Neutral Citation Number: [2021] EWHC 586 (Ch)

Case No: PT-2020-CDF-000008

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

In the Estate of John Williams deceased (Probate)

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 16 March 2021

Before:

HIS HONOUR JUDGE KEYSER QC
sitting as a Judge of the High Court

- -

Between:

TIMOTHY MUNDIL-WILLIAMS	**Claimant**
- and -	
(1) RICHARD JOHN WILLIAMS	
(2) THOMAS OWEN WILLIAMS	
(3) WILLIAM IFOR WILLIAMS	
(4) SUSAN WILLIAMS	**Defendants**

- -
- -

Daisy Brown (instructed by **Roger James Clements & Partners**) for the **Claimant**
Gareth Thomas (instructed by **Everett Tomlin Lloyd and Pratt**) for the **First and Fourth Defendants**

Hearing dates: 9 and 10 March 2021

- -

Approved Judgment

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

.....

HIS HONOUR JUDGE KEYSER QC

Covid-19 Protocol: This judgment was handed down 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 a.m. on Tuesday 16 March 2021.

JUDGE KEYSER QC:

Introduction

1. This is a dispute as to the identity of the last valid will of John Williams ("the testator"), who died on 27 September 2017 aged 91 years. He was survived by his four sons, who are the claimant and the first, second and third defendants; for convenience, I shall refer to them as Timothy, Richard, Thomas and Ifor respectively, and collectively as "the brothers". The fourth defendant is Richard's wife; I shall refer to her as Susan.

2. On 21 July 2014 the testator signed a purported will ("the 2014 Will") and a side letter (which has been referred to, not entirely accurately, as "the Letter of Wishes"). In these proceedings, Timothy asks the court to pronounce against the validity of the 2014 Will, on the ground that the testator lacked knowledge and approval of its contents, and in favour of an earlier will of the testator dated 5 October 1990 ("the 1990 Will"). No question arises concerning lack of testamentary capacity or in respect of any other potential vitiating factor, such as undue influence.

3. Thomas, who is represented by the solicitors who act for Timothy, does not contest the claim and has given evidence in support of it. Ifor also does not contest the claim: he filed an acknowledgment of service that said, "I do not wish to be involved in a court case with family members and would urge my brothers to seek mediation." Richard and Susan do contest the claim and ask the court to pronounce in favour of the 2014 Will.

4. The trial was heard over two days on the Cloud Video Platform. I am grateful to Miss Brown, counsel for Timothy, and to Mr Thomas, counsel for Richard and Susan, for their helpful submissions.

The Law

5. The relevant law is not in issue, and I can take it quite shortly. A party who is propounding a will must prove that the testator knew and approved its contents at the time he signed it. In the ordinary case, knowledge and approval will be inferred from the facts that the testator had testamentary capacity and that the will was duly executed. In other cases, however, something in the circumstances will raise a suspicion in the mind of the court and more will be required before the burden is held to be discharged. In *Fuller v Strum* [2001] EWCA Civ 1879, [2002] 1 WLR 1097, Peter Gibson LJ referred to circumstances in which the court's suspicions might be aroused by the nature of the testamentary provisions and continued at [33]:

> "What is involved is simply the satisfaction of the test of knowledge and approval, but the court insists that, given that suspicion, it must be the more clearly shown that the deceased knew and approved the contents of the will so that the suspicion is dispelled. Suspicion may be aroused in varying degrees, depending on the circumstances, and what is needed to dispel the suspicion will vary accordingly. In the ordinary

> probate case knowledge and approval are established by the propounder of the will proving the testamentary capacity of the deceased and the due execution of the will, from which the court will infer that knowledge and approval. But in a case where the circumstances are such as to arouse the suspicion of the court the propounder must prove affirmatively that knowledge and approval so as to satisfy the court that the will represents the wishes of the deceased. All the relevant circumstances will be scrutinised by the court which will be 'vigilant and jealous' in examining the evidence in support of the will (*Barry v Butlin* (1838) 11 Moo PC 480 at p. 483 per Parke B.)."

In the same case, Chadwick LJ summed the matter up at [65]: "The question is whether the court is satisfied that the contents do truly represent the testator's testamentary intentions." (Cf. his detailed analysis of this question at [66]-[72].)

6. In *Hawes v Burgess* [2013] EWCA Civ 74, Mummery LJ, with whom Patten LJ and Sir Scott Baker agreed, commented as follows in the circumstances of the case before the court:

> "12. As for want of knowledge and approval of the contents of the 2007 Will, the scope of the inquiry indicated by a long line of authorities gives rise to other questions distinct from lack of mental capacity to make the will: *Wintle v Nye* [1959] 1 WLR 284; *Fuller v Strum* [2001] 1 WLR 1097; *Gill v. Woodall* [2011] WTLR 251. The relevant questions to ask in this case are-
>
> > i) Do the circumstances of the 2007 Will arouse the suspicions of the Court as to whether its contents represent the wishes and intentions of the Deceased as known to and approved by her? The judge said 'Yes.'
> >
> > ii) Has scrutiny of those circumstances by the court dispelled those suspicions? The judge said 'No.'
>
> 13. In answering those questions in a particular case the court has to consider and evaluate the totality of the relevant evidence, from which it may make inferences on the balance of probabilities. Although talk of presumptions and their rebuttal is not regarded as specially helpful nowadays, the courts realistically recognise that, for example, if a properly executed will has been professionally prepared on instructions and then explained by an independent and experienced solicitor to the maker of the will, it will be markedly more difficult to challenge its validity on the grounds of either lack of mental capacity or want of knowledge and approval than in a case where those prudent procedures have not been followed.

> 14. I should add a statement of the obvious in order to dispel any notion that some mysterious wisdom is at work in this area of the law: the freedom of testation allowed by English Law means that people can make a valid will, even if they are old or infirm or in receipt of help from those whom they wish to benefit, and even if the terms of the will are hurtful, ungrateful or unfair to those whose legitimate expectations of testamentary benefit are disappointed. The basic legal requirements for validity are that people are mentally capable of understanding what they are doing when they make their will and that what is in the will truly reflects what they freely wish to be done with their estate on their death."

7. It will suffice, I think, to confine further references to remarks in the judgment of Lord Neuberger MR (with which Jackson LJ agreed and Lloyd LJ concurred) in *Gill v Woodall* [2010] EWCA Civ 1430, [2011] Ch 380:

> "14. Knowing and approving of the contents of one's will is traditional language for saying that the will 'represented [one's] testamentary intentions' – see per Chadwick LJ in *Fuller v Strum* [2002] 1 WLR 1097, para 59. The proposition that Mrs Gill knew and approved of the contents of the Will appears, at first sight, very hard indeed to resist. As a matter of common sense and authority, the fact that a will has been properly executed, after being prepared by a solicitor and read over to the testatrix, raises a very strong presumption that it represents the testatrix's intentions at the relevant time, namely the moment she executes the will.
>
> 15. In *Fulton v Andrew* (1875) LR 7 HL 448, 469, Lord Hatherley said that
>
> > 'When you are once satisfied that a testator of a competent mind has had his will read over to him, and has thereupon executed it, … those circumstances afford very grave and strong presumption that the will has been duly and properly executed by the testator'.
>
> This view was effectively repeated and followed by Hill J in *Gregson v Taylor* [1917] P 256, 261, whose approach was referred to with approval by Latey J in *In re Morris deceased* [1971] P 62, 77F-78B Hill J said that 'when it is proved that a will has been read over to or by a capable testator, and he then executes it', the 'grave and strong presumption' of knowledge and approval 'can be rebutted only by the clearest evidence.' This approach was adopted in this court in *Fuller* [2002] 1 WLR 1097, para 33 and in *Perrins v Holland* [2010] EWCA Civ 840, para 28.
>
> 16. There is also a policy argument, rightly mentioned by Mrs Talbot Rice, which reinforces the proposition that a court

> should be very cautious about accepting a contention that a will executed in such circumstances is open to challenge. Wills frequently give rise to feelings of disappointment or worse on the part of relatives and other would-be beneficiaries. Human nature being what it is, such people will often be able to find evidence, or to persuade themselves that evidence exists, which shows that the will did not, could not, or was unlikely to, represent the intention of the testatrix, or that the testatrix was in some way mentally affected so as to cast doubt on the will. If judges were too ready to accept such contentions, it would risk undermining what may be regarded as a fundamental principle of English law, namely that people should in general be free to leave their property as they choose, and it would run the danger of encouraging people to contest wills, which could result in many estates being diminished by substantial legal costs.
>
> 17. Further, such disputes will almost always arise when the desires, personality and state of mind of the central character, namely the testatrix herself, cannot be examined other than in a second-hand way, and where much of the useful potential second hand evidence will often be partisan, and will be unavailable or far less reliable due to the passage of time. As Scarman J put it graphically in *In the Estate of Fuld, deceased (No 3)* [1968] P 675, 714E; 'when all is dark, it is dangerous for a court to claim that it can see the light.' That observation applies with almost equal force when all is murky and uncertain."

8. In the present case, no question arises as to the testator's testamentary capacity. And, as will appear more fully below, the 2014 Will was prepared by a firm of solicitors following the receipt of instructions from the testator, was read over by him before it was signed, and was duly executed. The basic questions in the case are, therefore, (1) whether there are circumstances that nevertheless give rise to suspicions that the testator may not have known and approved the contents of the 2014 Will and, if there are, (2) whether a consideration of the entirety of the evidence dispels those suspicions.

9. A distinct matter of law, concerning the court's powers where knowledge and approval are lacking in respect of only part of a will, is conveniently dealt with after I have made relevant findings of fact.

The Facts

Events before 2014

10. The testator was the owner of Little Cwmdowlais Farm, Llangybi, Usk ("the Farm"), which comprises a farmhouse, farm buildings, and agricultural land and woodland. He lived at the farmhouse with his wife until around the time that they were divorced

in 1980 and, after she moved out, he continued to live there until his death, latterly with Richard and Susan. The Farm was by far the most significant asset in the testator's estate: the gross valuation of the assets in the estate for tax purposes was some £983,000 of which £700,000 was the value of the Farm.

11. Richard is the eldest of the testator's four children; he is now 65 years old. He has worked on the Farm since he was a teenager and over the years has made a significant contribution to it in terms of financial assistance as well as labour. He has lived nearly all his life in the farmhouse and resides there still with Susan.

12. In December 1979 a deed of partnership was executed by the testator, Richard and Thomas in respect of the carrying on of the business of farmers at the Farm. Clause 2 of the deed provided that the partnership would during its continuance be yearly tenants of the Farm to the testator. In the event, Thomas's involvement in the farming business did not continue for very long after the execution of the deed of partnership. The testator and Richard continued to farm together, though Thomas did not formally retire from the partnership until 2014. The deceased continued to be active on the Farm after the deed of partnership was executed; he was unable to do significant physical work after he reached the age of about 70 years, but he was engaged in the business side of the partnership until the last year of his life. In 2014, when he gave instructions for the 2014 Will, he was described on an attendance note as a "retired farmer".

13. On 4 May 1980, after the making of the decree nisi of divorce between the testator and his wife but before the making of the decree absolute, the testator made a will ("the 1980 Will") that provided for the Farm to be left to his four sons equally and for his share in the partnership to be left to those of his sons who were farming in partnership with him at the date of his death.

14. On 5 October 1990 the testator made the 1990 Will. Clause 2 appointed Richard and Thomas as executors and trustees. Clause 3 gave a number of gifts of furniture and household items to the testator's sons. For present purposes the most important provisions were clauses 4, 5 and 6:

> "4. I Give all my share and interest in the farming partnership at present carried on with my son Richard John Williams subject to payment of any inheritance tax chargeable thereon to my son Richard John Williams absolutely. For the avoidance of doubt the land farmhouse and buildings known as Little Cwmdowlais Farm, Llanbadoc, are not to be treated as an asset of the said partnership.
>
> 5. I Give all the rest of my estate whatsoever and wheresoever to my Trustees Upon Trust either to retain or sell it an[d],
>
> (a) to pay thereout my debts, any other inheritance tax chargeable thereon and funeral and testamentary expenses,

> (b) to divide the residue between those of my sons William Ivor (sic) Williams, Richard John Williams, Thomas Owen Williams and Timothy Wood Williams who survive me in equal shares …
>
> 6. I Direct that my son Richard John Williams shall have an option for a period of ten years immediately following my death to purchase my land farmhouse and buildings known as Little Cwmdowlais Farm, Llanbadoc, Usk, Gwent, which is subject to an agricultural tenancy in favour of the said partnership carried on by myself and my son at its subject to tenancy value at the time the option is exercised. …"

15. No issue arises as to the validity of the 1990 Will. The question is whether it was revoked and replaced by the making of a subsequent will (the 2014 Will).

16. Some evidence was given at trial by Timothy, Richard and Thomas as to the understanding within the family, prior to 2014, concerning what would happen to the Farm after the testator's death. The evidence was of peripheral relevance to the issues in the case; this was just as well, as it was not very impressive.

- Timothy's evidence was to the effect that it was known that the testator wanted Richard to remain at the Farm and take over the farming business, but that Richard would be given time to exercise an option to buy out his brothers' shares in the Farm. Timothy attributed this understanding to what his father had told him shortly after the execution of the 1980 Will, but that is at best doubtful: first, Timothy was only 17 years old when the 1980 Will was executed; second, at that time Thomas was also a partner in the farming business; third, the option was first included in the 1990 Will, of which Timothy denied any knowledge.

- Richard's written evidence was to the effect that the testator had told him that the Farm would be his and that the testator would also leave him his savings so that he could "pay it to the boys" (first witness statement, paragraph 6). This appeared to mean that Richard would be enabled to buy out his brothers' interests in the Farm, a meaning made clear by a later passage of the same statement, where Richard recounted a conversation in which he expressed the belief that he would be left the savings "to pay the boys (my brothers) out". However, in his oral evidence, which was at times confused and confusing, Richard said, first, that his father meant that he had saved some money to "give to the boys" (that is, the other brothers), and then he said that his father had told him to "save some money to pay the boys out"; he then denied that the testator had mentioned "pay[ing] the boys out". The most likely conclusion is that Richard expected to have to "pay out" his brothers for their share in the Farm, whatever that share might be.

- In the course of cross-examination, Thomas mentioned his understanding before the 2014 Will was made that he would receive a 25% share in the Farm. That piece of evidence was not challenged, although in fairness it was given in

the context of a line of questioning concerning Thomas's understanding of the 2014 Will.

17. The conclusion I draw from the evidence is that prior to the 2014 Will the brothers' understanding was that the Farm would be left to them all, probably in equal shares, and that Richard would be given an opportunity, and maybe some financial assistance, to buy the shares of Timothy, Thomas and Ifor. It is unsurprising that they had this understanding, because it accords with the tenor of the 1990 Will.

Events surrounding the 2014 Will

18. On 19 May 2014 the testator attended by appointment at the offices of Harding Evans, solicitors, in Newport, where he met with Tracy Gillard. Ms Gillard was not a solicitor; she was the secretary to the head of the Wills and Probate Department at Harding Evans, Paul Lindsey. The testator attended with Richard, but Ms Gillard asked Richard to wait in the waiting room while she spoke to the testator. (When he gave evidence, Richard had no recollection of this visit to the solicitors.) The meeting lasted for about 40 minutes. Ms Gillard took handwritten notes during the meeting and produced a typed file note afterwards.

19. Ms Gillard recorded that the purpose of the meeting was to take the testator's instructions regarding amendments to his existing will and that the testator "had also prepared a handwritten note (he confirmed that it was written by him)". She recorded that, though 88 years old and physically frail, the testator was "fairly bright and talkative" and "appeared to have a very good idea of the assets comprising his estate and what he wanted to do with them". She wrote: "I had no doubts as to his testamentary capacity." After various other matters had been discussed, the business of the meeting was recorded as follows in the file note:

> "He does not want to keep the furniture legacies in his existing Will. He said that Richard and his wife have been living with him for years and he wants them to keep them.
>
> If there is anything left over from his ISAs he wants them to be divided equally between his sons.
>
> He wants to leave a small gift to Sue, his daughter-in-law (Richard's wife)—he will need to confirm how much or what that is to be.
>
> The residue is to be divided as follows:
>
> > 50% to Richard—he should get the tenancy and half of the Estate
> >
> > 50% to be divided between all four sons.

> The option for the ten-year period at clause 4 of his existing Will should be reduced to five—Richard should be able to get a mortgage easily enough."

Ms Gillard recorded in the file note that, because she usually dealt with simple wills, she would pass the matter to one of her colleagues.

20. During the meeting Ms Gillard completed in manuscript a standard form containing details of the testator, the intended beneficiaries, and the estate. It recorded that the testator owned in his own name, free of mortgage, the property he lived in and that its approximate value was £700,000. His other major asset was shown as a share in a partnership, valued at £300,000. Two intended specific gifts were listed: "ISAs ÷ between sons" and "small gift for daughter-in-law, Sue". Then, under "Residue of Estate", was written:

> "Richard tenancy + ½ estate
>
> ½ ÷ four sons
>
> Speak to accountant (Oakleys)
>
> 10 years reduced to five (RW) may be able to get mortgage now
>
> [space]
>
> Thomas still partner + but working".

21. The testator's own manuscript note, referred to in the file note, was headed with his address and telephone number and read (spelling and punctuation modified):

> "I have four sons.
>
> The eldest Richard and his wife Sue live with me looking after me and running the arm at above address.
>
> William Ifor & family lives at [address].
>
> Thomas Owen & family lives at [address].
>
> Timothy Wood & family live at [address].
>
> Myself, Richard & Thomas formed a partnership & tenancy agreement in 1979 for tax reason.
>
> Thomas was still paid wages, but left in less than a year.
>
> Ifor, Thomas & Timothy all helped on the farm for a while but were paid a wage.
>
> I am obliged to pay my ex wife £30 per wk until the end of her days.

> Richard only received what he required & the balance went into the farm business. He now runs the farm himself.
>
> Considering he has worked on the farm for most of forty-four years, I wonder if the shares quoted in previous will is fair & correct.
>
> I would like to leave a small amount to Sue for looking after me so well over many years.
>
> Please check with our accountant – address enclosed."

22. On the file of Harding Evans is a photocopy of the 1990 Will. A marginal annotation next to clause 2 reads, "keep", indicating that the executors were to remain unchanged. A diagonal line has been placed through clause 3, indicating that the specific gifts were no longer to be included. The only other manuscript annotations on the copy are in clause 6, where a period of five years has been marked above the original references to ten years. It is a reasonable though uncertain inference that Ms Gillard made these annotations; anyway, they accord with the instructions given to her.

23. Mr Lindsey passed the file to another member of his department, Amanda Campbell, and instructed her to prepare a will for the testator on the basis of the instructions received by Ms Gillard. In the summer of 2014 Miss Campbell was employed by Harding Evans as a paralegal. She qualified as a solicitor in July 2017, three years after her involvement with the testator.

24. On 18 June 2014 Miss Campbell made a telephone call to the testator at his home in order to discuss his instructions. The file note that she prepared afterwards recorded that Ms Gillard had already taken comprehensive instructions from the testator, but that Miss Campbell "needed to clarify some of them before drafting his will." The critical part of the file note is as follows:

> "The client said that he wanted to give his share in the partnership to his son Richard. The client explained that he owned the farm and the house in his sole name and that he let the farm and the house out to the partnership to carry on the business. He also wanted to give his house and land (the farm) known as Little Cwmdowlais Farm to his son Richard. The client then went on to say that he wanted to give the following:
>
> - His ISAs held with NFU Insurance to be split equally among his four sons.
>
> - £10,000 to his daughter-in-law Sue as a token of appreciation for looking after hi[m] after his divorce from his wife
>
> - 50% of his residuary estate to his son Richard

> - 50% of his residuary estate to be sh[a]red equally among his four sons including Richard (meaning that Richard would gain 62.5% of the residuary estate and the other children would stand to receive 12.5% each)."

25. The instructions recorded by Miss Campbell and eventually carried over by her into the provisions of the 2014 Will differed significantly from the instructions given to Ms Gillard so far as they concerned the Farm. The instructions to Ms Gillard meant that Richard would have the agricultural tenancy and a 62.5% share of the reversion (which would fall into residue), with a 5-year option to buy the remaining 37.5% share. The instructions as recorded by Miss Campbell meant that Richard would have the Farm outright. As for the other brothers, they would still receive 12.5% of the residuary estate; but whereas on Ms Gillard's instructions the residuary estate included the reversion of the Farm, the instructions as recorded by Miss Campbell would leave either nothing or nothing significant in the residuary estate (the Farm, the contents of the farmhouse, the share of the partnership and the money all having been disposed of by other provisions).

26. On 19 June 2014 Miss Campbell sent to the testator, under cover of a letter of that date, a draft will and what she called a Letter of Wishes for his approval. The relevant part of the Letter of Wishes read as follows:

> "As you have chosen to leave a larger share of your residuary estate to your son Richard (including the house and farm), I have prepared a Letter of Wishes for you to have stored alongside your Will which details the reasons for this and your decision to leave your daughter in law, Sue a cash gift of £10,000. This is because, just in case your other children decide to bring a claim against your estate (not that we are suggesting that this would ever happen, but just as a precautionary measure) your Letter of Wishes will inform your Executors and Trustees as to why you have chosen to distribute your estate in the manner set out in your Will. This means that they can then make the court aware of your reasons if such a claim ever arose.
>
> In your Will, you have also chosen to give your sons the sum standing to your credit in your NFU Insurance accounts at the date of your death equally.
>
> The remainder of your estate has then been split so that 62.5% of it will go to Richard and the rest of your sons will receive 12.5% each. However, if any of them pass away before you, the share of your residuary estate (excluding the NFU monies which would fall back into an[d] form part of your estate) that they would have received will pass to any children that they may have living at the date of your death in equal shares once they have reached the age of twenty one.
>
> Please take the time to read through your draft Will carefully to ensure that it clearly expresses your wishes and instructions.

> Thereafter, I would be grateful if you would telephone me so that we can discuss any required amendments or additions and arrange an appointment for you to call at the office to sign the engrossment copy."

27. The draft will and the Letter of Wishes were, save in respects of no relevance for present purposes, identical to those eventually signed by the testator (see below).

28. A file note records that on 25 June Miss Campbell received a telephone call from the testator concerning his instructions and the draft will that she had sent to him. The file note read:

> "[Miss Campbell] asked the client whether the draft will that he received was ok and the client said that it was.
>
> The client stated that he understood that, as it stood, if this will took effect that he was leaving his land and farm as well as his 1/3 share in the partnership to his son, Richard. However, the client said that he would like to revise the partnership agreement and make sure that Richard received the partnership in full.
>
> [Miss Campbell] said that she would speak with her colleague tomorrow and try to get this matter referred across to the relevant department to try and resolve this issue for him.
>
> In the meantime, the client was happy for [Miss Campbell] to amend his draft will with the correct address which is Llangybi near Usk, not Llanbadoc and to amend his Letter of Wishes to state that his son Ivor (sic) who is a Baptist minister was able to participate in his funeral / plan or arrange his funeral if he wished as he knew that he did not see eye to eye with his one brother. [Miss Campbell] said that she would incorporate this into his LoW for him.
>
> [Miss Campbell] advised the client … that she would get back to him regarding an appointment for him to come in and sign his final will."

(In the event, the address was corrected in the 2014 Will, but, apparently by oversight on the part of Miss Campbell, the Letter of Wishes was not redrafted to include mention of Ifor.)

29. On 21 July 2014 the testator attended by appointment at the offices of Harding Evans for two purposes: first, to meet with Miss Campbell in order to execute the new will; second, to meet a solicitor in another department in the firm in order to give instructions concerning the removal of Thomas from the farming partnership.

30. Miss Campbell made a file note of her attendance on the testator. She recorded that, although the testator was physically frail, he "knew exactly what he was doing." The file note continued:

> "[Miss Campbell] noting that the client understood everything that was in his will and asked for his son to be present in the room with him even though [Miss Campbell] explained that everything in his will was confidential. The client said that this did not matter and that he wanted his son present. [Miss Campbell] noting that she did not feel as though there was any undue influence etc, as the client's son remained silent throughout the whole meeting apart from asking what one clause was. After a brief explanation, he did not say anything else. [Miss Campbell] noting that she is confident that the client's instructions are his own and that he knew exactly what it was that he wanted to do.
>
> [Miss Campbell] noting that the client signed and dated his will in front of her and her colleague Tracy Gillard who then witnessed his will.
>
> … The client also expressed an interest in giving half of his farm and house to his son Richard during his lifetime. AEC [Miss Campbell] noting that she said she could refer him on to the relevant department or get her colleague to discuss the same with him. AEC noting that the client saw David Lewis straight after her in relation to a partnership agreement he has in place regarding his farm. AEC ntoging that during that appointment the client mention[ed] transferring half of his property to his son during his lifetime for tax planning purposes. DL advised that PL may be able to advise initially, so AEC said that she would see what he had to say on the matter when he was back in the office."

31. The 2014 Will appointed Richard and Thomas as the executors and trustees of the will. For present purposes, the most important provisions were clauses 4 to 8:

> "4. (a) IN THE exercise of the power in my partnership agreement dated 14 December 1979 I GIVE my son RICHARD JOHN WILLIAMS of [address] my share and interest in that partnership or the price payable for it …
>
> (b) This gift includes my share of all the assets of the business …
>
> 5. I GIVE all of my legal and beneficial interest in my land and property known as Little Cwmdowlais Farm, Llangybi, Near Usk, NP15 1TH ('my house') along with the furniture, carpets, curtains and other items of household use and ornament ('the effects') to my son RICHARD JOHN WILLIAMS of [address] absolutely and I DIRECT that any mortgage shall be discharged out of my residuary estate and I DECLARE that this gift is

not conditional on Richard acting as executor and trustee of this my will

6. I GIVE the amount standing to my credit in my ISA accounts held with NFU Insurance at the date of my death equally among [Richard, Ifor, Thomas and Timothy] in equal shares …

7. I GIVE the sum of £10,000 (ten thousand pounds) to my daughter-in-law SUE WILLIAMS of [address] absolutely.

8. MY TRUSTEES shall hold the rest of my estate on trust for sale with power to retain or postpone such sale and

(a) (i) to pay my debts, funeral and executorship expenses

(ii) to pay any inheritance tax in respect of property passing under this Will

(b) to divide and pay the residue of my estate ('my residuary estate') among the following in the shares specified:

(i) As to 62.5% thereof to RICHARD JOHN WILLIAMS of [address] absolutely

(ii) As to 12.5% thereof to WILLIAM IFOR WILLIAMS of [address] absolutely

(iii) As to 12.5% thereof to THOMAS OWEN WILLIAMS of [address] absolutely

(iv) As to 12.5% thereof to TIMOTHY WOOD WILLIAMS of [address] absolutely

…"

32. The Letter of Wishes was addressed to the trustees of the 2014 Will and read:

"I have chosen to leave my son Richard John Williams the farm and the house known as Little Cwmdowlas (sic) Farm in Llangybi, Near Usk because he has taken over the farming business from me and has been running it on his own for approximately 40 years. Also, Richard and his wife Sue live with me and I feel as though they should receive the house as well as the farm when I pass away.

I have also chosen to give Richard a larger share of my residuary estate than my other children for the reasons mentioned above.

> I have chosen to give my daughter in law, Sue £10,000, because since my divorce, she has looked after me and has been very kind. This gift is a token of my appreciation to her for her kindness."

33. Miss Campbell gave evidence at the trial. (She is now married and called Mrs Taylor, but for convenience I shall refer to her throughout as Miss Campbell.) The following material points arose from her evidence.

1) Miss Campbell had two reasons for making the telephone call to the testator on 18 June 2014. First, some weeks had elapsed before the file had been passed to her and she felt it appropriate to apologise for the delay and to ensure that his instructions still stood after a month had passed since his meeting with Ms Gillard. Second, she had not taken the initial instructions from the testator and considered that it would be professional to speak to him directly before drafting his will.

2) Before the telephone call on 18 June 2014, there had been no intimation from the testator that the instructions he had given to Ms Gillard no longer represented his intentions.

3) The telephone call on 18 June 2014 was made without appointment or prior warning. Miss Campbell asked if it was convenient to speak about the will and told the testator that she could speak to him at another time if he preferred, but he was content to speak then.

4) In her oral evidence, Miss Campbell said that she had gone through the instructions received by Ms Gillard with the testator, though she accepted that the attendance note did not record that she had gone through that exercise; it rather says that she had asked the testator to tell her how he wanted to dispose of his assets.

5) Miss Campbell acknowledged that the instructions she recorded were different from those recorded by Ms Gillard. She confirmed that the testator did not tell her in terms that he was giving different instructions from those he had given to Ms Gillard or that the instructions he had given to Ms Gillard no longer held good. She was uncertain whether she had pointed out to him that the instructions were different: initially she accepted that she had not told him that these were different instructions from those he had given previously; in a subsequent answer she said that she was not sure whether or not she had told him they were different; later again, she said that, although she had not recorded telling the testator that his instructions were different from those previously given, "to the best of [her] belief" she would have raised the point with him. Towards the end of her evidence Miss Campbell said that she would probably have discussed with the testator his change of mind within a matter of weeks, although she could not remember whether she had asked him why he had changed his mind.

6) Miss Campbell's evidence was that the testator was clear and unequivocal in his instructions to her and that, when she asked him about the instructions, he explained his reasoning in a manner that she subsequently incorporated into

the Letter of Wishes. The key point that she focused on in her evidence was the testator's "overarching concern" to ensure that Richard and Susan were "okay" and his insistence that he wanted to leave the Farm and farmhouse to Richard. When answering questions, she several times referred to the Farm and farmhouse being left "entirely" or "absolutely", though she acknowledged that she could not say that the testator had used either word; he had said he "wanted it all left to them."

7) Miss Campbell acknowledged that she had made no record of what assets would fall into the residuary estate, that the effect of the will she drafted was that there was nothing or practically nothing in the residuary estate, and that she had made no record of informing the testator of that fact. She said that the fact that three of the sons would receive practically nothing under the will was something she "would have discussed" with the testator at the time. In answer to a boldly leading question in re-examination, Miss Campbell was happy to accept a somewhat dismissive attitude to clauses dealing with residuary estate as a "mopping up" exercise. In answer to me, she acknowledged that now, as a qualified solicitor, she would be careful to ascertain what would be comprised in the residuary estate; however, she noted that the estate was known to consist mainly of the Farm.

8) Miss Campbell acknowledged that the words in her letter of 19 June 2014, "As you have chosen to leave a larger share of your residuary estate to your son Richard (including the house and farm)", were misleading and that the letter did not point out that there would be nothing in the residuary estate. But she said that, if a client tells you that he wants to leave his entire property to a particular person, that is clear enough.

9) As for the meeting on 21 July 2014, when the 2014 Will was executed, Miss Campbell said that her file note was correct in recording that Richard was present when the will was executed. She acknowledged that the file note did not record that she had read the will to the testator before he signed it, but she said that she always did so and would have done so on this occasion.

34. Richard gave evidence concerning the execution of the 2014 Will and his knowledge of its terms, to the following effect. Before the will was executed, the testator told him that the furniture in the farmhouse would be left to him. On the occasion when the will was executed, he was in the room with the testator at the start of the meeting with Miss Campbell, but he was asked to leave and he did so, returning only after the will had been executed. When he came back into the room, the testator was looking at the will, and Richard happened to notice the provision (clause 6) leaving the ISAs to the brothers in equal shares. Richard's witness statement continued:

> "I said that I thought they [the ISAs] were going to be left to me to pay the boys (my brothers) out, but he said not to worry, he could always take the money out (out of the ISAs, I presumed he meant) and that if it wasn't there they couldn't have it. I did not know the other contents of the Will …"

35. As to whether Richard was present throughout the meeting on 21 July 2014 or went out until the 2014 Will had been executed, the best evidence is the file note. It is a

contemporaneous record made in connection with the provision of professional services, and it gives a coherent and credible account of the request that Richard leave, the testator's wish that he remain, Miss Campbell's reason for acquiescing in the testator's wish, and the extent of Richard's involvement in the meeting (involving, I note, a question about one particular provision of the will). The lapse of six and a half years since the meeting (five and a half before Richard made his witness statement) is liable to render his recollection less reliable than a contemporaneous record. And Richard was not by any means a convincing historian. I do not place any independent weight on Miss Campbell's recollection as to Richard's presence, as I am not persuaded that she has any genuine recollection on the point and, if she had, it would be less reliable than her own file note.

36. Any further relevant findings of fact concerning the preparation of the 2014 Will are set out below, when I discuss the specific issue in the case.

37. Immediately after executing the 2014 Will, the testator saw David Lewis, a solicitor at Harding Evans, in order to discuss the removal of Thomas from the farming partnership. On 30 July 2014 Mr Lewis sent to the testator, for execution by the partners, the Deed of Retirement. The covering letter explained, accurately: "The deed removes Thomas from the partnership without any payment being made to him as a result and then allows yourself and Richard to carry on as before." Thereafter the Deed of Retirement was duly executed and dated 4 August 2014. The farming partnership then continued as an equal partnership between the testator and Richard.

Subsequent conversations

38. At trial evidence was given concerning a number of conversations regarding the 2014 Will and the disposition of the deceased's estate. The evidence is relevant, if at all, only insofar as it sheds light on the testator's knowledge and understanding of the provisions of the will. Further, although it is convenient to discuss the evidence at this point, it can only be fully assessed in the context of the entirety of the evidence in the case; in particular, conclusions as to the testator's state of mind can at best be no more than tentative and provisional insofar as they might be drawn from evidence regarding conversations.

39. It is uncontroversial that at some point, probably in August 2014, the testator spoke to Timothy about the 2014 Will at the farmhouse and that Timothy then gave a report to Thomas of what had passed between him and their father. There is, however, a dispute as to the form and content of the conversation between Timothy and the testator.

    1) Timothy's evidence as to the conversation was to this effect. He called at the farmhouse on one of his visits to see his father; he used, at that time, to visit once every two or three weeks on average. On this occasion, Richard and Susan were present during the roughly hour-long conversation; Richard left the room on a couple of brief occasions but was present for the substance of the conversation. The testator quickly brought the conversation around to the question of his will; it appeared that he had intended to take the opportunity to raise the matter. The testator said that he had decided to reward Richard for the effort and time he had put into the farm business by increasing Richard's share in the farm and buildings to 62.5%; the remaining brothers would share

equally the remaining 37.5% (that is, each would have 12.5%). The testator said that he expected Richard to find money to buy out his brothers' shares by selling another property that he owned, Hill Farm, which adjoined the Farm and had been left to Richard by its previous owner. The testator also said that Richard was also to have the furniture at the Farm. Timothy said that his father had not shown him the 2014 Will but had no difficulty in giving this explanation of it. Timothy said that he promised his father that he would tell Thomas and Ifor what he had been told.

2) The evidence of Timothy, Thomas and Thomas's partner, Jill Woodland, was to the following effect. After he had spoken to his father, Timothy made a telephone call to Thomas. However, Thomas was unavailable and the call was taken by Ms Woodland. Timothy told her that he had some good news to tell Thomas, but he did not give her any details. Later that day, Timothy called again; this time he spoke to Thomas and told him that Timothy, Thomas and Ifor would each receive 12.5% of the value of the Farm under the will and that Richard would sell Hill Farm to enable him to buy out their shares. Thomas was pleased at this news: the inheritance was less than the 25% share he had understood he would get under previous wills, but he also understood that Richard had worked on the Farm for a long time; he would have been surprised and disappointed to receive nothing under the will, but he was content with the prospect of 12.5%. This evidence was not materially challenged.

3) Richard gave a different account of what must have been the same meeting between Timothy and the testator. According to Richard, he and Susan were in a different room for most of the time that Timothy was talking to the testator and they heard no conversation about the 2014 Will. In his second witness statement, Richard also gave evidence of what the testator told him of his conversation with Timothy:

> "At some point after this, my father told me that he had shown his Will to my brother Timothy and that Timothy had left with a big grin on his face. My father remarked that he would not be surprised if Timothy contested the Will. My father stated that as I had worked and paid for everything, I should not give in to Timothy if he did contest the Will."

4) Susan did not mention the testator's conversation with Timothy in her witness statement. In cross-examination, she said that Timothy and the testator had been in the living room, while she and Richard were in the kitchen and heard none of the conversation. A day or two later, the testator told them that he had showed the will to Timothy. However, Susan also commented that it had seemed very quiet in the living room and that she had assumed that Timothy was reading the will to himself. She acknowledged that she was unable to give an answer to the question why she had assumed that, when she had not then known that the testator was going to show the will to Timothy. Susan appeared to have very little idea of the matters to which this case relates, and I am not persuaded that she has any genuine recollection of anything that is in any way relevant to the issues.

40. As to what happened in August 2014, some findings can be made, though any conclusions as to the testator's knowledge must be tentative and subject to testing against the entirety of the evidence concerning the testator's knowledge.

    1) In consequence of his conversation with his father, Timothy (a) was happy as to the provision that he believed had been made for him and (b) believed that the provision included 12.5% of the Farm. Conclusion (a) is confirmed by Timothy, by the evidence of his report to Thomas, and by Richard's evidence that the testator said he had left with a grin on his face. Conclusion (b) is confirmed by Timothy, by the report that he gave to Thomas, and by the fact that he could only have been happy if the 12.5% related to the Farm: 12.5% of nothing is nothing.

    2) Although there is no reason to doubt that the testator perceived that Timothy was happy, it is improbable that Richard's evidence that the testator anticipated a dispute over the 2014 Will is correct. If the evidence were correct, it would mean that the testator had made a point of apprising Timothy of the terms of the 2014 Will but knew that Timothy had misunderstood it and did not correct his misunderstanding but allowed it to continue until an anticipated dispute after his death. That is scarcely credible, and Richard himself acknowledged in cross-examination that his father was an honest man who would want his sons to understand the effect of his will.

    3) Whether Timothy's belief was the result of what he was told by the testator or the result of his own (mis-)reading of the 2014 Will, it is probable that it was shared by the testator. This conclusion follows from the following: (a) Timothy believed he had cause to be happy; (b) Timothy's happiness must have involved a belief that he was going to inherit 12.5% of the Farm; (c) the testator would probably have known if Timothy were unhappy, and Richard himself says that the testator saw that Timothy was happy; (d) the testator would have sought to correct any misapprehension on Timothy's part if he had been aware of it; (e) it is improbable that the testator could have believed that Timothy was happy and not under a misapprehension, unless he too believed that the 12.5% related to the Farm. As mentioned above, this third conclusion must at this stage remain tentative.

41. There is no evidence of any other conversation concerning the 2014 Will before the testator died on 27 September 2017.

42. Evidence was given of three conversations that took place after the death of the testator. The potential relevance of these is to shed light on the state of mind of the testator by showing what Richard's own understanding of the position was, the assumption being that his understanding is likely to have been received from the testator. Again, any prima facie inferences that might be drawn from the evidence concerning these conversations would have to be considered in the light of all the other evidence in the case.

43. First, Thomas gave evidence that on a date between the death and the funeral on 6 October 2017, he went to the farmhouse and spoke to Richard, who told him (a) that the value of the Farm was halved by his agricultural tenancy and (b) that he had some money in ISAs but, if necessary, would sell Hill Farm to enable him to buy his

brothers' shares in the Farm. This evidence would tend to suggest that Richard believed that his brothers were to inherit shares in the Farm and that he would be buying them out. As Timothy had been given information by the testator as to the 2014 Will, it would be reasonable to suppose that Richard also had been given such information and that his belief concerning shares in the Farm either had been created by that information or had not been dispelled by it. However, Richard was not questioned at trial about this alleged conversation.

44. Second, Jill Woodland and Samuel Williams, Thomas's son, gave evidence about a conversation that took place while people were gathering outside the farmhouse before the funeral, when Richard is said to have remarked that he would if necessary sell Hill Farm to raise necessary funds to buy his brothers' shares. This evidence has to be approached with particular caution, for several reasons. (1) There is an obvious risk that the evidence is self-serving. (2) It relates to a casual conversation that took place more than three years ago and in circumstances of natural emotion and upset. (3) Ms Woodland's account in paragraph 3 of her witness statement clearly suggests that she was a direct participant in conversation with Richard, whereas her oral evidence was to the effect that she was just listening to the conversation taking place among others with whom she was standing. (4) Sam Williams' evidence was that the conversation was between Richard and Thomas, with no one else present other than himself. (5) Although both Ms Woodland and Sam Williams say that Thomas was involved in the conversation, Thomas did not give evidence of such a conversation. (6) Richard denied the conversation.

45. Third, immediately after the funeral, Thomas and Jill Woodland went back to the farmhouse with Richard and Susan. According to Thomas's witness statement, Richard said that he would sell Hill Farm to pay his brothers (that is, for their shares). The witness statement said that the purpose of going back to the farmhouse was "to go through the will", but both Thomas's oral evidence and the evidence of Ms Woodland show that it was for mutual comfort after the funeral. Ms Woodland gave evidence that Richard did talk about selling Hill Farm, and that she and Thomas told him not to worry about such matters at that time. Richard denied the conversation. Susan was not asked about it.

46. In summary, I conclude that the evidence concerning these three conversations shortly after the death of the testator does not materially advance consideration of the issues. A conclusion on other grounds that the testator thought he was leaving the Farm to the four brothers as residue would give some reason to believe that the conversations did take place, as being consistent with a belief that the testator might have engendered or encouraged. But the evidence as to these conversations would not itself justify any conclusion as to the testator's state of mind.

47. It appears to have been at a meeting at the Farm on 12 November 2017 that a clear dispute arose as to the effect of the testator's will. It is unnecessary to recite the sequence of events that resulted in the present litigation.

Discussion

48. The issue in the case is simply whether the testator knew and approved the contents of the 2014 Will; that is, whether the 2014 Will represented his testamentary intentions. This is an issue concerning the state of mind of the testator when he made the 2014 Will.

49. The state of mind of the testator can only be assessed upon consideration of all the evidence in the case. Of primary importance are the undisputed facts of the preparation of the 2014 Will by a firm of solicitors and its due execution by a testator of full capacity. Also of great importance is the contemporaneous documentation prepared by the testator and the firm of solicitors concerning the instructions for the 2014 Will and the circumstances of its preparation and execution. This provides a measure of objective evidence of matters that took place some 6½ years ago. The written and oral evidence of witnesses may be important, and I think that some of the evidence given at trial was indeed important, but as I have already observed it has to be approached with caution. The passage of time adversely affects the reliability of recollections of past events, even if evidence is honestly and confidently given. And the court must be alive to the risk that recollections have been subconsciously moulded to a witness's perceived best advantage or, more regrettably, that a witness is giving evidence that is merely self-serving. Finally, however good may be the quality of evidence concerning conversations with the testator or others, whether in connection with the preparation and execution of the 2014 Will or thereafter concerning its provisions and effect, it has value only insofar as it casts light on the relevant state of mind of the testator himself.

50. Several factors already mentioned weigh powerfully in favour of the conclusion that the 2014 Will did represent the testator's intentions. First, he had testamentary capacity. Second, the will was prepared by a firm of solicitors, who took detailed instructions and drafted the will and an explanatory Letter of Wishes to explain the reasoning behind it. Third, the testator read the will carefully, as is indicated by the correction that (as I am satisfied) he required in respect of the address of the Farm. He also read the Letter of Wishes, at least in its draft form. Fourth, the firm of solicitors received confirmation both by telephone and in a face-to-face meeting that the testator understood its provisions and was content with them. Fifth, the will was clear and unambiguous on its face. Further, I bear in mind the remarks of Lord Neuberger MR in *Gill v Woodall*, cited in paragraph 7 above.

51. However, I have reached the clear conclusion that the testator did not have knowledge and approval of the contents of the 2014 Will and that he seriously misunderstood its provisions, in that he did not appreciate that the Farm was not part of the residuary estate and would go entirely to Richard. Thus the 2014 Will did not represent his testamentary intentions. Several factors indicate, and together compel, this conclusion.

52. First, the 2014 Will does not accord with the instructions that the testator gave to Ms Gillard in May 2014. Of course, the testator's thoughts might have developed in the following month; he might have decided that a 62.5% share of the Farm did not sufficiently reward Richard. However, one might be cautious before drawing that conclusion. The deceased had not changed his will for nearly 24 years. He had clearly given serious thought to his instructions to Ms Gillard; though it is right to observe that his manuscript note did not specify the shares to be left to his sons, and he remained undecided about the amount to be left to Susan. Further, there is no

evidence that anything occurred between 19 May and 18 June 2014 to cause the testator to change his mind in any significant way. To deprive Timothy, Thomas and Ifor of nearly all the benefit they would receive was on any view a very significant alteration.

53. Second, the testator did not contact Harding Evans to tell them that he had changed his mind. There is good evidence that he was capable of making telephone calls as well as receiving them, but he neither wrote nor telephoned to say that the Farm was to be left to Richard absolutely.

54. Third, the supposed change of instructions came about in a telephone call that was made by Miss Campbell without appointment or warning. She says, and I accept, that she offered to call again at another time if that would be more convenient and that the testator was happy to continue. However, as the testator was unprepared for the telephone call and had already given detailed instructions, the potential for misunderstanding or confusion ought to have been obvious, as ought the need to examine closely any apparent divergence between what was being said on the telephone from what had been recorded by Ms Gillard.

55. Fourth, I find as a fact that Miss Campbell did not go through the instructions as recorded by Ms Gillard when she spoke to the testator on the telephone. In making this finding, I reject Miss Campbell's evidence that she did go through those instructions. First, throughout her evidence Miss Campbell showed obvious, though understandable, signs of remembering things in a manner that accorded with what she knows she ought to have done and what, as a qualified solicitor, she now would do. Second, the file note is more reliable as a record than a recollection several years later; when the file notes differ from Miss Campbell's recollection, I prefer to rely on the file notes. The file note of the conversation on 18 June 2014 does not record that Miss Campbell went through the instructions as recorded by Ms Gillard. Rather, it records that she "asked whether the client could let her know what it is that he wanted to do with his assets when he passed away."

56. Fifth, in the circumstances of the particular case there was obvious room for confusion as to the testator's intentions regarding the Farm. Miss Campbell emphasised in her oral evidence that the testator was clear that he wanted Richard to have the Farm. The file note also records: "He also wanted to give his house and land (the farm) … to Richard." In one sense, that is indisputably correct. It is usual that a farmer with several children, only one of whom has remained on the farm and taken on the farming business, will want to ensure that that child will be able to remain at the farm and continue to farm it. But that aim might be, and commonly is, achieved by means other than an outright gift of what is likely to be the farmer's only significant asset.

57. Sixth, the testator did not tell Miss Campbell that he had changed his mind about the Farm and, whereas formerly he had wanted to leave it to his four sons in the shares recorded by Ms Gillard, he now wanted to leave it outright. The file note does not record that he said he had changed his mind, and Miss Campbell confirmed in her oral evidence that he did not say that he had changed his mind.

58. Seventh, Miss Campbell did not tell the testator that the instructions he was giving (as she understood them) were different from those recorded by Ms Gillard. It follows,

and I find, that she did not ask him why his instructions had changed in the course of the previous month. The file note contains no mention that she pointed out the difference or asked about it. Her evidence on the point, summarised above, was unimpressive and does not lead me to conclude that she identified, mentioned or asked about the difference.

59. Eighth, Miss Campbell did not seek to address with the testator the effect of his instructions (as she understood them) on the residuary gift.

60. Ninth, Miss Campbell did not seek to address with the testator the fact that the option clause, previously contained in the 1990 Will and to be retained with a slight modification according to the instructions given to Ms Gillard, would now be omitted. In her oral evidence she said that she would have mentioned this in the course of going through the instructions given to Ms Gillard, but the point is not recorded in the file note and I do not accept that Miss Campbell did go through the instructions given to Ms Gillard.

61. Tenth, the letter of 19 June 2014 was thoroughly misleading, because it could clearly be understood to mean—and, in my view, its natural meaning was—that the Farm was part of the residuary estate, of which Richard would receive a larger share. It was thus entirely consistent with the instructions given to Ms Gillard and with the purpose of providing for specified shares of the residuary estate.

62. Eleventh, I find that the 2014 Will was not read to the testator on the occasion when he signed it. This point is not itself of the greatest importance; the testator had read it for himself previously. However, the file note for 21 July 2014 does not record that the will was read before being executed; indeed, the record that the testator understood everything in the will precedes the record that Richard was asked to leave. Richard's evidence that the will was not read out in his presence is not of great significance, even though I have found that he was present throughout the meeting, because his recollection of events is unreliable. However, if the will had been read out, the fact would probably have been recorded in the file note. Miss Campbell's evidence that the will was read out reflects her tendency to remember events in a manner that best shows her compliance with what she now understands to be good practice.

63. Twelfth, although the 2014 Will is capable of being implemented according to its terms, it makes little practical sense. The provision for precise shares of the residuary estate (62.5% + 3 x 12.5%) made good sense on the instructions recorded by Ms Gillard, because the Farm was part of the residuary estate. But it now stands as a piece of refined redundancy, because there is nothing identifiable in the residuary estate.

64. Thirteenth, the conclusions that appeared reasonable in respect of the testator's conversation with Timothy in August 2014 (see paragraph 40 above) confirm that the testator understood the 2014 Will in the manner suggested in the letter of 19 June 2014, namely that Richard was getting 62.5% of the Farm. In the context of the evidence as a whole, those conclusions are confirmed. (I also think it likely that Richard made remarks about selling Hill Farm to buy out his brothers' shares. But this finding relies in part on findings made on other grounds; it is not an independent basis for a finding as to the testator's state of mind.)

65. Fourteenth, accordingly, the supposed clarity of the 2014 Will and the Letter of Wishes does not provide significant support to the contention that the testator knew and approved the contents of the will. The testator wanted Richard to have the Farm, which represented his home and his livelihood. But he intended to bring that about by giving Richard the partnership business, with the agricultural tenancy, and a large share in the reversion of the Farm, which would enable him to give money to his brothers in respect of their shares. He was not confronted with the apparent change of instructions from what he had told Ms Gillard; it was not pointed out to him that the carefully worked out shares of the residuary estate had no application; indeed, he was encouraged in the misapprehension that the Farm was part of the residuary estate; he was not directed to the omission of the option or to the reason for that omission. In view of the clarity of the instructions he had given in the face-to-face meeting with Ms Gillard, it was natural that he read the 2014 Will to accord with the intentions those instructions reflected.

Disposition

66. What, then, is to be done? On behalf of Timothy, Miss Brown invited me simply to pronounce against the 2014 Will, on the basis that the parties could then reach a solution that would accord with the testator's actual wishes. I have been assured that Timothy and Thomas have no wish to enforce the more favourable terms of the 1990 Will: they are content with the shares of the residuary estate in the 2014 Will, provided that it is understood that the Farm is part of the residuary estate, and they want to honour the gift of £10,000 to Susan. (Ifor has played no part in the proceedings, but there is no indication that he wishes to stand on his rights.) It is suggested that the parties might agree a deed of variation and that, presumably, the 1990 Will would be admitted to probate once that has been done.

67. In his closing submissions for Richard and Susan, Mr Thomas submitted that, if I were to make the findings that I have in fact made, the proper course would be to pronounce in favour of the 2014 Will subject to the exclusion of words that caused it to depart from the testator's testamentary intentions. The proposed omission is limited to words in clause 5, as follows:

> "5. I GIVE all of my ~~legal and beneficial interest in my land and property known as Little Cwmdowlais Farm, Llangybi, Near Usk, NP15 1TH ('my house') along with the~~ furniture, carpets, curtains and other items of household use and ornament ('the effects') to my son RICHARD JOHN WILLIAMS of [address] absolutely ~~and I DIRECT that any mortgage shall be discharged out of my residuary estate and I DECLARE that this gift is not conditional on Richard acting as executor and trustee of this my will~~".

The effect of the omission of these words would be to place the Farm (subject to the agricultural tenancy) in the residuary estate. The 2014 Will would then accord entirely with the instructions given to Ms Gillard, save only that the 5-year option would not be included.

68. Understandably, Miss Brown was unprepared for this suggestion, which did not feature in the defence. She did not strongly oppose the suggested course, and did not say that it ought not to be considered, but she raised the question whether the effect of the omission of words from clause 5 was to rewrite the 2014 Will and go beyond the proper exercise of the court's powers.

69. In the circumstances, this point was not fully argued at the trial.

70. I note, also, that there is no claim for rectification of the 2014 Will pursuant to section 20 (1) (b) of the Administration of Justice Act 1982. The jurisdiction to rectify a will was not raised in submissions at the trial.

71. Mr Thomas referred me to the decision of Latey J in *In re Morris, deceased* [1972] P 62, to illustrate the breadth of the court's power to admit a will to probate with the omission of words that did not reflect the testator's intentions. In that case, the testatrix had made a will that included in clause 7 individual pecuniary legacies numbered (i) to (xx). She wanted to revoke clause 3 of her will and the legacy numbered (iv) in clause 7. A codicil was drawn up by her solicitor and executed by the testatrix. By reason of a drafting error unnoticed by the testatrix, the codicil purported to revoke "clauses 3 and 7" of the will, instead of "clauses 3 and 7 (iv)". Latey J found that it was clear that the testatrix had not intended to revoke any gift in clause 7, other than the gift in clause 7 (iv), and that if she had spotted the drafting error she would never have approved and executed the codicil. The power to rectify (in the strict sense) a testamentary document had not yet been conferred on the court, and Latey J observed at 75 that the simple course of merely adding "(iv)" after "7" was therefore not available, although it would have "giv[en] effect to the testatrix's intentions in their entirety." He continued at 81 (the underlining is mine):

> "[T]he case is one in which the court has power to rectify, using that word in a broad sense, so far as it can. Which is the proper course? To pronounce against the instrument in its entirety? or to exclude part and admit the rest?
>
> Certainly to reject the whole instrument would come much nearer to giving effect to the testatrix's dispositive intentions (both in the number of beneficiaries and in the amounts involved) than would the admission of the whole instrument.
>
> But is the instrument severable, and can one get <u>nearer still</u> by excluding part? In my judgment, I can."

72. It is interesting to observe how Latey J effected severance. He did not excise text as follows, "clause~~s~~ 3 ~~and 7~~", so as to leave "clause 3 of my said will". Instead, he simply removed "7", leaving the text as "clauses 3 and of my said will". He did this on the basis that the result would be a codicil that was ambiguous on its face and that a court of construction might cure the ambiguity either in such a way as to revoke only clause 3 or, possibly, in such a way as to supply "7 (iv)" into the text. Thus Latey J held that it was permissible to remove content that was definitely intended to be present, namely "7", in order to achieve the closest possible approximation to the testatrix's intentions by means of construction of what remained.

73. *In re Morris, deceased* was followed in *In re Phelan, deceased* [1972] Fam 33, where at 35 Stirling J summarised the law:

> "The court also has power, if it is satisfied as to the testator's clear intention, to omit certain words from probate which are there by inadvertence or by misunderstanding, or anything of that sort.
>
> … [I]f the obvious facts militate against such an intention as expressed in the document the court can act upon the real intention as found by the court. It can do so in this case (and there is authority for it) by omitting certain words. The court cannot, of course, remake a will for a testator, but it can omit words which have come in by inadvertence or by misunderstanding if their omission gives effect to the true intentions of the testator as found by the court."

74. The limits of the power to omit words were noted by the Court of Appeal in *In re Horrocks, deceased* [1939] P 198. The will created trusts of the residuary estate for "charitable or benevolent object or objects". Unfortunately, the word "or" rendered the trust void for uncertainty; the trust required the word "and". An action was brought to omit the word "or", so as to leave "charitable benevolent", which would have the same meaning as "charitable and benevolent". The action succeeded at first instance. But the Court of Appeal reversed that decision. One reason for the decision on appeal was that the Court rejected the plaintiff's attempt to blame the use of "or" on a typist; the evidence did not show that it was anything but an error by the draftsman. However, the Court held that there was anyway no jurisdiction to make the proposed alteration, because it altered the meaning of the words that were preserved, specifically of "charitable": as the will stood, the trustees could have recourse to the whole field of charity, and the words "or benevolent" merely enlarged the field to which they could have regard; to remove "or benevolent" would have left "charitable" with its full signification; but to remove merely "or", so as to leave "charitable benevolent", would restrict the field of charity available to the trustees. Therefore its meaning would be altered. At 218 the Court of Appeal said:

> "It is as though a proviso were to be inserted to the effect that the discretion of the trustees was not to be exercised in favour of a charitable object unless it was also benevolent. The result would be that the one thing as to which the intentions and instructions of the testatrix were clear would be defeated.
>
> "Does the jurisdiction of the Court of Probate extend to the making of an alteration having this result? In our opinion it does not. It appears to us that so to alter a will as, under the guise of omission, to affect the sense of words deliberately chosen by the testator or his draftsman is equivalent to making a new will for the testator, and on principle we do not consider that this is permissible."

The reasoning of the Court of Appeal with regard to the facts of the particular case before it has come in for criticism, but the principle is not in doubt that the court

cannot omit words from a will if the effect of doing so would be to alter the sense of the rest of the will.

75. More recently, the permissible scope of the power to omit words from a will was considered by the Supreme Court in *Marley v Rawlings* [2014] UKSC 2, [2015] AC 129. A husband and wife executed wills in materially identical terms; each left everything to the other, but if the other had already died or failed to survive for more than a month everything was left to a third party. By simple mistake, the husband executed the wife's will and the wife executed the husband's will. The mistake only came to light after the husband had died, having survived his wife for some years. The Supreme Court held that the husband's will could be rectified under section 20(1)(a) of the Administration of Justice Act 1982 on the grounds of clerical error. However, it rejected an alternative attempt to save the will by an ingenious and selective process of severance. The way the appellant's alternative argument was put can only be appreciated by close reading of the will under consideration. I shall not set out the text here. But the gist of the argument and the reasoning of the Supreme Court appear from the following passage in the judgment of Lord Neuberger, with whom Lords Clarke, Sumption, Carnwath and Hodge agreed:

> "43. The appellant's case under this head rests on two propositions. The first is that, in order to be a valid will, the testator must have known and approved of its contents: see *Fuller v Strum* [2002] 1 WLR 1097 quoted in para 16 above. There is a rebuttable presumption that the testator knew and approved the contents of a regularly executed will with unexceptional provisions. However, that presumption may be rebutted by evidence of the circumstances in which the will was prepared or executed. It can also be rebutted where the will is so worded as to cast doubt on whether the testator can have known or approved of its contents. In the present case, the will, as literally interpreted, plainly did not represent Mr Rawlings's intentions: accordingly, he cannot have known or approved of its contents, as it stood.
>
> 44. The second proposition invoked in the present connection is that, where the testator did not know or approve of only part of a will, that part can be notionally excised by the court, with the remainder being valid and admitted to probate as described in the last sentence quoted from *Fuller's* case in para 16 above. Examples of such cases are cited in *Theobald on Wills*, 17th ed, para 3-028.
>
> 45. On this basis, Mr Ham ingeniously argued that the will can be validated by deleting (i) the opening sentence, (ii) clause 2, (iii) the first phrase of clause 3, and (iv) the reference to Mrs Rawlings at the end of the will. If this were permissible, it would simply leave the will as stating that the signatory, Mr Rawlings, revokes his previous wills and leaves his entire estate to the appellant.

> 46. In my view, this argument must be rejected. The most typical case where only part of a will is rejected on the ground that it was not known and approved by the testator, is where that part is self-contained—e.g. a particular clause or subclause. One such example is in *In the Goods of Oswald* (1874) LR 3P & D 162, 164, per Sir James Hannen. However, it is also true that, in some cases, a simple word or expression can be deleted 'if shewn to have been inserted by mistake'—per Jeune J in *In the Goods of Boehm* [1891] P 247, 250.
>
> 47. However, it is quite inappropriate to invoke this principle in order to justify selecting phrases and provisions for deletion from a will intended to be signed by someone else, to enable the will, effectively by happenstance, to comply with the testator's intentions. I note that Sir James Hannen and Barnes P took the same view in, respectively, *In the Goods of Hunt* (1875) LR 3P & D 250, 252, and *In the Estate of Meyer* [1908] P 353, 354. Further, as Jeune J pointed out in the *Boehm* case [1891] P 247, 251, there is obvious 'difficulty [in] rejecting words where their rejection alters the sense of those which remain'.
>
> 48. The appellant's proposed exercise in deletion summarised in para 45 above would involve converting what is a simple and beneficial principle of severance into what is almost a word game with haphazard outcomes. That is well illustrated by the fact that, in this case, the suggested deletions from the will only achieve the intended result because Mrs Rawlings pre-deceased her husband, because clause 2 is deleted: therefore, if Mr Rawlings had pre-deceased his wife, this argument would not work.
>
> 49. I would accordingly reject the argument that the will can be treated as a valid will by making the deletions suggested on behalf of the appellant."

76. Turning to the present case, I am satisfied that the omissions proposed by Mr Thomas would closely accord with the intentions of the testator and would do so far more closely than would admitting the 1990 Will to probate.

77. The solution would not be ideal, because the jurisdiction to omit words is not a jurisdiction to add them. Therefore the 5-year option intended by the testator cannot be introduced into the 2014 Will by this method. In practice, that is unlikely to represent a major problem, because Timothy, Thomas and Ifor will probably realise their interests in the Farm by selling them to Richard. The option in the 1990 Will, which ought to have been carried over into the 2014 Will, included a mechanism for fixing the price to be paid. It may be that there would be no disagreement as to the appropriate method of valuing the shares to be purchased.

78. The critical mistake in the 2014 Will was the inclusion of the Farm in clause 5, when it ought to have been left to fall into residue. The omissions proposed by Mr Thomas

would correct this mistake and would, in my judgment, fall within the proper scope of the jurisdiction as explained in paragraph 46 of the judgment of Lord Neuberger in *Marley v Rawlings.* The proposal would not be subject to the objections mentioned in paragraph 47 of that judgment.

79. The remaining question is whether the omission of text from clause 5 materially alters the sense of the rest of the will and falls foul of the strictures in *In re Horrocks, deceased.* In my judgment, it does not do so but falls on the right side of the line. The material difference that the omission makes is to enlarge the content of the "the rest of my estate" and "my residuary estate" in clause 8. However, the meanings of those expressions remain unaltered.

80. Whether these problems could better have been addressed by a claim for rectification of the 2014 Will is a question I need not consider, in the absence of any such claim or of submissions in that regard.

81. I shall hear counsel as to the appropriate terms of the order.