010 almost every day, but on Sue's evidence the relationship rapidly declined after John's wedding in August 2010. Attempts by Sue at reconciliation failed. The judge found that Sue was not responsible for the estrangement (preferring her account to John's version of events), that Jean had taken against Sue and that Jean had also irrationally maintained that it was Sue who cut her out rather than the other way round (Judgment at [222] to [229]).

The wills

15. The 2010 will was prepared in some haste by solicitors and without a face-to-face meeting with Jean. It appointed John as the sole executor, left Jean's Swarovski Crystal collection to Charlotte, a diamond and garnet ring to Sue, some other small legacies to named individuals and the residuary estate to John.

16. The 2013 will also appointed John as sole executor. It left the residuary estate to John (or his daughters if he predeceased Jean). The legacies were altered and limited to a gift of £5000 to each of Jean's three granddaughters, plus a bequest of the diamond and garnet ring to Sophia.

17. Jean provided handwritten instructions for both wills. The note she provided for the 2010 will stated that she was not giving more to Sue "as she's a shopaholic & would just fritter it away". An attendance note of a call that a Chartered Legal Executive at

Powis & Co, the firm of solicitors who prepared the 2010 will, had with Jean recorded that she was "evidently very clear what you wish to do", and stated that Jean did not wish Sue to have anything apart from the diamond ring "as she is such a spendthrift and will just spend away her inheritance" (Judgment at [20] to [22]).

18. For the 2013 will Jean initially gave instructions by telephone to Powis & Co in early April 2013. A note of the call stated that she now wanted to leave everything to John "as he does everything for her and nothing to her daughter" (Judgment at [25]). Jean's handwritten notes provided the following day (and delivered to the solicitors, like her instructions for the 2010 will, by John) are summarised at [26] to [30] of the Judgment. They referred to Jean having not seen Sue since John's marriage and to Sue not letting Jean see Charlotte. A number of other comments were made, including about Sue being a shopaholic, and that if left to Sue Jean would have "starved to death". The notes also accused Sue of theft of a number of items and of going through Debs' property with her husband and a friend "taking anything which took their eye". The will was executed some months later, on 3 December 2013, during a visit to Jean's home by another Chartered Legal Executive from Powis & Co. There was a further manuscript note from Jean that bears the same date as this will, summarised in the Judgment at [35] to [37]. Among other things this repeated the "shopaholic" allegation but specifically claimed that Debs held that view about Sue, and repeated allegations of theft and of "ransacking" the Bungalow.

19. The Judgment records at [41] that, whilst instructions for both wills were not taken in accordance with best practice and the "golden rule" was ignored, the Deputy Master formed the impression that "Jean gave detailed and believable reasons which she expressed directly and without equivocation". (The so-called "golden rule" was conveniently summarised by Briggs J in *Key v Key* [2010] 1 WLR 2020 as follows:

> "7. The substance of the golden rule is that when a solicitor is instructed to prepare a will for an aged testator, or for one who has been seriously ill, he should arrange for a medical practitioner first to satisfy himself as to the capacity and understanding of the testator, and to make a contemporaneous record of his examination and findings…"

The rule is not a rule of law but rather a guide to avoiding disputes: *Burns v Burns* [2016] EWCA Civ 37 at [47].)

The claim and the Decision

20. John's claim propounded both wills. Sue disputed their validity on the basis that Jean lacked testamentary capacity, or alternatively that the 2013 will was the result of fraudulent calumny. Sue's case was that Jean suffered from a complex grief reaction from around the time of Debs' death and a continuing affective disorder beyond it, manifested by depression and insane delusions regarding Sue, together with a poisoning of her mind against Sue (Judgment at [13]). The claim of fraudulent calumny failed and is not relevant to this appeal.

21. The Judgment followed a five day trial in which nine witnesses of fact and two experts gave oral evidence. The Deputy Master also had to deal with a significant amount of documentary evidence. The Judgment is detailed. I will not attempt to cover the full ground that it covers, but it is worth highlighting a few findings at this stage.

22. There was no dispute that Jean was a very strong character, and was described among other things as strong-willed and stubborn. The experts also agreed that there was nothing in the medical records to suggest any cognitive impairment. She was found by every treating clinician to have had capacity, including just before her death, albeit she at no stage had a full psychiatric assessment. She did, however, undoubtedly suffer from a number of other medical problems, including ones that impacted her mobility.

23. There were substantially different factual accounts from some of the witnesses. The Deputy Master generally accepted the evidence of the independent witnesses. He also accepted Sue's evidence as truthful (Judgment at [108]). In sharp contrast he said of John (Judgment at [69]):

> "I cannot accept much of what he said unless it was supported by independent documentary evidence… In general, where his evidence conflicted with others, I prefer their accounts."

24. Similarly in relation to Ms Walsh, John's partner, he found that:

> "She did not seem to care whether what she said was the truth or not…" (Judgment at [85])
>
> and:
>
> "I… do not accept Josephine's evidence where it conflicts with others…" (Judgment at [92])

25. The trial was conducted on the basis that the correct test of testamentary capacity was that set out in *Banks v Goodfellow* (1870) LR 5 QB 549. The Deputy Master asked for additional written submissions on the legal test for the presence of "delusions", and considered those at paragraphs [144] to [160] of the Judgment.

26. The trial was also conducted on the basis that the Deputy Master needed to determine whether various factual bases that Jean might have had for making the wills in the form that she did were actually true, and whether there was any rational basis for her to believe them (Judgment at [15] and [16]). One of these, which is clearly of real significance, was an allegation that Sue had falsely accused her father of sexual abuse and had thereby broken her parents' marriage. John's case at trial was that this was indeed the case. The Deputy Master had no difficulty in concluding, based on clear contemporary evidence, that Sue's account could not be impugned (Judgment at [174]). In particular, it was Jean who discovered letters from Keith to Sue detailing the abuse, which were seen by doctors and were also used in the divorce, although Jean shied away from prosecution. However, the judge found that from 2009, just before Debs died, Jean started to maintain and continued to maintain until her death that the allegations of abuse were untrue and that there were no letters. He found this irrational to the point of being delusional (Judgment at [168] and [169]).

27. Other allegations that the Deputy Master addressed related to whether Sue was a shopaholic or spendthrift, accusations of theft of various items and the allegation of ransacking the Bungalow. He made findings about the morphine related incident, the estrangement between Jean and Sue and the impact of Debs' death on Jean.

28. The Deputy Master also heard expert medical evidence, to which I will return in some detail. In short, he accepted the evidence of Sue's expert, Professor Jacoby, that Jean was at the material times suffering from an affective disorder which included a complex grief reaction and persisting depression, which he found impaired her testamentary capacity.

Ground 1: *Banks v Goodfellow*

29. The first ground of appeal was that the Deputy Master applied the wrong approach for determining whether Jean had capacity to make either will. He applied the approach set out by Cockburn CJ in *Banks v Goodfellow* ("*Banks*"), whereas he should have applied the approach under the Mental Capacity Act 2005 ("MCA") in relation to either or both of the test itself and the burden of proof.

The Banks test

30. The *Banks* test, with sub-paragraphs added by the Court of Appeal in *Sharp v Adams* [2006] EWCA Civ 449 at [68], is as follows:

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

(I should add that there is some debate as to whether the test has four limbs as indicated in *Sharp v Adam*, or three as referred to in *Hawes v Burgess* [2013] EWCA Civ 94, but the point is not material for the purposes of this decision.)

31. Under the *Banks* test, the burden of proof is ultimately on John as propounder of the wills, although this is subject to some shifting of the evidential burden. This was described by Briggs J in *Key v Key* at [97] as follows:

> "97. The burden of proof in relation to testamentary capacity is subject to the following rules. (i) While the burden starts with the propounder of a will to establish capacity, where the will is duly executed and appears rational on its face, then the court will presume capacity. (ii) In such a case the evidential burden then shifts to the objector to raise a real doubt about capacity. (iii) If a real doubt is raised, the evidential burden shifts back to the propounder to establish capacity none the less: see generally *Ledger v Wootton* [2008] WTLR 235 , para 5, per Judge Norris QC."

The MCA test

32. The long title of the MCA reads:

"An Act to make new provision relating to persons who lack capacity; to establish a superior court of record called the Court of Protection in place of the office of the Supreme Court called by that name; to make provision in connection with the Convention on the International Protection of Adults signed at the Hague on 13th January 2000; and for connected purposes."

33. Sections 1 to 3 provide:

"**1. The principles**
(1) The following principles apply for the purposes of this Act.
(2) A person must be assumed to have capacity unless it is established that he lacks capacity.
(3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
(4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
(5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
(6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

2. People who lack capacity
(1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.
(2) It does not matter whether the impairment or disturbance is permanent or temporary.
(3) A lack of capacity cannot be established merely by reference to–
(a) a person's age or appearance, or
(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.
(4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.
…

3. Inability to make decisions
(1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable–
(a) to understand the information relevant to the decision,
(b) to retain that information,
(c) to use or weigh that information as part of the process of making the decision, or
(d) to communicate his decision (whether by talking, using sign language or any other means).
(2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given

> to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).
> (3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.
> (4) The information relevant to a decision includes information about the reasonably foreseeable consequences of–
> (a) deciding one way or another, or
> (b) failing to make the decision."

Whether to allow the argument to be advanced

34. There was no dispute before the Deputy Master that the *Banks* test was the correct test to apply in determining testamentary capacity, rather than the test in the MCA (Judgment at [132] and [139] to [143]). Indeed, John's counsel expressly submitted that the MCA was not directly concerned with the execution of wills (Judgment at [143]). It was also accepted that John, as the party propounding the will, bore the burden of proof to establish capacity (Judgment at [161]-[162]).

35. Mr Dumont, for Sue, submitted that John should not be able to advance Ground 1. The position had been positively conceded at trial, and the effect of raising it now was to "change the goalposts".

36. The circumstances in which the court will exercise its discretion to allow a new point to be raised on appeal have been considered in a number of authorities, including most recently by the Supreme Court in *FII Group Test Claimants v HMRC* [2020] 3 WLR 1369 ("*FII*"), where there is a discussion in the judgment of Lord Reed and Lord Hodge of the earlier authorities, in particular the Court of Appeal decisions in *Pittalis v Grant* [1989] QB 605, *Jones v MBNA International Bank* [2000] EWCA Civ 514 ("*Jones*"), *Singh v Dass* [2019] EWCA Civ 360 and *Notting Hill Finance Ltd v Sheikh* [2019] 4 WLR 146 ("*Notting Hill Finance*"). The context was a question whether HMRC should be allowed to withdraw a concession made at an earlier stage of the proceedings.

37. The judgment sets out at [89] the following summary of the relevant principles by Haddon-Cave LJ In *Singh v Dass*:

> "16. First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.
> 17. Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b) had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial (*Mullarkey v Broad* [2009] EWCA Civ 2 at [30] and [49]).
> 18. Third, even where the point might be considered a 'pure point of law', the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs (*R (Humphreys) v Parking and Traffic Appeals Service* [2017] RTR 22 , para 29)."

38. Lord Reed and Lord Hodge commented that the second of these principles reflected the judgment of the Court of Appeal in *Jones* and the third was a paraphrase of what Nourse LJ stated in *Pittalis v Grant*. The relevant extract from *Jones*, from the judgment of Peter Gibson LJ (at paragraph [38] of that decision), was set out at [87] of *FII*, as follows:

> "It is not in dispute that to withdraw a concession or take a point not argued in the lower court requires the leave of this court. In general the court expects each party to advance his whole case at the trial. In the interests of fairness to the other party this court should be slow to allow new points, which were available to be taken at the trial but were not taken, to be advanced for the first time in this court. That consideration is the weightier if further evidence might have been adduced at the trial, had the point been taken then, or if the decision on the point requires an evaluation of all the evidence and could be affected by the impression which the trial judge receives from seeing and hearing the witnesses. Indeed it is hard to see how, if those circumstances obtained, this court, having regard to the overriding objective of dealing with cases justly, could allow that new point to be taken."

39. Among other things, this extract is a useful reminder that whether to allow a new point to be taken is not simply determined by, for example, reference to the three criteria summarised in *Singh v Dass* at [18]. The court has a discretion which it must exercise in accordance with the overriding objective, having regard to all relevant circumstances. As explained in *Notting Hill Finance* at [26] (and approved in *FII* at [90]), the case does not need to be exceptional, and the court will always be cautious, but:

> "…the decision whether it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken."

40. Mr Dumont submitted that, if John had wished to argue that the applicable test for capacity was otherwise than the *Banks* test, it was imperative that the differences were identified at trial so that any further requirements could be addressed in evidence by both expert and lay witnesses. Further, had it been suggested (as it is now asserted on behalf of John) that Sue bore the burden of proving lack of capacity, then cross-examination, in particular of John's expert Dr Series, would have been conducted differently.

41. Mr Sachdeva, for John, submitted that Ground 1 raises a pure point of law, and that Sue has had ample time to consider and respond to it. The fact that the cross-examination of Dr Series was tailored to the burden of proof was a question of the strategy her legal team chose to adopt. The court might consider that it could reach a determination on the basis of the facts found below, and even if it considered that a remittal was required then that would not need to extend to all the issues that had been considered at trial. In any event a requirement for further evidence is not a complete bar on raising new points (*FII* at [86] to [90]).

42. I have concluded that it would not be accordance with the overriding objective to permit this issue to be raised on appeal. In short, it would not be just to do so.

43. I accept that Sue has had time to address the point. However, I do not consider that it is a pure point of law. In my view aspects of the trial would have been conducted differently with regard to evidence as well as submissions. It is clear that the experts' reports were prepared, and they were cross-examined, on the basis that the *Banks* test applied, both as to the content of the test and the burden of proof. As to the former, the evidence was specifically focused on the wording of the fourth limb of the *Banks* test. As to the latter, in circumstances where the parties were in agreement that the *Banks* test applied, the fact that the cross-examination of Dr Series was tailored to the fact that the burden of proof was on John cannot fairly be dismissed simply as a matter of strategy which was at Sue's risk.

44. Further, it also affected the factual evidence. The focus of the factual dispute was the truth or otherwise of the beliefs that Sue claimed were delusional. The Deputy Master made findings about this, about whether Jean's mind was "poisoned" against Sue and whether those matters affected either will (Judgment at [264] to [272]). No findings were made about whether the specific requirements of ss 1 to 3 MCA were met.

45. In *FII* Lord Reed and Lord Hodge said this at [93]:

> "An appellate court, in the interests of justice, will normally seek strenuously to avoid an outcome which results in the parties, who have already gone to trial on the quantification of a claim, having to amend their pleadings and to adduce further evidence to apply its ruling on a new issue of law to the facts of their case. In a normal litigation, the need for a retrial would be a strong and normally determinative pointer against allowing a party to withdraw a concession which had influenced the way in which a litigation had been conducted."

46. In *FII* the court was ultimately persuaded that HMRC should be able to withdraw the relevant concession for reasons which included the complex and evolving legal landscape, the context of a group litigation order and the manner in which the litigation had been conducted, and the size of the claims and their impact on the public purse (see in particular [94] and [99]).

47. This case is very different. It relates to a relatively modest estate, in respect of which there has already been a heavily contested, and no doubt costly, five-day trial. No consideration was given at trial to the requirements of the MCA test of capacity, whether and to what extent they differed from the *Banks* test and whether they were met in this case. Mr Sachdeva urged on me the importance of the question whether testamentary capacity continues to be determined under the *Banks* test or that set out in the MCA, but it does not follow that this is the right case in which to determine the point, in circumstances where the trial was conducted on a different basis.

48. The overriding objective is to enable the court to deal with cases "justly and at proportionate cost". In determining what is proportionate the court is specifically required to take into account, among other things, the amount of money involved, the importance of the case, the financial position of each party and allotting an appropriate share of the court's resources. In circumstances where at least in some respects the trial

would have been conducted differently with regard to the evidence, with one exception the relevant factors point away from allowing the new point. The exception is the potential significance of the legal point. However, I say "potential" because it is not clear that the question whether the *Banks* or MCA test applies will make a material difference in many cases, or indeed in this case. For example, cases should rarely turn on the question of the burden of proof. The fact that the question is one of legal interest does not mean that it is just to permit it to be resolved between these parties in this case, in circumstances where the trial was conducted on a different basis.

49. As regards costs, Mr Sachdeva accepted during submissions that it was open to me to make some provision to protect Sue in respect of costs (whilst submitting that it should not be done). However, I was given no indication as to how Sue could adequately be protected in practice. The current position is that all the substantive provisions of the Deputy Master's order are stayed, including the provision requiring payment on account of costs. The evidence provided in favour of a stay included that John's mental health and financial position was such that he was unable to comply with the terms of the order. Bearing in mind the size of the estate, it is not obvious that John has the resources to protect Sue in respect of any costs consequences.

50. Given my decision that it would not be in the interests of justice to permit this point to be raised on appeal, I gave careful consideration to whether to express any view on the point, which was very fully argued before me. Ultimately, I concluded that it is preferable that I explain relatively briefly why, consistently with the approach taken in the most recent cases, this ground would in any event have failed.

Does the MCA test now govern testamentary capacity?

51. Since the MCA was enacted, a number of authorities have considered whether it has affected the test of testamentary capacity. *James v James* [2018] EWHC 43 (Ch), a decision of HHJ Paul Matthews sitting as a Judge of the High Court, contains a useful summary at [72] to [82], including of the detailed discussion of the question by Nicholas Strauss QC, also sitting as a deputy High Court Judge, in *Walker v Badmin* [2014] EWHC 71 (Ch).

52. In *Walker v Badmin* Mr Strauss QC had, first, identified potential differences between the tests. These were 1) the burden of proof, with the MCA containing a presumption of capacity at s 1(2); 2) the requirements in s 3(1) MCA relating to the degree of understanding and retention of relevant information, which he thought could require more than the common law test; and 3) the requirements in s 3(1) read with s 3(4) relating to the consequences of the choices available (paragraphs [21] to [26] of the judgment).

53. Secondly, Mr Strauss QC had pointed out that the MCA sets out the test of mental capacity "for the purposes of this Act" (ss 1(1), 2(1)), which he said was to define the circumstances in which living persons are able to take decisions or, where they are not, when and how decisions can be made on their behalf (paragraph [27]).

54. Thirdly, he had expressed the view that it was not unsatisfactory not to have a single test for capacity applying to "the prospective task of the Court of Protection of deciding that a living person does not have capacity" and the "retrospective task of the Chancery Division" of assessing whether a will was valid (paragraph [29]). Finally, the traditional

threshold for testamentary capacity had been low and it was unlikely that Parliament had intended the detailed case law to be replaced by a "single definition applicable to decisions which might be taken on behalf of living persons" (paragraph [34]).

55. In *James v James*, having summarised the case law, HHJ Paul Matthews went on to refer at [83] to the principle that a court will follow decisions of co-ordinate jurisdiction as a matter of comity unless convinced that they are wrong, and concluded that he should follow *Walker v Badmin* in preference to the earlier decision of *Bray v Pearce*, unreported, 6 March 2014. He concluded that the individual provisions of the MCA were concerned with the mental capacity of living persons and that it did not follow that the test for judging capacity retrospectively must be governed by the same principles (paragraph [85]). He also referred at [86] to the principle of statutory interpretation that Parliament is assumed not to intend to overrule well-established rules of the common law without clear words. He explained at [87] that he was not able to discern that Parliament had intended the Act to apply to retrospective decisions about capacity.

56. In my view the conclusions reached in *Walker v Badmin* and *James v James* were correct. The *Banks* test, which as the Court of Appeal in *Sharp v Adam* noted at [66] has withstood the test of time, has not been swept away by the MCA.

57. Mr Sachdeva relied heavily on the long title of the MCA (set out at [32] above) and the requirement to construe the legislation purposively, referring to *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 at [8] and [21]. I have no doubt that a purposive approach is the correct one to adopt, but it is still necessary to pay careful attention to the words of the Act. As stated in *Quintavalle* at [8], the words used must be construed in the context of the statute as a whole, which itself should be read in the historical context of the situation which led to its enactment.

58. Sections 1(1) and 2(1) state principles, and a test of capacity, that apply "for the purposes of this Act". In order to discern what those purposes are it is necessary to consider the MCA as a whole. The long title does not override this and does not suggest otherwise. In particular, the statement that the Act makes "new provision relating to persons who lack capacity" carries no necessary implication that it provides a complete code in relation to such matters.

59. The MCA covers a number of important areas. These include the establishment of the Court of Protection and the conferral of certain powers on it, in particular the power to make a wide range of decisions on behalf of persons who lack capacity or to appoint deputies to do so, the establishment of the office of Public Guardian, provision for lasting powers of attorney, specific protection for persons taking action in connection with the care or treatment of a person reasonably believed to lack capacity, and provision for advance decisions to refuse medical treatment. Section 1(4) makes clear that acts done or decisions made must be done in a person's best interests, which is defined in some detail in s 4. Apart from a specific provision in respect of necessary goods and services (s 7), none of the provisions of the Act expressly cover or appear to affect the question whether an individual has validly entered into a particular transaction.

60. It is true that the powers which can be exercised by the Court of Protection under s 16 MCA in accordance with ss 1 and 4 expressly include the execution of a will (see s 18(1)(i) – this is generally referred to as a statutory will). Such a power is not

exercisable by a deputy without court approval (s 20(3)(b)). Mr Sachdeva submitted that it could not be right to apply a different test of capacity to determine whether the Court of Protection could exercise such a power, as opposed to the test that applies in determining whether a will made directly by the individual concerned is valid. There was no simple distinction by reference to one being considered prospectively and the other retrospectively, as suggested in the cases. For example, the test under the MCA would apply to determine whether a past decision regarding medical treatment was valid.

61. In my view, and subject to specific exceptions set out in the legislation, the purposes of the MCA do not extend to determining whether an individual had capacity to enter into a particular transaction that he or she has entered into. The exceptions to this are (a) certain transactions specifically addressed by the MCA, such as capacity to grant a lasting power of attorney or to make an advance decision about medical treatment, and (b) the specific provision relating to contracts for necessities. What the MCA does permit is a wide range of decision-making *on behalf of* individuals who are determined to lack capacity, as defined for the purposes of the Act. Section 1 makes sense in that context. The starting point is that an individual has capacity, and all practicable steps must be taken to ensure that he can make decisions for himself. If he cannot, then any decision made on his behalf must be made in his best interests, preserving his freedom of action as far as possible. The power to make a statutory will, as with other powers exercisable by the Court of Protection or by deputies on its behalf, can only be exercised if all the requirements of s 1 are met.

62. The question whether a will is valid is a different one, which is not in my view addressed by the MCA. Nothing indicates that determining such a matter is one of the "purposes" of the Act. I also note that it does not straightforwardly fit with all the principles in s 1. Obviously capacity could be presumed in favour of the testator, but s 1(3) in particular presents a potential problem. As Mr Dumont points out, it could encourage an approach that is the opposite of the "golden rule" (see [19] above), because if there was no or limited evidence of steps taken to assist the testator in (for example) understanding, retaining, or using or weighing information then capacity would be presumed.

63. I reject Mr Sachdeva's submission that there is power in the MCA to make a declaration as to the validity of a will, for which purpose the MCA test of capacity would have to be applied, and that this demonstrates that the MCA test must now apply in preference to *Banks*. Section 15(1) MCA provides as follows:

> "(1) The court may make declarations as to–
> (a) whether a person has or lacks capacity to make a decision specified in the declaration;
> (b) whether a person has or lacks capacity to make decisions on such matters as are described in the declaration;
> (c) the lawfulness or otherwise of any act done, or yet to be done, in relation to that person."

For these purposes the "court" is the Court of Protection: s 64(1) MCA.

64. Mr Sachdeva relied on the fact that s 15(1)(c) extends to past actions. However, it is notable that, unlike the two sub-paragraphs that precede it, sub-paragraph (c) refers to

the "lawfulness" of an act, not to capacity. The question of lawfulness would most obviously be relevant to such matters as medical treatment or restraint of an individual, but is also relevant, for example, to expenditure using the individual's funds (see s 8). The question whether or not a will is valid is not a question of lawfulness. It is simply whether there is a will that is capable of taking effect. I note that this is consistent with Munby J's observation in *Re M* [2011] 1 WLR 344 at [50] that the Court of Protection has no jurisdiction to rule on the validity of a will (see also *Re D* [2010] EWHC 2159 (Ch) at [15] and *Walker v Badmin* at [31]).

65. Mr Sachdeva also relied on the fact that in *Re D* HHJ Hodge QC authorised the execution of a statutory will in circumstances where there was a potential dispute about whether an existing will was invalid on grounds of incapacity. However, that case does not demonstrate that the MCA test applies for the latter purpose, but rather that it may be appropriate to authorise the execution of a statutory will to avoid bequeathing a contentious probate dispute (*Re D* at [16]).

66. I also reject Mr Sachdeva's suggestion that the determination of testamentary capacity using a common law test is out of step with all other areas of law (with what he accepted as the possible exception of gifts *inter vivos*, given *Kicks v Leigh* [2015] 4 All ER 329). For example, and whilst no case law authority is cited, I pointed out that *Chitty 33rd ed.* at para 9-093 contains a clear statement that the common law test of contractual capacity continues to apply. I also pointed out that the use of the MCA test in the CPR is the result of specific provision in the rules: see CPR 21.1(2), and also the discussion by Andrew Edis QC (sitting as a Deputy High Court Judge) in *Carlo Saulle v Nouvet* [2007] EWHC 2902 (QB) at [9] to [22].

67. I should clarify that I do not consider that the distinction is quite as simple as being one between living and dead persons, or about whether a matter is being considered prospectively or retrospectively. To that extent, I respectfully suggest that some comments in *Walker v Badmin* and *James v James*, for example the comment in *Walker v Badmin* at [27] referring to the MCA as defining the "circumstances in which living persons are able to take decisions", and the comment in *James v James* at [85] about the MCA being concerned with assessing the capacity of living persons and making decisions thereafter on their behalf, need to be considered with some care.

68. The MCA does permit the Court of Protection to determine whether a person (P) lacks capacity to make a particular decision, or a decision on specified matters, which it will do using the MCA tests (see s 15(1)(a) and (b)). If P does not have capacity then the Act provides a structure to allow decisions to be made on P's behalf. The obvious focus of the legislation is therefore on living persons and whether they are or are not able to take a particular decision, being a decision that has not yet been taken. The clear emphasis, built into the requirements of s 1, is also on preserving individuals' autonomy as far as possible.

69. However, if for example a question were to arise as to whether a particular act in connection with care or treatment was lawful, that would be determined using the MCA test of capacity and the provisions of s 5 (as applicable), irrespective of when the act occurred and whether P was still alive. Similar points might arise in relation to the validity of actions taken pursuant to a lasting power of attorney (bearing in mind that in order for a power of attorney to be validly created, and subject to the protections conferred by s 14, P must have capacity to execute it (s 9(2)), or in respect of the

validity or otherwise of an advance decision to refuse medical treatment (which again, and subject to certain protections, requires capacity, ss 24 to 26).

70. In contrast, if the question was whether P had capacity to enter into a particular contract, then if the matter was before the Court of Protection it could make a declaration on the basis of the MCA test, whereas if the matter was being determined as part of a commercial dispute then, in principle, the common law test would apply, irrespective of the date of the contract or whether the individual was or was not still alive.

71. Under s 42(5) MCA the court must take account of any relevant provision of the Mental Capacity Act 2005 Code of Practice. Paragraphs 4.31 to 4.33 of the Code are consistent with the conclusion I have reached. Paragraph 4.31 states that "for the purposes of this Act" means "that the definition and test are to be used in situations covered by this Act". Paragraph 4.32 explicitly refers to the existence of common law tests of capacity, including the *Banks* test. Paragraph 4.33 states:

> "The Act's new definition of capacity is in line with the existing common law tests, and the Act does not replace them. When cases come before the court on the above issues, judges can adopt the new definition if they think it is appropriate. The Act will apply to all other cases relating to financial, healthcare or welfare decisions."

72. In *Local Authority X v MM (adult)* [2007] EWHC 2003 (Fam) at [80] Munby J described the reference to "appropriate", for judges deciding capacity issues outside the Court of Protection, as meaning "appropriate… having regard to the existing principles of the common law". In that case, which concerned capacity to consent to sexual relations, Munby J found that there was no relevant difference between the tests, so it was indeed appropriate.

73. It is not necessary or appropriate for the purposes of this appeal to consider the existence or extent of the potential differences identified in *Walker v Badmin* between the requirements s 3 MCA and the *Banks* test, or indeed other possible differences between the tests such as the rule in *Parker v Felgate* (1883) 8 PD 171. However, I should briefly respond to a submission that suggested that, whilst the MCA test focuses entirely on the decision making process (irrespective of whether the outcome was an unwise decision: see for example *King's College Hospital NHS Foundation Trust v C* [2015] EWCOP 80 at [28] and [29]), the *Banks* case places emphasis on the rationality of the result. *Sharp v Adam* makes clear at [79] that it is not the case that the *Banks* test will result in an irrational, unjust or unfair will being treated as invalid, provided the testator had the capacity to make a rational, just and fair one. The relevance of excluding a child from a will is that it may be relevant to the enquiry into the testator's soundness of mind. It is not itself a reason to treat a will as invalid.

74. Mr Sachdeva also relied on the Law Commission consultation paper "Making a Will", published in 2017, and submissions to the Law Commission by the Law Society and the Chancery Bar Association. The consultation paper refers to problems with the *Banks* test, including a lack of clarity as to whether it continues to apply following the enactment of the MCA. It describes the "prevailing view", following *Walker v Badmin*, that the common law test continues to apply (paragraph 2.44). The paper contains a

provisional proposal that the MCA is adopted, supplemented by the MCA Code of Practice (paragraph 2.65).

75. I appreciate that, to the extent that there are differences between the two tests, there is a potential tension. As pointed out by the Chancery Bar Association to the Law Commission, at an extreme it might mean that no valid will could be executed if it were the case that a testator lacked capacity under the *Banks* test but was not demonstrated to lack capacity for MCA purposes. However, such questions do not arise in this case and, without a clearer determination of any substantive differences, it is not possible to say whether the question is a purely theoretical one rather than a practical problem. In any event, given that in my view the purposes of the MCA do not extend to determining testamentary capacity, any difficulties with the existing law are matters for the Law Commission and, ultimately, for Parliament, rather than for this court.

76. Both parties made submissions about the principle that clear words are required for the abrogation of a long-standing rule of law. Mr Dumont relied on *National Assistance Board v Wilkinson* [1952] 2 QB 648 ("*Wilkinson*") and *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 ("*Black-Clawson*").

77. In *Wilkinson* Devlin J said at p.661:

> "It is a well-established principle of construction that a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion."

In *Black-Clawson* Lord Reid emphasised at p.614 the need to consider the "mischief" which the Act was intended to remedy, and commented that:

> "…in the absence of any clear indication to the contrary Parliament can be presumed not to have altered the common law further than was necessary to remedy the 'mischief'."

Lord Wilberforce referred at p.632C to a "presumption" against changes in the common law and an expectation that, in respect of a principle which was:

> "… perfectly well known and understood… it was to be expected that… the common law would only be changed by a clear and express provision."

Lord Simon referred at p.650E to a canon of construction that "clear and unmistakable words will be required for the abrogation of a long-standing rule of law", citing the extract from Devlin J's judgment in *Wilkinson* set out above.

78. Mr Sachdeva submitted that applying the MCA would not involve the abrogation or sweeping away of a longstanding rule, but rather bringing the test into uniformity with the general law, and running with the grain of the common law. He also suggested that the presumption against a change to the common law was relatively weak.

79. In my view it is relatively clear from the terms of the MCA that Parliament did not intend to alter the common law in respect of testamentary capacity, other than in providing a regime to allow statutory wills to be made on behalf of an individual who is demonstrated to lack capacity. The principle referred to in *Wilkinson* and *Black-*

Clawson provides some additional support for, and is certainly consistent with, the conclusion that I have reached. The *Banks* test was very well established when the MCA was enacted. Nothing in the Act expressly alters it. Although the extent of the differences between the *Banks* test and the MCA test remain to be determined, there are clearly some, such as the clear presumption of capacity and the obligation under s 1(3).

80. Mr Sachdeva alternatively submitted that, as a decision of the High Court, I am not strictly bound by *Banks*, and that whilst the test has been considered by the Court of Appeal there is no decision that binds this court to apply it. He submitted that, even if the *Banks* test has not been overridden by the MCA, the only rational course for the common law is to adopt the MCA approach.

81. I disagree. The *Banks* test is very well settled and has proved sufficiently flexible to take account of developments, in particular developments in medical understanding. *Key v Key* provides an illustration of this. *Banks* was also a decision of the full court, on appeal from a trial by jury, and was decided before the Court of Appeal was established in 1875. I received no submissions about the effect of those features on its status. Further, as explained in *James v James* at [86] the basic test was not new when *Banks* was decided, there being case law going back for the best part of three centuries beforehand, case law which was also not the subject of submissions to me. I have also so far identified six relatively recent Court of Appeal decisions in which it has been considered, namely *Sharp v Adam*, *Hoff v Atherton* [2004] EWCA Civ 1554, *Perrins v Holland* [2011] Ch 270, *Simon v Byford* [2014] EWCA Civ 280, *Hawes v Burgess* and *Burns v Burns* [2016] EWCA Civ 37. I note that in both *Hawes v Burgess* and *Burns v Burns* the testators died after the MCA came into force. Finally, I note that in *Sharp v Adam* some doubt was expressed at [82] about whether the Court of Appeal would have been able to depart from *Banks*. In my view I should certainly not attempt it.

82. In summary, the *Banks* test has not been overridden by the MCA. Further, there is no sufficiently good reason to depart from well-established case law, and I also have significant doubt as to whether it would be possible for this court to do so even if it were so minded.

Grounds 2 and 3: incorrect interpretation and application of the test for delusions

83. John's second ground of appeal is that, even if *Banks* remains good law, the Deputy Master erred by misapplying the test for "delusions", in particular by failing to consider whether it was impossible to reason Jean out of the relevant beliefs, failing to have proper regard to relevant evidence, in particular the medical meaning of "delusions", and paying undue regard to dictionary definitions of colloquial expressions used to express subjective beliefs. It is convenient to take this with the ground 3, which is that the Deputy Master misapplied the test for testamentary capacity in light of the evidence and/or made findings as to delusions which were not open to him.

84. Sue served a Respondent's notice that is relevant to these grounds. In addition to seeking to adduce further evidence, this claimed that Jean's false beliefs about Sue were delusional in that it was not possible to reason her out of them, and in particular that they were held without rational basis, in the absence of evidence, in the face of evidence to the contrary and in the face of challenge, and further that the delusional beliefs were themselves sufficient evidence of a lack of capacity irrespective of whether Jean suffered from an affective disorder.

The Deputy Master's analysis

85. The Deputy Master considered the legal test for the presence of delusions at paragraphs [144] to [160] of the Judgment. Mr Sachdeva submitted that in that passage the Deputy Master wrongly rejected the definition of delusions set out in *Williams on Wills, 10th ed.* at 4.15, namely:

> "A delusion is a belief in the existence of something which no rational person could believe and, at the same time, it must be shown to be impossible to reason the patient out of the belief."

William on Wills cites *Dew v Clark* (1826) 3 Add 79, 162 ER 410 as authority for this.

86. The Deputy Master preferred a definition in *Williams, Mortimer & Sunnucks, 21st ed.* at 10.24 and 10.25, and specifically a formulation taken from *Boughton & Marston v Knight* (1873) LR 3 P&D 64 at 68 ("*Boughton v Knight*"), as follows:

> "… you must of necessity put to yourself this question and answer it: Can I understand how any man in possession of his senses could have believed such and such a thing? And if the answer you give is, I cannot understand it, then it is of the necessity of the case that you should say the man is not sane."

87. In particular, the Deputy Master concluded on the basis of this test and other cases, including *Smith v Tebbitt* (1865-9) LR 1 P&D 398[1], that it is not necessary to show that it was impossible to reason the person out of their belief.

The expert evidence

88. The medical experts also considered the question of delusions. Mr Sachdeva relied on Dr Series' evidence which he said accurately reflected the clinical position and supported the conclusion that it must be shown that it is impossible to reason the person out of the relevant belief.

89. As summarised in the experts' joint statement, the opinion of Professor Jacoby was that, if Jean's beliefs about Sue were false then they could have been delusional in nature, caused by her affective disorder. Dr Series considered that for something to be a delusion:

> "… it must be shown not only that it is false [but] also that it was a belief which was unreasonable for the person to hold. A delusion should be a fixed belief, in other words, it should not be possible to persuade someone out of a delusion by providing evidence or reasons suggesting that they could be mistaken."

He added that even if the allegations about Sue were found to be false:

[1] The Judgment gives an incorrect reference for this case.

> "… it would have to be additionally shown that the deceased continue to hold them in the face of reasonable evidence of their falsity. A person may be mistaken in their beliefs, but that does not make them delusional."

90. Mr Sachdeva relied on the following section of Dr Series' report:

> "In psychiatry, a delusion is a fixed false belief which is out of keeping with the person's social, cultural, educational, or religious background. The word 'fixed' means that the person holds onto the belief in the face of strong evidence or argument that it is false. It is not sufficient simply to show that the belief is false; many of us believe things which are in fact false, but it is not until the holder of those beliefs continues to hold them in the face of normally persuasive evidence of their falsity that the beliefs could be called delusional. The central idea of a delusion is that the mind has adopted a belief which is out of keeping for that person's background and rigidly holds on to it, no matter what arguments against it are put. Delusions do not respond to reason. It is not possible to talk someone out of a delusion.
> …
> If the deceased had reasonable grounds for believing that [claims about Sue's conduct] were true, then in my view they were not delusional. They can only be said to be delusional if the deceased had no good reason for believing them, and if she continued to hold them after efforts have been made to persuade her that they were false.
> …
> …demonstrating their delusional nature requires more than simply demonstrating that the beliefs were false. It would require it to be shown that the deceased held those beliefs unreasonably, and could not be persuaded by any means that she was mistaken…"

He expressed his conclusion on this issue as follows:

> "I do not think that it is correct [to] characterise [Jean's] beliefs about Susan as delusional on the evidence available. That would require it to be shown not only that her beliefs about Susan were wrong, but also that she continued to hold them in the face of ordinarily persuasive evidence that she was wrong."

91. Dr Series expressed a similar view in answer to a written question asking whether, if the allegations about Sue were not true, that would suggest that Jean's affections towards Sue were poisoned "and therefore she did not have testamentary capacity". He said:

> "If it could be shown not only that all of these beliefs were false, but also that the deceased had no reasonable grounds for believing them then I accept that it would appear that her mind was poisoned against Susan."

92. He also said in an Addendum Report:

> "A delusion has to be fixed, that is incapable of being dislodged by reasonable argument or evidence."

He added that he had not seen evidence to suggest that anyone tried to persuade Jean that her beliefs about Sue were ill-founded, so "that in my view it is difficult to demonstrate that they were fixed beliefs".

93. In cross-examination Dr Series gave the following evidence:

> "If it was shown that what [Jean] thought were [sic] false and fixed, meaning that she couldn't be talked out of it … and that it wasn't reasonable for a person in her position to think what she thought … then I would say that would be a delusion, and if she had a delusion then it is very possible that that was related to an affective disorder."

94. In answers to written questions to him, Professor Jacoby defined a delusion in psychiatry as a "fixed, false belief of morbid origin which is inconsistent with the believer's educational or cultural background", and "fixed" as meaning that the believer is "not open to persuasion even in spite of evidence to the contrary". He clarified that by "morbid origin" he meant arising from a known or presumed mental illness. He distinguished delusions from "overvalued ideas", suggesting that some of Jean's ideas about her health could fall into the latter category. He gave oral evidence to similar effect.

Discussion: the legal test

95. Mr Sachdeva submitted that the Deputy Master had misunderstood *Dew v Clark*, a case which was approved in *Banks*. He referred me to a longer report of the case by Haggard and submitted that, properly understood, it did support the test cited in *Williams on Wills*.

96. I have considered both versions of the report. I agree that support can be found in them for the proposition that it must be demonstrated that it is not possible to reason the relevant person out of the particular belief. This is reflected in the report reproduced in the English Reports, 3 Add 79 at pp.90-91 with a reference to the patient "incapable of being, or at least of being permanently," reasoned out of the belief, a point also picked up in *Boughton v Knight* at p.68 (a few lines after the passage cited above). In the report by Haggard there is a reference at p.7 to a delusion which "no arguments or proofs could remove", but also the following statement:

> "… where there is delusion of mind there is insanity; that is, when persons believe things to exist which exist only, or, at least, in that degree exist only, in their own imagination, and of the non-existence of which neither argument nor proof can convince them, they are of unsound mind: or, as one of the counsel accurately expressed it, 'it is only the belief of facts, which no rational person would have believed, that is insane delusion.'"

97. There is also reference at p.10 to a person who:

> "… pertinaciously adheres to some delusive idea, in opposition to the plainest evidence of its falsity; and endeavours, by the most ingenious arguments, however fallacious they may be, to support his opinion."

98. At p.39 there is the following statement:

> "But where the case set up is… that the belief… grew out of mere delusion of mind, and that the erroneous impression could be removed by no proof or argument; it becomes essential to ascertain what foundation in truth the belief had, and what means were used, without effect, to remove that belief, which is shown to be founded in error."

99. I do not agree that it is clear from these references that *Dew v Clark* lays down an absolute rule that a delusion can only exist if it is shown that it was impossible to reason the individual out of the belief. The Haggard report also refers to maintaining the belief in the face of plain evidence or proof, and in addition the simple test suggested by counsel of "belief of facts, which no rational person would have believed". As already indicated, *Boughton v Knight* uses the latter formulation but also refers to whether the individual can be reasoned out of the belief.

100. Similarly in relation to the clinical definition, Dr Series' evidence did not uniformly state that it must be shown that it was not possible to reason the individual out of the relevant beliefs. Some statements suggest that, but others refer to the alternative of holding the beliefs in the face of evidence to the contrary, or (in the context of whether Jean's mind was "poisoned") to there being no reasonable grounds to hold the belief. I also note Professor Jacoby's evidence that a delusion requires a fixed false belief which is held despite "evidence to the contrary": see [94] above.

101. My reading of the Judgment is that the Deputy Master read the extract from *Williams on Wills* as requiring evidence to be adduced of actual attempts to reason the person out of their beliefs (see in particular Judgment at [160], sub-paragraphs (iii) and (iv)). Mr Sachdeva submitted that this was a misunderstanding of the test. He accepted that it is not an essential element of the test that there is evidence of actual attempts having been made to reason the testatrix out of her false beliefs, but nevertheless that it must be shown that it would have been impossible to do so if it was attempted. He submitted that here are certain kinds of belief, such as that of the testatrix in *Smith v Tebbitt* that she was one of the Trinity, where the nature of the belief could mean that little additional evidence would be required to show the existence of a delusion. But that did not apply to the nature of the beliefs in issue here, and in a case such as this it was very hard to demonstrate a delusion in the absence of evidence of actual attempts being made. In contrast, evidence of actual challenge would be highly persuasive.

102. I agree that, for a delusion to exist, the relevant false belief must not be a simple mistake which could be corrected. It must be irrational and fixed in nature. I also agree that it should be out of keeping with the person's background. Where the belief is as obviously extreme and irrational as the kind in question in *Smith v Tebbitt* it is unlikely to be difficult to demonstrate that it amounts to a delusion. Where a belief does not fall into that category, one way of demonstrating that it amounts to a delusion – and indeed the obvious way in many cases – is to show by evidence that the individual could not in fact be reasoned out of it. It is not surprising that the clinical test focuses on this for that reason, and also because it is a matter which can be tested with a live patient. However, as *Smith v Tebbitt* shows it is not an essential ingredient of the test. Rather, it is a means of demonstrating evidentially that the test is satisfied. Another way, which is relevant in this case, would be if it could be shown that the belief was formed and maintained in the face of clear evidence to the contrary of which the individual was plainly aware (the "proof" referred to in the Haggard report of *Dew v Clark*), such that there is no sensible

basis on which to conclude that the individual was simply mistaken or had forgotten the true position, as opposed to being delusional. A further alternative would be to demonstrate that the individual had no basis on which they could rationally have formed and maintained the mistaken belief. The key question in each case is whether the relevant irrational belief is fixed.

103. As a matter of principle, it seems to me that the correct focus must be on the individual's state of mind. What is required to determine that the relevant belief has the requisite fixed nature must depend on the particular factual circumstances (which will include the nature of the belief and the circumstances in which it arose and was maintained), rather than itself being part of the test. A test based on proving a hypothetical proposition, namely that if an attempt was made to reason the individual out of the belief it would not succeed, seems to me to be not only an inherently difficult concept in the absence of an actual attempt being made, but also one that does not take account of the potential range of different factual circumstances that may exist. For example, if there is irrefutable evidence known to the individual that a particular belief is unfounded, but they still continue maintain it, I do not follow why further mental gymnastics should necessarily be required to prove a further hypothetical proposition. That risks, at the least, adding additional, and in my view unnecessary, complexity. It also gives rise to particular difficulties in a testamentary context, where the challenge of proving a hypothetical might mean that, in practice, issues of capacity could turn on the happenstance of whether the deceased was in fact challenged about a belief during his or her lifetime.

104. What I consider to be the correct approach would allow a holistic assessment of all the evidence. This would take account of the nature of the belief, the circumstances in which it arose and whether there was an evidential basis for it, whether it was formed in the face of evidence to the contrary, the period of time for which it was held and whether it was the subject of any challenge.

105. An example of the test being applied in the way that I have described is *Walters v Smee* [2008] EWHC 2029 (Ch), where HHJ Purle QC concluded that no rational person could possibly have believed certain things believed by the testatrix, given the knowledge she had or must have had and the events she experienced (see paragraphs [124] and [125]).

106. One question that arises is the precise relevance of the medical definition of "delusion" to the legal test of testamentary capacity. This was not the subject of specific submissions so I limit myself to a few observations. First, the *Banks* test of incapacity must not be understood as being limited to incapacity caused or manifested by a "delusion" as now clinically understood. A far broader category of disorders may result in incapacity, and the 19th century cases need to be considered with that in mind. Secondly, the list of disorders is not necessarily closed. *Key v Key* provides an example of testamentary capacity being found to be lacking as a result of the effect of bereavement, both experts in that case having accepted that bereavement could cause an affective disorder (see paragraph [95] of that decision). Thirdly, Professor Jacoby's evidence was that a delusion requires a disorder of the mind, that is some form of mental illness (see [94] above). Dr Series confirmed at the trial that he largely agreed with Professor Jacoby's evidence on this issue, and he also specifically confirmed that there are "delusional disorders for which the evidence of mental disorder is only the

delusion". In addition he stated that if Jean had a delusion then it was "very possible that that was related to an affective disorder" (see [93] above).

107. Put another way, as I understand the expert evidence a delusion (in the clinical sense) is not itself a medical disorder, although it may be evidence of one. In this case, and as discussed further below, the Deputy Master's conclusion was that Jean was suffering from an affective disorder.

Did the Deputy Master fall into error?

108. In recording that he preferred the test in *Williams, Mortimer & Sunnucks*, the Deputy Master said the following in respect of the test in *Boughton v Knight* set out at [86] above:

> "I would emphasise that this test does not require it to be a) evidenced and b) impossible to reason the person out of the belief. Those requirements are prescriptive."

I have to say that I find the reference to not being required to be "evidenced" difficult to follow. It may well be that what was meant is simply that it is not necessary to show by evidence that it was impossible to reason the patient out of the belief (as referred to in the *William on Wills* version of the test), but that is not clear.

109. The Deputy Master also said at [160viii)] that the test he favoured "does allow for the belief to be challenged but is not prescriptive in its application".

110. I do have a concern that the Deputy Master may not have taken full account of the need for the relevant beliefs to be "fixed" in order to amount to delusions. In particular, at paragraphs [264b)] and [267a)] he relies in relation to each will on an "insane delusion" that Jean believed that Sue and her husband had stolen Jean's Swarovski crystals. However, the findings of fact to which he cross-refers state that in a note made by Jean she "wondered" whether they had been stolen, with later notes in turn claiming that Sue had stolen them and then wondering if they were still in Debs' loft.

111. Further, in relation to the 2013 will the Deputy Master relied at [267d)] on "extensive delusions" regarding thefts of the Swarovski crystals, some trolls Debs kept in her classroom and also other items listed at Issue 6(g)(i)-(x). The crystals are discussed in the paragraph above. As regards the trolls, there was in fact evidence that Sue had denied this to her mother, and that the trolls were given to children at the school, so there appears to have been evidence from which the Deputy Master could conclude that there was no rational basis on which Jean could have formed and maintained the view that she did (Judgment at [223] and [231]). But in relation to other items the Deputy Master appears to have overlooked his conclusion at [235] of the Judgment that the allegations of theft were false but that he hesitated to find they were delusional beliefs, as Jean appeared to ask people about various items. In other words, it is not clear that she had a fixed belief in respect of those items.

112. Mr Sachdeva also submitted that the Deputy Master fell into error when he indicated at paragraph [269] that the delusions that he found to exist were set out in her oral and written instructions for the wills. I agree that this comment is not entirely accurate since the allegation that Sue lied about sexual abuse was not referred to in the instructions.

But I do not agree that the Deputy Master failed to consider each will separately and assumed that the same delusions necessarily affected each will. Instead he carefully made separate findings as to the delusions affecting each will at paragraphs [264] and [267]. He was also obviously aware that sexual abuse was not referred to in the instructions: see for example paragraph [264c)] where he refers to the spendthrift allegation as the "main supposed reason" in the instructions for the 2010 will.

113. Mr Sachdeva also made specific criticisms of the way in which the Deputy Master approached Jean's allegations that Sue was a "shopaholic" or "spendthrift" (Judgment at [210] to [221]), including by reference to dictionary definitions. I agree that a belief on the part of Jean that Sue was a shopaholic or spendthrift, however hypocritical that view might be, is on the face of it hard to classify as a delusion. Not only might those terms mean different things to different people, but more fundamentally it would seem to be a matter of personal opinion about the characterisation of someone's behaviour rather than belief of a fact.

114. However, rather than simply applying dictionary definitions, the Deputy Master recognised that there was no evidence as to how Jean understood the terms. Further and importantly, a substantial part of his findings on this issue relate to Debs' attitude and the impact of that on Jean. Whilst Jean's own view was a matter of opinion, beliefs held by Jean that Debs disapproved of Sue's spending, that Debs was "disgusted" with Sue for that reason, and indeed that Debs herself spent based on need only and not want, would I think be capable of being false fixed beliefs about Debs' own views and behaviour. On these points the Deputy Master concluded that Debs did not disapprove of Sue's spending, and that Debs spent enthusiastically on what she wanted rather than simply what she needed (Judgment at [220]-[221]). He also commented that Sue was not cross-examined on her own spending.

115. I address the potential consequences of these issues for the appeal below, from paragraph [142] onwards.

Grounds 4 and 5: inadequate/irrational reasons for preferring evidence of Sue's expert; too low a threshold applied in determining lack of capacity

116. Ground 4 is that the Deputy Master gave inadequate and/or irrational reasons for preferring the evidence of Sue's expert, Professor Jacoby, to that of Dr Series with regard to the question whether Jean suffered from an affective disorder and/or the nature and degree of any disorder, and/or whether any beliefs she had were properly characterised as delusions. I will consider this with ground 5, which is that the Deputy Master applied too low a threshold for finding that Jean had an affective disorder causing delusional beliefs and/or that Jean's beliefs were delusional and/or that she otherwise lacked testamentary capacity.

117. The Deputy Master considered the experts' written and oral evidence in some detail at paragraphs [109] to [131] of the Judgment. His findings about whether Jean was suffering from an affective disorder as a result of Debs' death (which he referred to as "Issue 1") are set out at paragraphs [254] to [263], with his conclusions as to whether she suffered from insane delusions as a symptom of such a disorder or otherwise that her mind was poisoned against Sue (being "Issue 2") at paragraphs [264] to [268].

118. It is worth setting out paragraphs [254] to [263] in full:

"254. Mr Hicks submits that the evidence submitted by John has not "come up to proof" as Dr Series in his reports has addressed the wrong question, as he concludes there is not enough information in the medical records to be confident that Jean had a clinical depressive disorder – see paragraph 8.2.10 of his report which I set out at [111] above. What he does not say is whether she did not have a depressive disorder.

255. In cross examination Dr Series accepted that he could not say Jean did not have an affective disorder – see [127] above. Then in re-examination he said if a psychiatrist examined Jean in the several year period after Debs' death, based on the information in the records, there was a good chance – it was definitely possible – even likely that she had a depressive disorder – see [128] onwards.

256. I accept Mr Hicks' submission that Dr Series' opinion does not discharge the burden of proof on John. Accordingly, the short answer is that Jean did not have testamentary capacity at the material times.

257. If I am wrong as to that, I must consider the expert evidence further. I have set out material extracts from the reports and oral evidence at [109-131] above. Professor Jacoby concluded (see [114]) that Jean was suffering from an affective grief disorder within the meaning in *Banks v Goodfellow*. He said that he used that term as it encompassed the complex grief reaction and persisting depression.

258. He went on to say that any lack of testamentary capacity could also be due to her suffering from insane delusions, if the beliefs Jean held are found to be false. Dr Series' approach was first that there was insufficient clinical evidence, although he did confirm that a positive diagnosis was possible – see the re-examination I refer to at [255] above.

259. Dr Series took as I have set out above a more prescriptive approach, on the basis of there being no proper psychiatric assessment of Jean in the records – or that if one had been carried out, it was not noted as such in those records. I prefer the approach taken by Professor Jacoby as

a) his conclusion arises from his professional opinion based on the records before him which he considers sufficient for the task and

b) to do otherwise could substantially limit such expert opinion and result in injustice.

260. Further, and in any event, the burden of proof is on John but the evidence of Dr Series is that more is needed - so again John cannot discharge the burden of proof. Finally, at the end of his oral evidence Dr Series accepted that the likely conclusion of any examining psychiatrist was that based on pain, medical problems and grief reaction Jean was likely to be diagnosed with an affective disorder - [128] onwards again. The differences between the experts therefore narrowed substantially.

261. In summary, I accept Professor Jacoby's opinion that Jean was at the material times suffering from an affective disorder which includes complex grief reaction and persisting depression that impaired her testamentary capacity.

262. Further, Dr Sheppard, Ms Baines and Ms Hennessy all gave evidence - [249-252 above] – as to how Jean did not accept Debs was going to die and how there was nothing else in Jean's life after Debs died.

> 263. Accordingly my answer to Issue 1 namely did Jean suffer from a complex grief reaction or other affective disorder as a result of Debs' death or otherwise is yes, and John has failed to prove that she did not so suffer."

119. It is worth clarifying one point at this stage. Dr Series focused on whether the evidence that he had considered established that Jean suffered from a depressive disorder, which he explained in his report is one of the most common form of affective disorders. He considered that whilst a bereaved person may develop a depressive disorder, that should be diagnosed in the same way as any other depressive disorder. Professor Jacoby, in contrast, concluded that Jean suffered from a complex grief reaction (that is, a pathological or abnormal grief reaction) following Debs' death, which he described as (itself) a form of affective disorder. He specifically used the term affective disorder, rather than referring as Dr Series did to a depressive disorder (Judgment at [131]).

120. A further difference of opinion between the experts was also recorded in the Judgment at [131]. Professor Jacoby's evidence was that it is quite common for older patients to project feelings of guilt on to others (in this case projecting guilt in respect of Debs' terminal illness and Jean surviving her onto Sue), and that this was the basis for the delusions. Dr Series was not convinced by this.

121. Mr Sachdeva submitted that the Deputy Master's approach to the burden of proof was wrong. Further, he had misunderstood the evidence of Dr Series and failed to interrogate it against the detailed medical records. Dr Series had not said that it was "likely" that Jean would have been shown to have a depressive disorder. In fact he was unequivocal that there was insufficient evidence to support such a finding. Further, in his view any depression would have been of mild severity. He had not simply failed to reach a view because there had been no proper psychiatric assessment. The fact that Professor Jacoby considered the records to be sufficient, and was prepared to offer a more conclusive view, was not a sound reason to prefer his evidence.

122. I agree that the fact that an expert identifies that there is insufficient evidence to support a particular conclusion is not by itself a good reason to attach less weight to the evidence. However, despite detailed submissions to me, involving a line by line analysis of parts of Dr Series' evidence, I am not persuaded that his evidence was misunderstood by the Deputy Master. On the contrary, I think the Deputy Master considered it carefully and understood it.

123. Mr Sachdeva's first, and in fact key, complaint relates to the burden of proof. Since the *Banks* test applied, the burden of proof was ultimately on John to demonstrate that Jean had capacity on a balance of probabilities, as the Deputy Master described at paragraphs [161] and [162] of the Judgment. In my judgment the Deputy Master correctly identified that Dr Series at no point in his evidence gave a positive opinion that Jean was *not* suffering from an affective disorder. To say as Dr Series did that the evidence did not support a diagnosis that she *did* have such a disorder is not the same thing. He did not form a positive view that she did not (or indeed that she did) suffer from any such disorder.

124. I accept that it is not generally satisfactory to resort to the burden of proof to decide a case (see for example *Sharp v Adam* at [74]). However, in contrast to Dr Series, Professor Jacoby formed a positive opinion that Jean did suffer from an affective disorder. That evidence was accepted (Judgment at [261] and [263]).

125. As regards the Deputy Master's alternative conclusions from paragraph [257] onwards, although caution is needed in picking out passages from the evidence there is a section in the cross-examination of Professor Jacoby that is particularly illuminating in understanding the approach taken. Professor Jacoby specifically confirmed that the disagreement between him and Dr Series related to whether Jean was suffering from a complex grief disorder. Professor Jacoby confirmed that, on the balance of probability, he considered that Jean had a complex grief reaction, which he classified as an affective disorder, and "that is where we disagree". He understood that Dr Series was saying that, on the basis of the papers (which I understand to refer, at least principally, to the medical records), it was not possible to say that Jean was suffering from a complex grief disorder. In contrast, Professor Jacoby was "as confident as I can be", without seeing the patient, that on the balance of probabilities she had suffered from an affective disorder. In a clinical situation, he would have made a provisional diagnosis, which could have been confirmed if he had seen her, but "we are not in the clinical situation".

126. This cross-examination formed part of a "hot-tubbing" process in which Dr Series was also involved. When Dr Series was asked to comment on what Professor Jacoby had just said, he said that he thought that both of them were struggling with the fact that there was no psychiatric assessment, which (in his view) "limits the confidence, certainly of the conclusions I can reach". He then suggested that the difference between them was not so much whether Jean had a bereavement reaction but "whether that could properly be said to be an affective disorder".

127. There was also the following exchange with Dr Series towards the end of his cross-examination:

> "A. . . . My position, just if may be clear about this; I am not saying that I think she did not have a depressive disorder. I am saying that the evidence of the notes I have seen does not clearly establish to me that she did. I do think she had a prolonged and unusual bereavement reaction.
> Q. Just putting it another way, can you positively say that she didn't have an affective disorder.
> A. No, I can't.
> Q. You can't. Can you say it is more likely than not that she didn't have an affective disorder?
> A. (Pause) Well, I think that you would get different answers from different doctors. I am quite sure some doctors would have said, "Yes, she did have dissociative disorder", some psychiatrists. There is a whole book that was written by some psychiatrists about their concerns about the medicalisation of bereavement, and they have strong views that it should not be turned into a disorder."

128. Contrary to Mr Sachdeva's submissions, this exchange supports the Deputy Master's conclusions about Dr Series' evidence. Dr Series did not provide a definitive response to the question whether Jean did or did not have an affective disorder. Further, in re-examination, as referred to at paragraph [128] of the Judgment, Dr Series said that if there had been a psychiatric examination:

> "… there is a good chance that their additional assessment would have shown that she had a depressive disorder. I think that is a definite possibility. Maybe even likely, but that assessment never took place…"

129. Dr Series then explained that he thought that a psychiatrist would be going beyond the clinical evidence in diagnosing a depressive order "on the notes that we do have", but that if a psychiatrist had carried out a proper assessment then:

> "… I think it is quite likely that someone described as here might well have been diagnosed with a depressive disorder."

This is followed by a further explanation:

> "The reason I think it is likely that at least some psychiatrists, had they assessed her, would have found a depressive disorder is because there were a number of factors known to be associated with depression – that is chronic pain, relative isolation, loss of her daughter, other medical problems, particularly the swollen legs, the osteomyelitis. So she had a whole . . . she had good reason to be depressed. So the risk factors were there, and we also know she had morbid thoughts and we know that she was lacking in energy."

130. These responses provide support for the Deputy Master's references to Dr Series accepting that Jean was "likely" to be diagnosed with an affective disorder if she had been examined by a psychiatrist. Further, the Deputy Master clearly understood Dr Series' view that the reason that a depressive order might have been diagnosed was due to a number of medical problems: this is recorded in the Judgment at [130]. However, the Deputy Master explained at [131] that Professor Jacoby disagreed with this, his view being that the pathological grief reaction which Jean suffered from was (itself) a form of affective disorder. The nature of the disagreement is also clear from the experts' joint statement.

131. Importantly, the Deputy Master's conclusion that Professor Jacoby's opinion was to be preferred was supported by the factual evidence about the effect of Debs' death on Jean (Judgment at [262]). This included the evidence of Dr Susan Sheppard, a Chartered Psychologist who had been a good friend of Debs, as well as two independent other witnesses who were friends of Debs, Lynn Hennessy and Heather Baines. It is clear that Professor Jacoby also took full account of this evidence, whereas Dr Series did not consider witness evidence in preparing his report, and had (for example) not read Dr Sheppard's witness statement before his cross-examination. It is also relevant to note here Dr Series' evidence that if Jean had a delusion then it was "very possible" that that was related to an affective disorder (see [93] above).

132. Mr Sachdeva submitted that the Deputy Master did not pay sufficient attention to the full content of Dr Series' written evidence, and effectively cherry-picked from it. Having read it in full, I do not think that is a fair characterisation. In particular, Dr Series' own focus on the absence of a proper psychiatric assessment, his references to a diagnosis of a depressive disorder as being possible or likely, and his failure positively to confirm that Jean did not have an affective disorder, are notable. In contrast, Professor Jacoby concluded that Jean did have an affective disorder, and in forming his

opinion he took account of factual evidence going well beyond the medical records, being evidence which the Deputy Master accepted.

133. A judge is entitled to prefer the evidence of one expert to that of another. However, in doing so the judge must give adequate reasons. As explained in *English v Emery Reimbold & Strick* [2002] 1 WLR 2409, the judge must explain why he has reached the decision that he has. The adequacy of the reasons will depend on the nature of the case, but as the Master of the Rolls stated at paragraph [19] of that case, the judge is required to "identify and record those matters which were critical to his decision". He also explained at [26] that where the complaint is that reasons are inadequate:

> "… the appellate court should first review the judgment, in the context of the material evidence and submissions at the trial, in order to determine whether, when all of these are considered, it is apparent why the judge reached the decision that he did. If satisfied that the reason is apparent and that it is a valid basis for the judgment, the appeal will be dismissed…. If despite this exercise the reason for the decision is not apparent, then the appeal court will have to decide whether itself to proceed to a rehearing or to direct a new trial."

134. In addition to considering the expert evidence, I have also considered the written closing submissions made about the expert evidence by Sue's counsel at trial. In substance, the Deputy Master accepted these submissions. There was a specific submission that Dr Series had not "come up to proof", because his report concluded that there was insufficient information in the medical records to be confident that Jean had a clinical depressive order, when the question was whether she did *not* have such a disorder. It was also submitted that Professor Jacoby drew a conclusion from the information before him, whereas Dr Series complained that the evidence was inadequate, essentially because there was no proper psychiatric assessment. That gave rise to a difficulty for the claimant in terms of the burden of proof but was, it was submitted, in itself a reason to prefer Professor Jacoby's approach because he had done the best he could with the information available. It was also submitted that in view of Dr Series' confirmation in re-examination (see above at [128] and [129]) it was hard to see how the experts' conclusions really differed, at least in addressing the evidential task. Further, emphasis was place on Professor Jacoby's holistic approach, formed on the basis of all the evidence.

135. Overall, I think the Judgment contains sufficient reasoning, in the context of the evidence and the submissions of Sue's counsel at trial, for it to be apparent why Professor Jacoby's evidence was preferred. The Deputy Master's reasons could have been more fully explained, but in the light of the evidence they were not inadequate or irrational. In particular, the Deputy Master was entitled to conclude that John had not demonstrated that Jean was not suffering from an affective disorder. It was also not irrational to describe the approach of Dr Series as more prescriptive and to prefer Professor Jacoby's opinion, formed on the basis of the evidence available, which importantly included the witness evidence as well as medical records. The reference to expert opinion being otherwise substantially limited (Judgment at [259b)]) needs to be read in the context of Dr Series' own focus on the absence of a psychiatric assessment and his acceptance that such an assessment could, or would even have been likely to, have resulted in a positive diagnosis. It is also important to bear in mind that Dr Series

accepted that if fixed false beliefs about Sue were found to exist then that was very possibly related to an affective disorder (see above at [93]). I do not accept that the Deputy Master was making a general point that less weight should be attached to the evidence of an expert who identifies that there is insufficient evidence to support a particular conclusion, or who expresses their view less conclusively than another expert.

136. In support of ground 5 of the appeal Mr Sachdeva referred to Professor Jacoby's reliance on the concept of projected guilt, which he described as a controversial and unlikely mechanism to rely on as the sole basis on which the challenge to capacity rested.

137. I do not think it is correct to characterise the concept of projected guilt as being the sole basis for the challenge to capacity. It was not. Effectively, it was an explanation suggested by Professor Jacoby for the formation of the delusions but not itself the basis for the decision that Jean had formed them.

138. As already indicated, in my view the Deputy Master was entitled to prefer the evidence of Professor Jacoby. His evidence, based on a great deal of experience, was that the concept of projected guilt was quite common in older patients. However, I emphasise the importance of the factual evidence that supported the existence of an affective disorder related to Debs' terminal diagnosis and death (Judgment at [262], cross-referring to [249]-[252]). I also note the clear findings at [168] and [169] that Jean started to maintain that Sue's allegations of abuse by her father were untrue from a point just before Debs died, and that this continued up to her death. The Deputy Master found at [265] that Jean could not accept that Debs was going to die and accepted Professor Jacoby's evidence that she projected her guilt about outliving Debs onto Sue. In my judgment he was entitled to do so.

Ground 6: refusal of admission to probate

139. Ground 6 of the appeal was that the Deputy Master wrongly failed to uphold the validity of at least one of the wills, in circumstances where that was the only lawful decision open to him on the evidence.

140. I did not receive substantive submissions on this ground independently of the others. In my view it does not raise issues not raised by the other grounds of appeal. Rather, it is intended to draw attention to the absence of evidence of mental impairment in Jean's medical notes, the broad consistency and apparent rationality of the wills (and the instructions for them), the estrangement of Jean from Sue in the years leading up to her death and of course the importance of personal autonomy.

141. However, none of these points would prevent the wills being held to be invalid if, notwithstanding them, capacity was properly found not to exist as a result of one or more delusions that predated the relevant will and affected its contents. In particular, I would point out that whilst an estrangement could certainly provide a rational explanation for excluding Sue, the causes of it cannot be ignored. If the estrangement was caused or materially affected by a mental disorder which impaired Jean's capacity, then the fact of the estrangement might well not advance John's case materially.

Next steps regarding grounds 2 and 3

142. As already explained, I have some potential concerns about aspects of the Deputy Master's decision that are relevant to grounds 2 and 3 of the appeal. However, Sue has also made an application to admit new evidence that has not been addressed, and in addition has raised other points in her Respondent's notice that are relevant to these grounds. I am therefore not in a position to determine them.

143. Rather than direct a further hearing at this stage, I propose to allow the parties an opportunity to reflect and determine whether, through mediation or otherwise, they are able to reach an agreement that does not require the expense either of a further hearing before me, or indeed any remittal. I propose to set a three month period for this.

144. I also consider it appropriate to make some observations which are intended to assist the parties in their discussions.

145. First, whatever the position in relation to other possible delusions relied on in the Judgment, the evidence and factual findings in respect of sexual abuse are striking. In circumstances where there is no indication of any cognitive impairment, it is very hard to see how Jean could simply have forgotten or become mistaken about such a fundamental matter, rather than forming a belief in the face of evidence of which she was clearly aware and which she had previously accepted. The Deputy Master held that Jean found the letters from Keith to Sue, provided them to her doctor and relied on them to obtain a divorce. These events would have been highly significant for the family and would have caused immense upheaval. As Mr Dumont said, the events would have shaped Jean's life. There is no indication that Jean had any rational basis to change the view that she had clearly reached at the time the letters were discovered and she divorced Keith, and conclude that Sue had made up the stories of abuse or that there were no letters. There is also no indication that there was any evidence that could have formed the foundation of a mistaken belief about those matters. It is also very striking that Jean's beliefs started to be expressed just before Debs died and continued up to Jean's death.

146. There is also some indication of challenge to Jean on this issue. John's written evidence at trial was that he stuck up for Sue and argued back when Jean claimed that Sue had lied and there were no letters. Mr Sachdeva submitted that I should place no reliance on this because of the Deputy Master's findings about the unreliability of John's evidence. Apart from this being a very unattractive submission, which appears to amount to asking me to assume that John was committing perjury when he (presumably) adopted that evidence at trial, what the Deputy Master actually concluded was that he could not accept much of what John said unless it was supported by independent documentary evidence, and that he generally preferred the accounts of others where there was a conflict (see [23] above). I do not think that that prevents reliance being placed on this particular evidence, which was not contradicted. I am not prepared simply to assume that John lied because that would now suit his case.

147. Secondly, there were also clear findings of fact in relation to the beliefs that Jean had that Sue was not prepared to see her and would not allow her to see Sue's daughter Charlotte, beliefs that the Deputy Master found to be delusional. The Deputy Master found that Jean refused to see Sue, rejected Sue's attempts to reconcile, and that it was Jean who cut Sue and Charlotte out of her life without Sue being in any way

responsible (Judgement at [224] to [229] in particular). Bearing in mind for example that there was documentary evidence of cards and messages continuing to be sent from Sue and Charlotte aimed at reconciliation, the evidence appears to support the existence of a fixed belief, formed without evidential basis and maintained in the face of contrary evidence.

148. Thirdly, in relation to allegations of theft, whilst there may be issues in relation to specific items, there is clear evidence of Jean being challenged in relation to the alleged theft of the trolls, reflected in the Judgment at [223]. Dr Sheppard also gave some evidence of challenging Jean in relation to allegations of theft, as did Ms Walsh (whose evidence was not challenged on that point). More generally, there is a question as to what rational basis Jean could have had for forming any view that Sue was stealing items in the first place when, for example, Jean was not in a position to go through Debs' things to check whether items were indeed missing, and when Sue was not the only person going in and out of the Bungalow. A similar point applies in relation to the allegation that Sue "ransacked" the Bungalow (Judgment at [237]-[240]).

149. Fourthly, Mr Sachdeva submitted that the Deputy Master wrongly treated the morphine-related incident that occurred close to Debs' death as a further delusion, relying on paragraph [186] of the Judgment in which the Deputy Master said that delaying pain relief in the circumstances was capable of no rational explanation. I agree that it is certainly possible to take issue with the Deputy Master's conclusion that there was no rational explanation for Jean's unwillingness to allow morphine to be administered (given the fact that it could hasten death), but it is not the case that the Deputy Master treated this matter as a delusion. The Deputy Master did find at [265] that Jean's mind was poisoned against Sue by Sue's defiance of Jean's instruction not to call the Macmillan nurse, but he did not list it among the delusions that he found to exist. Rather, he found that it was a turning point in the relationship.

150. Fifthly, Mr Sachdeva relied on certain diary entries made by Jean as indicating the existence of a difficult relationship with Sue long before Debs' death. However, the Deputy Master accepted Sue's evidence as truthful (Judgment at [108]). That evidence included that prior to Debs' death, Jean, Sue (and after her birth Charlotte) had a close relationship.

151. Sixthly, as regards Debs' views about Sue's spending habits, there was obviously some difference between the witnesses, with Dr Sheppard maintaining that Debs did not frown on them (Judgment at [216]) and Zoe Reed saying otherwise (Judgment at [77]). However, the Deputy Master clearly preferred Dr Sheppard's evidence on this point.

152. Finally I should put on record concerns I have about John's expressed desire that, if new evidence is to be admitted, there should be cross-examination in respect of it. Apart from concerns about proportionality I would point out that the Deputy Master has already made clear findings about the relative credibility of, in particular, Sue, John and Ms Walsh.

Conclusions

153. In conclusion:

a) In the circumstances of this case, it would not be in the interests of justice to allow the question whether testamentary capacity should be determined using the MCA test rather than the *Banks* test to be pursued on appeal (although, if it were, I would have concluded that the *Banks* test continues to apply).

b) In order to establish whether a delusion exists, the relevant false belief must be irrational and fixed in nature. It not an essential part of the test that it is demonstrated that it would have been impossible to reason the relevant individual out of the belief if the requisite fixed nature can be demonstrated in another way, for example by showing that the belief was formed and maintained in the face of clear evidence to the contrary of which the individual was aware and would not have forgotten.

c) The Deputy Master did not give inadequate or irrational reasons for preferring the evidence of Professor Jacoby to that of Dr Series, and was entitled to conclude that there was a causal link between Debs' terminal illness and the delusions.

d) In relation to Grounds 2 and 3, I am adjourning the appeal for a period of three months to give the parties an opportunity to reflect on their positions and determine whether agreement can be reached without the expense of any further hearing. I trust that, in doing so, they will pay careful attention to the observations made at [145] to [152] above.