



Neutral Citation Number: [2021] EWHC 893 (Ch)

Case No: CH-2019-000310

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**APPEALS (ChD)**

**IN THE MATTER OF THE ESTATE OF ANNA REA, Deceased**

7 Rolls Building  
Fetter Lane  
London EC 4A 1NL

Date: 14/04/2021

**Before :**

**MR JUSTICE ADAM JOHNSON**

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**Between :**

**RITA REA**

**Claimant and**  
**Respondent**

**- and -**

**(1) RENO REA**

**Defendants and**  
**Appellants**

**(2) NINO REA**

**(3) DAVID MARK REA**

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**Ms Natalie Wood** (instructed under the Bar Direct Access Scheme) for the **Claimant and Respondent**

**Mr Robin Howard** (instructed under the Bar Direct Access Scheme) for the **Defendants and Appellants**

Hearing date: 20 January 2021  
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**Approved Judgment**

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

Covid-19 Protocol: This Judgment was handed down remotely by circulation to the parties' representatives by email and released to Bailii.

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Approved Judgment**Mr Justice Adam Johnson:****Introduction**

1. This is an appeal, by order of Mr Justice Nugee (as he then was), from a decision of Deputy Master Arkush dated 13 September 2019. Although a number of challenges were initially made to the Judgment, permission has been given only as to one ground. That is that the “*trial was unfair by reason of the way it was conducted by the Judge*”. The Appellants seek a retrial.

**Background & Proceedings Below**

2. The claim before the Deputy Master was by the present Respondent, Rita Rea. The claim was a probate claim. Rita wished to establish the Will of her mother dated 7 December 2015 (I will refer to this as “*the Will*” or “*the 2015 Will*”). Her mother, the testatrix, was Anna Rea.
3. Anna had four children. Rita is the third in terms of age. The eldest child is Remo, and in descending ages he is followed by Nino, Rita and David. For convenience, and without intending any disrespect, I will refer to the four siblings in this Judgment by their first names, and I will refer to the testatrix as Anna or as Mrs Rea.
4. Remo, Nino and David were all Defendants before the Deputy Master and are the Appellants before me. It will be convenient to refer to them collectively as “*the Defendants*”. They resisted the claim and sought to challenge Anna’s 2015 Will.
5. Anna died on 26 July 2016. The claim was issued just under a year later, on 5 July 2017. Following a directions hearing on 13 March 2018, the trial was originally scheduled in a trial window between December 2018 and Feb 2019. In the event, the trial did not proceed then and was rescheduled as a fixture for 9 September 2019 with 5 day time estimate.
6. Although they had legal representation during the course of the proceedings, it seems that the Defendants lost confidence in their advisers at some point during the Summer of 2019, or at any rate there was a disagreement about how the case was to be presented (see below at [17]-[18]). In consequence the Defendants parted company with their then solicitors.
7. On 19 August 2019 the Defendants issued an application to vacate the trial date on the basis that they needed more time to instruct advisers. That application was refused on paper, but the Defendants renewed their application at an oral hearing before Deputy Master Arkush on 5 September 2019, i.e. on the Thursday the week before the trial was due to begin on Monday, 9 September.
8. The Deputy Master refused the application to adjourn, but at the same hearing authorised the issue of two witness summonses by the Defendants who wished to call evidence at trial from two new witnesses, Angela Contucci and Paula Batson. Angela is Anna’s niece, and therefore the cousin both of the Defendants and of Rita. Paula was in a relationship with Rita for a period of time, and then acted as carer for Anna and lived with Anna up until the time of her death. In the course of dealing with the

Approved Judgment

Witness Summonses, the Deputy Master sounded a note of caution about the possible risk to the Defendants of calling witnesses who were not giving evidence voluntarily.

9. At the start of trial, the Defendants applied again for an adjournment on the ground that they wished to seek new representation. That application was again refused by the Deputy Master. In giving his reasons, he said the following:

*“I do appreciate that you are without legal representation, but I believe that with all the assistance that the bench can give, and counsel can give, that you - your case will be given a fair hearing, Mr Rea. So, I will not grant your request for an adjournment and we should proceed.”*

10. Consequently, the Defendants represented themselves as litigants in person. There is no appeal against either of the decisions made to refuse to adjourn the trial.
11. The Claimant was represented at trial by Mr John Ward-Prowse of counsel. I should mention that he was not available for the hearing of this appeal and Rita was instead represented by Ms Natalie Wood of counsel.
12. The trial ran from 9 September to 13 September 2019, and so finished well within the original five-day time estimate. The Deputy Master heard evidence over two days and had closing submissions from the parties on the morning of the third day. I will say more about the conduct of the trial below.
13. The question before the Deputy Master was ultimately a short one: was the 2015 Will valid and should it be admitted into probate? The Defendants said not. The matter was contentious because the 2015 Will, which superseded an earlier Will of 1986 (*“the 1986 Will”*), left the principal asset of the estate, namely Mrs Rea’s home at 5 Brenda Road, Tooting Bec, London (referred to as *“the House”*) to Rita alone. In contrast to the 2015 Will, the 1986 Will had divided the estate equally between the four siblings.
14. As might well be expected, the dispute between the parties was emotionally charged. The sensitivity was no doubt greatly increased in this case given the terms of the 2015 Will, which set out reasons for Mrs Rea’s decision. Clause 7 dealt with the gift of the House to Rita and said:

*“I give to my daughter Rita Rea my property known as 5 Brenda Road, Tooting Bec, London SW17 7DD absolutely as she has taken care of me for all these years. If there is any inheritance tax to be paid on this property any such tax must be paid from this gift.”*

15. Clause 11 was headed *“Declaration”* and reads:

*“I DECLARE that my sons do not help me with my care and there has been numerous calls from me that they are not engaging with any help or assistance. My sons have not taken care of me and my daughter Rita Rea has been my sole carer for many years. Hence should any of my sons challenge my*

Approved Judgment

*estate I wish my executors to defend any such claim as they are not dependent on me and I do not wish for them to share in my estate save what I have stated in this Will.”*

16. Prior to trial, the Defendants’ case rested on four broad allegations. The first was that Anna lacked testamentary capacity. The second was that she spoke limited English and therefore did not properly know what she was doing when she executed the 2015 Will and did not properly approve it. The third was that Rita could be angry, violent and vindictive, with the implication that she had manipulated her mother into making the 2015 Will as an act of vindictiveness. In legal terms this manifested itself as a claim of undue influence. Fourth, and closely related to the third allegation, the Defendants said that Rita must have poisoned Mrs Rea’s mind by saying unfair and untrue things about them. This was put as a case of “*fraudulent calumny*”, which properly speaking is a species of undue influence.
17. At [38] of his Judgment, the Deputy Master said that the Defendants had not pursued their case on testamentary capacity, and at [55] he said:

*“In David’s closing submissions on behalf of the defendants, he made it clear that they did not pursue the case that Mrs Rea lacked testamentary capacity. He submitted that it was never their case to question her mental competence but claimed that they were ignored by their previous legal team.”*
18. David’s submission on that point is in the Day 3 Transcript at p. 5B-C, where he made it clear that “ ... *it was never our case to question the mental capacity of our mother. This is what we told our previous legal team and was ignored.*”
19. That being so, the Deputy Master summarised the legal framework in his Judgment at [56]. Given the way the case had been advanced before him, he said that the issues for determination were:
  - a. Whether Mrs Rea “*knew and approved*” the contents of the 2015 Will, having regard to the guidance given by Lord Neuberger MR in *Gill v. Woodall* [2011] Ch. 380 .
  - b. Whether the execution of the 2015 Will was procured by the exercise of undue influence: see *Re Edwards* [2007] EWHC 1119 (Ch), at [47].
  - c. Whether the 2015 Will was procured by a fraudulent calumny practised by Rita on Mrs Rea: see also *Re Edwards*.
20. David was the spokesperson for the Defendants at trial. Rita gave evidence on her own account, together with Mrs Savita Sukul, the solicitor who had drawn up the 2015 Will, and a Dr Qaiyum, a GP, who on Mrs Sukul’s advice had carried out a mental capacity assessment of Mrs Rea in November 2015.
21. On the Defendants’ side, Remo, Nino and David all gave evidence, together with Angela Contucci and Paula Baston, who appeared in response to Witness Summonses served by the Defendants.

Approved Judgment**The Judgment Below**

22. In summary, the Deputy Master found the Claimant's evidence on the key points more persuasive than that called by the Defendants. He was strongly influenced by the evidence of Mrs Sukul and Dr Qaiyum, both of whom had indicated that they considered Mrs Rea was well able to understand what she was doing and that the 2015 Will represented her true intention. To varying degrees, the Deputy Master was critical of the Defendants themselves, and on analysis considered that the evidence from the two witnesses who had been summonsed, Ms Contucci and Ms Baston, was consistent with the Claimant's evidence, and supported the view that Mrs Rea had properly appreciated the effect of the 2015 Will.
23. The Deputy Master thought that the intention underlying the Will, namely to benefit Rita particularly, was consistent with the accepted fact (or accepted at least by David in his evidence: see the Judgment at [70]) that Rita had been principal carer for her mother for a long period. He also thought it consistent with Angela Contucci's evidence that Mrs Rea would have wanted to help Rita and was protective of her, and with David's evidence that Mrs Rea "*always had a soft spot for Rita.*"

**The Defendants' arguments on Appeal**

24. The Defendants' case is summarised in an admirably brief and focused Skeleton Argument from their counsel, Mr Robin Howard. His case is made out by reference to the transcript which is now available of the hearing. The Skeleton is accompanied by a list of references to the transcript, each reference being accompanied by a description of what is said to be objectionable about the exchanges identified.
25. I have included these references in a Schedule to this Judgment, which also includes the relevant extracts from the transcripts. Where relevant below I will refer to the Schedule and to the individual Items of complaint it sets out. I should say that I have read all of the transcripts in full, but have paid particular attention to the passages highlighted by Mr Howard.
26. Based on the transcripts, Mr Howard identifies in his Skeleton a number of themes or "*strands*", which he says render the trial unfair. The strands are summarised as follows:
  - a. Unequal treatment of the two sides.
  - b. Stifling enquiry or the development of particular points in the evidence. It is said that this comes out in particular on the point of Mrs Rea's command of English, which was central to the question of knowledge and approval.
  - c. Heavy indications of the way the Deputy Master was thinking, which led to the abandonment of the capacity argument.
  - d. Apparent impatience and certainly hurrying the Defendants along, unfairly and despite the fact that there were five days allocated for the trial. The evidence was completed in two days.

Approved Judgment

- e. Hostility which occasionally suggested an animus, perhaps reflecting an early view that the Defendants' arguments were hopeless and that the hearing represented a waste of judicial resources.
27. Before considering the Defendants' arguments in more detail, it is useful to give some context, by describing the course of the trial as the Defendants see it. I do so I will identify what seemed to me to emerge as the main thrust of Mr Howard's submissions on the present appeal. These points are largely focused on the Deputy Master's conduct of Day 1 of the trial.

**The Defendants' View of the Hearing**

28. The first witness to be called as part of the Claimant's case was the Claimant herself, Rita. She was examined in chief by her counsel at some length (the examination runs to approximately 26 pages of the transcript). The examination in chief includes, starting in the transcript at p. 25G, a series of questions about the circumstances which led to the making of the new Will in 2015 (Rita's evidence was that Mrs Rea had read an article in a newspaper which had prompted her to consider it); about whose idea it was to make a new Will; about the use in the Will of the emotionally charged word "*abandon*"; about the allegation that Rita had improperly influenced Rita in her decision to leave the House to Rita in the Will; and about whose idea it was to leave the House to Rita in the Will. Questions were put to Rita both by Rita's counsel, Mr Ward-Prowse, and also by the Deputy Master himself. The resulting exchanges now have a particular relevance, in light of how matters developed later in the trial, which I will come to below (see at [40]).
29. Mr Howard said that such lengthy examination-in-chief is unusual in modern practice, and I agree; but he makes no complaint about it as such. What he does make complaint about, however, is what happened next (see Schedule, Item (1)). Following the examination-in-chief, David Rea, who had been nominated as spokesperson, asked for a 30 minute adjournment "*so we can discuss what's been said so far and make questions up.*" The Deputy Master refused and said: "*No, I do not think that is necessary. You have got your two brothers with you, who can pass you notes.*" The Defendants were given a five minute break, and then had to commence their cross-examination of Rita.
30. After a period of cross-examination by David (as to which Mr Howard makes one particular point of criticism: Schedule, Item (2)), David sought to make reference to some medical records relating to Mrs Rea which were included in the trial bundle. These were important documents from the Defendants' point of view, which were relevant to the question of Mrs Rea's level of English. It was part of the Defendants' case that their mother's English was poor, and that she did not properly appreciate what she was doing in making the Will. The medical records were relied on as supporting that proposition, since they recorded Mrs Rea having only limited English and needing assistance from a translator. During the hearing before me, I was shown three such documents, which are conveniently identified by reference to the page numbers in the original trial bundle. At page 385 is a note from a Dr Ramphul, which says: "*She was accompanied by her daughter. Her daughter was acting as her main translator.*" At page 386 is a set of handwritten notes dated 28 June 2003 which contain the following: "*Italian speaking English poor.*" At p. 387 is a letter dated 31

Approved Judgment

January 2005 from a Dr Fullard which contains the following: *“I saw Miss Rea again today with one of her friends who acted as an interpreter.”*

31. At pp. 50-51 of the transcript (Schedule, Item (3)), one can see David seeking to move on to the topic of the medical records, but he was hampered because he did not have the relevant document references to hand. The Deputy Master said to him *“I think you have to take the witness to a page number and a reference ... Rather than put a generalised statement.”* David said he would come back to the point, and the Deputy Master commented: *“You will have the lunch adjournment ... to collect your thoughts and write any document references down.”* David then moved on to another document. In the event, as we shall see, he never did come back to put the medical reports to Rita (Schedule, Item (15)).
32. Mr Howard makes certain other detailed criticisms of the course of Rita’s cross-examination which are set out in the Schedule (Items (4)-(5)). To carry on with the narrative, however, the next main event is what happens shortly before the lunch adjournment. The Claimant’s counsel, Mr Ward-Prowse, explained to the Deputy Master that the Claimant’s two professional witnesses, namely Mrs Sukul, the solicitor, and Dr Qaiyum, were due in Court at 2pm, which was the time arranged for their attendance. Mr Ward-Prowse said it might cause difficulties if they had to come back. The Deputy Master then had the following exchange with David (now the subject of complaint at Item (6) of the Schedule,):

*“DEPUTY MASTER ARKUSH: Right, well check that, Mr Rea, you heard the question. I mean, the solicitor and the doctor are independent professional people.*

*MR REA: Yes?*

*DEPUTY MASTER ARKUSH: And in principle, I would be quite happy to interrupt the claimant’s evidence so that their evidence can be heard and taken in court, so that they can get back to work?*

*MR REA: And then we go back to Rita afterwards?*

*DEPUTY MASTER ARKUSH: Yes.*

*MR REA: Yes, that’s fine, Your Honour.”*

33. Part of Mr Howard’s overall argument was that the interposition of the evidence from the two professional witnesses, which had not been expected by the Defendants, meant that time must have been taken up during the lunch adjournment preparing to cross-examine them, and consequently the exercise of gathering together document references for the medical records was overlooked, and Rita never was cross-examined on them (this argument is really a composite of the complaints at Schedule, Items (3), (6) and (15)).
34. Mrs Sukul, the solicitor, was the first witness to give evidence in the afternoon. After (again) a reasonably long examination in chief by Mr Ward-Prowse, David came to his cross-examination. His first question to her was about a meeting with Mrs Rea on

Approved Judgment

7 December 2015, when according to Mrs Sukul's evidence she had read out the terms of the draft 2015 Will to Mrs Rea before the Will was executed. David's question was a simple and pertinent one. He asked: "*And did you feel that Mother understood them complicated paragraphs, even in layman's terms.*" Mrs Sukul gave a long answer, which was then followed by a lengthy intervention by the Deputy Master which covers approximately 2 pages of the transcript. Mr Howard's criticism of it (Schedule, Item (7)) is as follows: "*DMA takes over cross-examination after 2 questions to establish Mrs Sukul's evidence to the benefit of the claimant.*"

35. Mr Howard then makes a series of points about the Deputy Master intervening to stop lines of questioning by David, both of Mrs Sukul and of Dr Qaiyum, and about the Deputy Master showing increasing signs of impatience as the afternoon progresses. These are set out in the Schedule at Items (9)-(11).
36. The next main point in the chronology is that when Rita's evidence resumed, the Deputy Master remarked that although the evidence of Mrs Sukul and Dr Quiayum had used up quite a lot of the afternoon, he would still like to complete Rita's evidence during the day if that was humanly possible. That prompted the following exchange with David, during which the Deputy Master refused to adjourn overnight (Schedule, Item (12)):

*"MR REA: Your Honour, I would appreciate it, if we could carry on tomorrow, because there's a lot of questions that we have prepared and we would like to have this evening to may be prepare them?"*

*DEPUTY MASTER ARKUSH: Well why have you not prepared them, you knew you were coming to trial?"*

*MR REA: I knew on Thursday –*

*DEPUTY MASTER ARKUSH: Well I suggest you move on with it, quickly. The court has to have in mind the availability of resources, generally and I do not want there to be any risk of this trial running on. And also, I have to say on past form, an awful lot of the questions asked are really not helpful. So, if you want to ask some questions, I am going to make sure, by intervening if necessary, that they are to the point and necessary. And always remember, to keep on asking questions from an adverse witness, there is a great risk that all that happens is that they strengthen their case at your expense.*

*MR REA: Thank you, sorry about this Your Honour, we've been thrown from two witnesses to another and back to the other one."*

37. David then began to question Rita about the background to Mrs Rea's decision in 2015 to change her Will. After just a few questions, however, the Deputy Master made the following intervention, which formed an important part of Mr Howard's submissions:



*“DEPUTY MASTER ARKUSH: And all this was gone over and questions were asked about it earlier today, I think by her counsel? No, it was in answer to you. She said, ‘the issue of making a new Will was first discussed around 2015. We were at home, Mummy was in the kitchen reading the newspaper. She read an article about Wills, she read it to me. She said things like, wanting to be cremated. It was her idea to make a new Will, not mine, I’m sure about that. Mummy asked me to make an appointment to see a solicitor. I did as she asked, but not straightaway, it may be about two weeks later’. And then you asked her about paragraph 306 in Nino’s statement and how the word ‘abandon’ had got there, do you remember that? And then you asked lots of questions, ‘did you influence Mother in relation to the Will, in particular, leaving her property to you’? And the answer given was, ‘no, I did not pressurise her I did not misrepresent anything to her about my situation. I did not misrepresent anything to her about my brothers’ willingness to care for her. I did not poison her mind against them’. And I asked, ‘whose idea was it to leave the house to you’? And the witness said, ‘it was her idea to leave the house to me, she wrote the Will, I did not ask for or encourage her to do it’. Now, I do not want to go over old ground and I do not think it will necessarily help you to go round and round and round. But I am not going to permit questions that go over the old ground.”*

*MR REA: Your Honour, I would like a 30-minute break, I don’t feel well at the moment, to be honest with you.*

*DEPUTY MASTER ARKUSH: There is no 30-minute break, we are going to sit and hear the matter until the end of the day. I really wonder whether you have any further questions that you wish to put to this witness?”*

38. At this point one of the other Defendants asked for a 10 minute break. This was at around 4pm. The Deputy Master responded:

*“You will have until 4.10pm to finalise what questions you are going to put to this witness and I will not have the court go round and round in circles on old ground. Any matters we have covered before we will not be covering again.”*

39. The significance of the exchanges set out at [36]-[38] above is as follows. The overall effect, says Mr Howard, was to increase the pressure on David and the Defendants unnecessarily. There was no need to rush, in the sense that there was no real danger of the trial running on: the time estimate was 5 days; the parties were still on Day 1 and had made good progress; and it would have cost little in the overall scheme of things to have allowed David – a litigant in person – more time to prepare.
40. Moreover, and perhaps more significantly, the Deputy Master’s impatience was the result of a mistaken premise (Schedule, Item (13)). He assumed – see his summary

Approved Judgment

above at [37] – that the “old ground” gone over already had been by David in his cross-examination of Rita. In fact, that was wrong. If one compares his summary at [37], with the transcript of Rita’s examination-in-chief at starting at Day 1, page 25G (described at para. [28]) above, it is clear that the “old ground” had been covered *not* in David’s cross-examination of Rita, but in the course of her examination-in-chief by Mr Ward-Prowse and by the Deputy Master.

41. Mr Howard accepted of course that that was an honest mistake; but said that nonetheless, the result was that David had been deprived of the opportunity to conduct his own cross-examination, and to challenge Rita on the topics mentioned, and that was unfair. One particular effect, as already noted, was that the medical records which were an important part of the Defendants’ case were never in fact put to Rita (Schedule, Item (15)).
42. One further, more detailed point is relied on by Mr Howard (Schedule, Item (14)). However, he then makes a more substantive, stand-alone point by reference to the following passages from the Transcript at the conclusion of Day 1, after Rita had finished her evidence (this did not feature in Mr Howard’s Schedule but was identified in his Skeleton):

*“DEPUTY MASTER ARKUSH: Right, now I would, however, just like to reflect on today and I would like to invite the defendants to reflect on the day. Because there were two witnesses who gave evidence today who do not have an axe to grind?”*

*MR D REA: Yes.*

*DEPUTY MASTER ARKUSH: The solicitor and the doctor. Now I think it is quite important for you – we have had day one of a five day trial and all the time we are sitting here, the meter is running, do you know what I mean by that?”*

*MR D REA: Yes, Your Honour.*

*DEPUTY MASTER ARKUSH: It costs you more money. I would like to suggest to you, to have a care when you think about the evidence of the doctor and the solicitor. Because their evidence, I think you will agree with me, was quite unambiguous. They did not see any sign of coercion, they did not see any sign of undue influence. They saw no sign of lack of capacity and that is very close to defeating your case. That leaves you with the claim in dishonesty on which, if you pursue the case to its end, I will make a finding. But, the admitted facts are that the burden of caring – the burden of caring, fell on your sister voluntarily or not, it does not matter. And even if your mother somehow got a false impression in her head, or she exaggerated, the care or lack of care that you brothers were giving her, it was her genuine perception. And she set it out on her own, without Rita being present when she saw the doctor and the solicitor, when she executed her Will. Now, it is*

Approved Judgment

*never too late to confront realities and call an end to hostilities. It will be a lot, lot less painful, even at this eleventh hour, if you were able to reach a negotiated outcome. But if you push the case to its bitter conclusion the court will make findings. And we will have had four or five days of court time, all of which will mean a much bigger bill. And if the effect of today's evidence, is that it is going to be very difficult for you to succeed, then I think you need to take that onboard as responsible adults. I think you understand, really what I am saying to you, do you not?*

*MR D REA: Yes, Your Honour, we have tried many times to negotiate –*

*DEPUTY MASTER ARKUSH: Well may I suggest that before you do finally go home today, you try again? I am sure that Rita's counsel will not run away but will give you some time to approach him?"*

43. Mr Howard said this all gave too heavy an indication, at such an early stage of the proceedings, of the way the Deputy Master was thinking.
44. Day 2 of the hearing was taken up with evidence from the Defendants' witnesses. Angela Contucci gave evidence first, then Paula Batson, and they were followed by the Defendants themselves – Remo, Nino then David. Mr Howard's points of criticism are much more limited in relation to Day 2. He makes only two points, one of which arises in relation to Angela's evidence and one in relation to David's evidence. Relevant excerpts are in the Schedule (Items (16) and (17)).
45. Day 3 of the trial involved closing statements. The Defendants made their closing statement first, by reference to a written note which they handed in; the Claimant's counsel then made a closing statement; and the Defendants were then given an opportunity to reply.

### **Relevant Principles**

46. Both sides referred me to the well-known decision of the Supreme Court in Serafin v. Malkiewicz [2020] UKSC 23. That case involved libel proceedings by Mr Serafin against the editor and publisher of a Polish language newspaper. The claimant represented himself as a litigant in person at trial, whereas the defendants had the benefit of representation from leading counsel. The claim was dismissed, but the Judgment was overturned by the Court of Appeal, and that decision was affirmed by the Supreme Court. One of the grounds of appeal was that the trial had been conducted unfairly by the Judge.
47. On this point, a number of points emerge from the speech of Lord Wilson in the Supreme Court, with whom the other Judges all agreed.
48. One is that the question of fairness in the trial process is different to the question of bias: see at [38]-[39]. The Court proceeded on the footing that bias means a prejudice against one party or its case for reasons unconnected with the legal or factual merits:

Approved Judgment

see per Leggatt J. in Bubbles & Wine Limited v. Lusha [2018] EWCA Civ 468, at [17], as applied by Hildyard J. in a later case, M&P Enterprises (London) Ltd v. Norfolk Square (Northern Section) Ltd [2018] EWHC 2665 (Ch). Thus, it was not bias for the Judge in Serafin v. Malkiewicz to have “*evinced prejudice*” against Mr Serafin; the source of that prejudice was not some factor unconnected with the legal or factual merits, but instead was the Judge’s “*almost immediate conclusion that the claim was hopeless and that the hearing of it represented a disgraceful waste of judicial resources*” (see at [39]. In the present case, no allegation of bias is made.

49. A further point is that a trial which has been conducted unfairly cannot be salvaged by an apparently careful reserved judgment, not matter how balanced and impressive it may appear: see Serafin at [43]-[44].
50. Finally, it is relevant to consider the analysis of unfairness itself, and the aspects of the trial which both the Court of Appeal and the Supreme Court determined gave rise to unfairness. This is revealed in a number of passages in Lord Wilson’s speech.
51. At [32] Lord Wilson summarised the Court of Appeal’s findings. He said:

*“The court concluded at para. 114 that on numerous occasions the judge had appeared to descend into the arena, to cast off the mantle of impartiality, to take up the cudgels of cross-examination and to use language which was threatening and bullying; and that its impression was of a judge who, if not partisan, had developed an animus towards the claimant. It observed at para. 117 that it found his conduct all the more surprising in light of the fact that the claimant was appearing in person and that, although he spoke it well, English was not his first language.”*

52. At the end of his para. [32]. Lord Wilson quoted from the Court Appeal’s conclusion at para. [19] of its judgment, as follows:

*“In our view, the judge not only seriously transgressed the core principle that a judge remains neutral during the evidence, but he also acted in a manner which was, at times, manifestly unfair and hostile to the claimant ... [W]e ... are driven to the conclusion that the nature, tenor and frequency of the judges interventions were such as to render this libel trial on fair. We therefore uphold [this] ground of appeal.”*

53. In conducting its review of the legal principles relevant to fairness, the Court referred to a number of earlier authorities. These included Jones v. National Coal Board [1957] 2 QB 55, London Borough of Southwark v. Kofi Adu [2006] EWCA Civ. 281, and Michel v. The Queen [2009] UKPC 41, [2010] 1 WLR 879, in each of which the gist of the objectionable behaviour was too frequent and proactive intervention during the course of the oral evidence phase. While in Kofi Adu Jonathan Parker LJ accepted that the modern practice was for Judges to be more interventionist than when the Jones case was decided, nonetheless he proceeded on the basis that interventions during the oral evidence continue to generate a risk of descent into the arena. In the Michel case, Lord Brown of Eaton-under-Haywood said:

Approved Judgment

*“The core principle, that under the adversarial system the judge remains aloof from the fray and neutral during the elicitation of the evidence, applies no less to civil litigation than to criminal trials.”*

54. The Court however considered that there was an important difference between the course of the evidence and final submissions, because by then (adopting the approach of Hildyard J. in the M&P Enterprises case), the trial had in effect entered the adjudication stage.
55. As to litigants in person, the Court said at [46] that no previous authority had been cited dealing with that topic specifically, but mentioned that the defendants’ representation by Leading Counsel “*made the imbalance of forensic resources all the more stark.*” The Court also referred to the Equal Treatment Bench Book, published by the Judicial College (as revised in March 2020), paras 8 and 59, which emphasises the stress likely to be involved by a litigant in person operating in an alien environment, and the consequent need for the Judge “*as a facilitator of justice*” to assist the litigant in person, for example by: “*Not interrupting, engaging in dialogue, indicating a preliminary view or cutting short on argument in the same way that might be done with a qualified lawyer.*”
56. In the same paragraph of his speech, however, Lord Wilson also recognised the difficulty in seeking to hold an appropriate balance:

*“Every judge will have experienced difficulty at trial in divining the line between helping the litigant in person to the extent necessary for the adequate articulation of his case, on the one hand, and becoming his advocate, on the other.”*

57. On the facts of Serafin itself, the Supreme Court accepted that the Court of Appeal’s conclusion had to be upheld. Lord Wilson’s analysis relied in particular on a series of excerpts, 25 in total, set out in a schedule to his speech, the overall effect of which he summarised as follows at [48] (emphasis added):

*“Some of the excerpts, if taken alone, would not merit significant criticism. Nor should we forget that the transcripts enable us to read but neither to hear nor to see. But, when one considers the barrage of hostility towards the claimant’s case, and towards the claimant himself acting in person, fired by the judge in immoderate, ill-tempered and at times offensive language at many different points during the long hearing, one is driven, with profound regret, to uphold the Court of Appeal’s decision that he did not allow the claim to be properly presented; that therefore he could not fairly appraise it; and that, in short, the trial was unfair. Instead of making allowance for the claimant’s appearance in person, the judge harassed and intimidated him in ways which surely would never have occurred if the claimant had been represented.”*

58. During the course of her submissions, Rita’s present counsel Ms Wood invited attention more generally to that section in the Equal Treatment Bench Book

Approved Judgment

concerning litigants in person hearings. This contains useful guidance on ways to help such litigants. I draw attention to two short points in the current edition:

- a. First, para. 17 emphasises that an important aim is to ensure that litigants in person understand what is going on and what is expected of them, which means (amongst other things) “ ... *ensuring that ... [t]he process is (or has been) been explained to them in a manner that they can understand*”.
- b. Second, para. 65, in the section dealing specifically with hearings, recommends “*Adopting to the extent necessary an inquisitorial role to enable the LIP fully to present their case, (though not in such a way as to appear to give the litigant in person an undue advantage).*”

**Discussion & Conclusions**General Points

59. I start with some general observations.
60. Both counsel were agreed that my inquiry must be broader than an analysis of the excerpts relied on by the Defendants. They are part of the story, but not the whole of it, because the challenge is that overall the conduct of the trial was unfair, and so what is required – in addition to the individual points – is an overall qualitative assessment of the trial process and whether it was a fair one.
61. In this case, fairness takes on a particular meaning, because we are concerned with a case involving litigants in person. The management of such cases can present particular challenges for the Judge, not because of any fault on the part of the litigants, but because our system has many complexities and has not developed with the needs of such litigants in mind. One particular challenge can be focusing on the real issues in the case. Indeed this is flagged in the Equal Treatment Bench Book at para. 66. Litigants in person very often exhibit an understandable degree of attachment to issues which are of pressing importance to them, but ultimately are of limited significance legally. While bearing in mind the sensitivities, judges do need to be able to take steps to focus attention on matters which are relevant to the issues they have to decide, and to limit unnecessary inquiry into other matters. Questions of fairness to others involved in the trial process arise, including witnesses who should be spared examination on irrelevant matters. These are essentially questions of case management, and both counsel were agreed that trial judges should normally be accorded a wide degree of latitude in making case management decisions.
62. Looking at Serafin, and in particular the quotation from para. 48 set out at [57] above, the overall reasoning seems to me consistent with the idea that not every error, be it the use of intemperate language or expression of hostility or something else, will result in an overall finding of unfairness. The reasoning in that case was that the cumulative effect of the many issues identified meant that the Judge “*did not allow the claim to be properly presented ... [and] therefore he could not fairly appraise it.*”

Decision

63. My overall view is that the trial before the Deputy Master was not unfair.

Approved Judgment

64. On proper analysis, I do not detect any animus towards the Defendants or, more particularly, towards their case. There may, at points, have been some signs of irritation from the Deputy Master, but if there were, that was because of tendency on the part of the Defendants to veer away from the points actually in issue in the case, which in truth were relatively narrow: did Mrs Rea understand what she was doing when she executed the 2015 Will, or had she been pressured into doing something she did not want to do?
65. The Deputy Master set the overall tone at the beginning of Day 1. In response to an indication from David that the Defendants would need help, the Deputy Master responded as follows:
- “Of course, as I said to you at the hearing last week, I will do my best to assist whenever I can properly do so, and I am quite certain that counsel, as matters go on, will also assist. And when we come to submissions - ... I am sure that counsel will follow the traditions of the bar and take any points of law or other matters - ... That could be said on your behalf that you have not said for yourself.”*
66. There are a number of examples on the Transcript of the Deputy Master doing just what he said, and seeking to assist the Defendants in putting their case, and/or seeking to explain the process they were engaged in and put them at their ease. For now, two instances will serve to illustrate the point, both from David’s examination-in-chief of Nino Rea, on Day 2 of the hearing.
67. The first is at p. 71 of the Transcript, when the Deputy Master took time to explain his process of taking notes of the important parts of the evidence. He said:
- “Thank you. When I repeat things, it is really just to make sure you understand that - ... my note is accurate ... And sometimes when things are said, or said quickly, it is just a little bit difficult to keep up ... and so what judges often do is repeat it to make sure they have got it right ... “.*
68. This of course reflects the fact that, although a transcript is now available of the hearing, there was no transcript available to the Deputy Master at the time. There are other instances of him slowing down exchanges in relation to important parts of the evidence in order to ensure it was properly and accurately captured in his note.
69. The second example comes from the Day 2 Transcript, p. 76. Here, David was seeking to question Nino about his knowledge of whether Mrs Rea had an interpreter with her at the time of execution of the 1986 Will. That she did was apparent from a witness statement of a Ms Guistina Vatti, which had been tendered in evidence, although Ms Vatti was not called since she was too ill. Although at p.76 the Deputy Master limited David’s examination of Nino on the question whether he knew Mrs Rea had an interpreter, because “[i]t does not really matter whether he knew it or not”, the Deputy Master went on say that more importantly from the Defendants’ point of view:

Approved Judgment

*“ ... you will submit to me, I assume ... that if she needed help in 1986, she needed help in 2015.”*

70. David agreed that was a point he wanted to make, and obviously it was the real issue of significance arising from Ms Vatti's evidence. The Deputy Master not only had the point in mind, but went out of his way to explain to the Defendants that he did, and would deal with it as a matter of submission. That is not the conduct of someone who is exhibiting an animus towards the Defendants' case, or who wishes to stifle inquiry, but the conduct of someone who wishes to try and assess the case fairly.
71. I think it is against this background that one must assess the individual complaints made by the Defendants. As to that, I have set out in the attached Schedule my comments on the particular points of criticism they rely on. It is also appropriate, however, to comment here on the main points to emerge from Mr Howard's submissions.
72. *Refusal to adjourn for 30 minutes prior to Rita's cross-examination (Schedule, Item (1) and above, para [29]):* This was somewhat stern, and other judges may have reacted differently, but I do not consider it to have been unfair or to have given rise to any unfairness. It was essentially a case management decision, as to which the Deputy Master must be accorded a wide latitude, and the refusal to adjourn was understandable and justified in light of the Defendants' earlier request to vacate the trial date which had been refused twice, including at an oral renewal hearing on 5 September 2019. Having been on notice since at least that date, if not before, that the trial would proceed, and knowing full well that Rita would be giving evidence, the Defendants should have been prepared to ask her questions, and the Deputy Master was entitled to want to proceed without undue delay.
73. In any event, looking at the remainder of Rita's cross-examination by David, it seems to me that nothing really flows from this. I will come back in a moment to the question of the medical records, but for now I note a number of points. First, although it is correct that David's questioning was punctuated by some interventions from the Deputy Master, nonetheless it seems to me that David had a fair run at questioning Rita for most of the remainder of the morning session on Day 1 (pages 33-62 of the Transcript).
74. Second, although the Defendants in their submissions were critical of certain of the interventions made by the Deputy Master, it seems to me that a number of them were in fact designed to be helpful to the Defendants in putting their case. For example, at pp. 48-49 he gave assistance to David in making use of a transcript, in which a former family friend had made statements about Rita's behaviour:
- “It is something that purports to be a transcript. But if it is a statement in that transcript and you want to put a question on it to your sister. Then just say to your sister, ‘according to the transcript, Dawn Strawn[?] says X, is it true?’”*
75. David then began to read a long extract from the transcript, but the Deputy Master intervened to say:



*“DEPUTY MASTER ARKUSH There is too many – it is too long a – let me just try and help here, if I may?”*

*MR REA: Okay?*

*DEPUTY MASTER ARKUSH: Ms Rea, according to something said in the transcript, Dawn Strawn says you blocked your mother from seeing Dawn Strawn’s mother, is there any truth in that?*

*A: No, there’s no truth.”*

76. Another example runs between p. 52 and p. 56. The topic was Mrs Rea’s command of English. After David had asked some questions about his mother’s handwriting, the Deputy Master intervened as follows:

*“DEPUTY MASTER ARKUSH: I think the point about this, is this to demonstrate that she has a command of English?”*

*MR REA: Yes?*

*DEPUTY MASTER ARKUSH: If you want to challenge that –*

*MR REA: Yes?*

*DEPUTY MASTER ARKUSH: – and I think you did before, there are references to the doctor?*

*MR REA: Yes?*

*DEPUTY MASTER ARKUSH: And ask a question designed to deal with that?*

*MR REA: Okay.*

*DEPUTY MASTER ARKUSH: Ask a simple question like, ‘what was Mum’s English like’? Or something like that and that would probably help everyone.”*

77. A little later, the Deputy Master picked up the questioning himself, but in a manner designed to be helpful: *“I will try and put the question and you can help or add, if you want ... “.* After a series of questions from the Deputy Master, there was then the following exchange at p. 56, which shows the Deputy Master directly challenging Rita to respond to a line of inquiry from David:

*“DEPUTY MASTER ARKUSH: Well Mr Rea, we have explored this quite a lot, have we not now?”*

*MR REA: Just one more –*

Approved Judgment

*DEPUTY MASTER ARKUSH: And I think you have heard the witness give the answers, but you can ask any more questions if you wish?*

*Q. Yeah, was Mother's English good enough for the legal language?*

*A. Sorry, didn't he just say we've explored it – the English part*

*DEPUTY MASTER ARKUSH: No, it is a proper question, could your mother understand? Well I think you want to make it a bit more direct. When your mother saw the solicitor, could she understand what the solicitor was saying to her?*

*A. Yes."*

78. Pausing there and looking at these exchanges, it seems to me that they are entirely consistent with the idea that the Deputy Master approached the evaluation of the evidence in a fair and open-minded way. I see no evidence of any animus, or of any pre-determination of the issues. On the contrary, I see evidence of efforts being made to help the Defendants put their case properly to the key witness on the Claimant's side, i.e., Rita herself. The Deputy Master was adopting an inquisitorial role, with a view to assisting the Defendants, and with a view to making sure the evidence was properly ventilated. This is not, to my mind, an example of an improper descent into the arena (*cf* the Serafin case), but instead an example of the Deputy Master being flexible in his approach in the manner encouraged in the Equal Treatment Bench Book.
79. *Interposition of the professional witnesses/medical records not put (Schedule, Items (3), (6) and (15) and above, paras. [31]-[33] and [41]):* It is convenient to look at these two points together, since the gist of Mr Howard's submission was that the one flowed from the other.
80. To my mind, it is not possible to criticise the decision to interpose the professional witnesses for at least two reasons. First, it was again a case management decision, and moreover a perfectly reasonable and indeed routine one. Second, the point was put to David and he raised no objection to it (see above at [32]). His only concern was to make sure it signalled only a suspension of Rita's cross-examination, and not the termination of it.
81. Nonetheless, Mr Howard's submission was that in consequence, the Defendants did not have time to pull together the references for the medical records, which the Deputy Master had suggested they might do during the lunch adjournment. Again, however, it seems to me there are a number of answers to this point, in terms of its impact on the basic fairness of the proceedings.
82. First, it seems to me a mischaracterisation to say the Defendants were prevented from putting the medical records to Rita. They were given the opportunity to do so. They may not have had the time they ideally would have liked during the lunch break, but the fact the medical records were not put to Rita is equally explicable on the basis that

Approved Judgment

the Defendants were not properly prepared beforehand. Second, the medical records went only to the point about Mrs Rea's command of English, and Rita was cross-examined at some length on that topic. Third, and perhaps most importantly, it seems clear that whether they were put to Rita or not, the Deputy Master had the medical records very much in mind. That is apparent from the Nino's re-examination by David, on Day 2, at p. 98 of the Transcript. David referred expressly to the medical records going to Mrs Rea's command of English, and the Deputy Master said:

*“DEPUTY MASTER ARKUSH: This is all matters of submission and I am treating them as matters of submission.*

*MR REA: Okay.*

*DEPUTY MASTER ARKUSH: There is actually no need to get your brother to confirm this, the medical reports speak for themselves.*

*MR REA: Okay. Sorry about that, sir.*

*DEPUTY MASTER ARKUSH: No, it is all right. I am just putting it into a proper box.”*

83. In my judgment, the Deputy Master was correct to put the medical records in that separate box. They could be evaluated on their own terms, and weighed against the other available evidence, including in particular the direct evidence of Mrs Sukul and of Dr Qaiyum, which was to the effect that Mrs Rea was fully aware of what she was doing. In those circumstances, and quite apart from the other factors mentioned, I do not see that any unfairness flows from the medical records not having been put to Rita.
84. *Evidence of Mrs Sukul and Dr Quiayum (Schedule, Items (7)-(11) and above paras. [34]-[35]):* Mr Howard's next main point was that at Schedule, Item (7), concerning the evidence of Mrs Sukul (*“DMA takes over the cross-examination after 2 questions to establish Mrs Sukul's evidence to the benefit of the Claimant.”*) He was also critical of certain aspects of Dr Qaiyum's cross-examination by David, mainly because of interventions by the Deputy Master and the Deputy Master showing impatience (Schedule, Items (9)-(11)).
85. I do not think these criticisms are justified and in any event, on proper examination, I do not consider they resulted in any unfairness.
86. Starting with the evidence of Mrs Sukul, I do not think it accurate to say that the Deputy Master *“took over”* her cross-examination. The Transcript shows her giving a long answer to an initial question from David, *“And did you feel that Mother understood them complicated paragraphs, even in layman's terms?”* What one sees thereafter is the Deputy Master, who did not at the time have the benefit of a transcript, and it seems, did not anticipate having one available to assist with preparation of his Judgment, breaking Mrs Sukul's long answer down into a series of smaller points, in order to ensure it was properly captured: *“Can we just pause for a moment there, as I need to get this evidence written down?”* That evidence, as the (now available) Transcript shows, was that Mrs Sukul explained to Mrs Rea in

Approved Judgment

everyday language what the effect of the 2015 Will was, and Mrs Rea understood what she was told and wished to proceed.

87. It is true that the Deputy Master then asked some important follow-up questions, but it seems to me they were questions designed to put the Defendants' case, and therefore to help them. Thus, the Deputy Master asked about Mrs Rea having an accent, "*an Italian accent or some sort of accent?*" (Answer: "*Not that I recall*"). And then he said:

*" ... You know you sometimes get an elderly person who is, what one might call, 'suggestible', that will just agree to everything. Was Anna Rea like that in your recollection?*

*A. No, not at all."*

88. I see nothing unfair about these questions. It was entirely proper that they be put, because they were part of the Defendants' own case, and it seems to me the Deputy Master was seeking to promote the overall fairness of the hearing in asking them. He was not descending into the arena, but instead acting as inquisitor. His concern was only to make sure that the necessary points were put to the witness, and that her evidence in response was properly recorded in his note.
89. Moving on then to the evidence given by Dr Qaiyum, the Defendants are critical of three exchanges during the course of his cross-examination by David, where the Deputy Master intervened (Schedule, Items (9)-(11)). It is said that the Deputy Master showed impatience. While the Deputy Master did show signs of impatience, I do not consider that gave rise to any unfairness.
90. The three exchanges can be looked at together because they concern the same topic, which was the assessment of Mrs Rea's mental capacity undertaken by Dr Qaiyum on 24 November 2015. His assessment was based on what he called a "*six-point screening questionnaire*." As part of the process, however, he had filled in a form which had been sent to him, presumably by the solicitor, Mrs Sukul. However, as Dr Qaiyum accepted in his evidence, he had neglected to fill in a box on the form for recording the questions asked of Mrs Rea.
91. The Deputy Master's first intervention was at Transcript p. 95, to say, as regards Dr Qaiyum's admitted error, "*I do not know really where this is going ... What you need to be asking the doctor, is whether he was satisfied that Anna Rea has [sic] capacity.*" It seems to me that this was a fair intervention to make. The Doctor's evidence was that he had made a mistake and there was little to be gained in labouring that point. The Deputy Master, who at that stage was not aware that the Defendants intended to abandon any capacity argument, correctly identified the issue of real concern on which he thought Dr Qaiyum might have further evidence to give, and he sought to direct David towards asking about that issue. That was not an unhelpful suggestion.
92. I think it true to say, as regards the two remaining exchanges (Transcript, pp. 98C and 99B-E) that the Deputy Master exhibited signs of impatience, but that was only because David came back twice to the question of the uncompleted form which the Deputy Master had already indicated was not a helpful topic for David to be focusing

Approved Judgment

on. More particularly, David was keen to interrogate the question of where the form came from. Thus at p. 98 he asked:

*“Q. When you make assessments, do you generally make them on your own forms or do you get forms from other people that bring them in?”*

*DEPUTY MASTER ARKUSH: It is irrelevant, I am not going to allow that question, it is completely irrelevant. If you have got a question about the form or a problem about the form, then let us take the doctor to the form and the court to the form. And then say if you are going to ask him if there is something wrong with it?”*

93. And at p. 99:

*“Q. Do you not normally use your own form to fill in to give advice –*

*DEPUTY MASTER ARKUSH: I am sorry, again I just do not see that this matters. He could have used a form you got from WH Smith, if it said the right things, it said the right things. Now, are you saying there is anything wrong with this form, if so, let us get to the point?”*

94. In short, I think the Deputy Master’s impatience at this point was perhaps understandable. David was coming back to the same issue, which had no real legal relevance. From the Deputy Master’s point of view, fairness was not simply a matter of allowing David to ask what questions he wanted. It also involved (1) focusing on the issues in the case and the evidence which would assist in resolving those issues – which on any view did not include where the form came from, and relatedly (2) not allowing the cross-examination of Dr Qaiyum to be unnecessarily prolonged.
95. Overall, the Deputy Master was performing a difficult balancing exercise, and it seems to me that in all the circumstances, the exchanges I have mentioned were well within acceptable bounds and were certainly not unfair.
96. Further and in any event, it is difficult to see that anything turns on the Deputy Master having curtailed David’s line of questioning about the form, because it went only to the matter of Anna’s mental capacity, and although the Deputy Master did not realise it at the time, that was not a point the Defendants wished to pursue, and indeed had fallen out with their previous legal advisers about it: see above at [17]-[18].
97. *Rita’s resumed cross-examination (Schedule, Items (12)-(13) and above, paras [36]-[41]):* A number of points of criticism are made under this broad heading, and since they are inter-related, it is again useful to examine them together. They are (1) the Deputy Master’s refusal to adjourn overnight, as David requested, after the evidence of Mrs Sukul and Dr Qaiyum had completed (Schedule, Item (12)); (2) the Deputy Master’s refusal shortly thereafter to adjourn for 30 minutes, and instead to adjourn only for 10, that decision being informed by his assumption that a number of topics had already been put by David in cross-examination, whereas in fact they had been

Approved Judgment

covered by Rita's own counsel in her examination-in-chief; (Schedule, Item (13)); and (3) the exchanges at both (1) and (2) involving "asperity" on the part of the Deputy Master.

98. I have carefully considered the relevant exchanges, and have come to the view that they did not result in unfairness. I say that for the following reasons.
99. I can see that looked at in one way, the decision to carry on and complete Rita's evidence was stern one. Other judges may have done things differently. But that is not the same as saying there was anything unfair in what did happen. Looking at matters in their proper context, it seems to me clear that in making his decision to carry on, the Deputy Master was not motivated by any animus against the Defendants, but instead by a desire to be fair to all parties involved in the process, including Rita.
100. It must be remembered that David had had a long run at cross-examining her during the course of the morning (see above). He had not seemed well prepared, and the Deputy Master had intervened in order to try and help him. He was unsympathetic to the idea of allowing David more preparation time when he had been aware at least since the previous Thursday that the trial was proceeding and that, in the absence of their former legal advisers, the Defendants would need to be able to present it themselves. The overall assessment also involved looking at fairness from the point of view of the witness, Rita, who was entitled to expect her cross-examination to be conducted without undue delay and without allowance for a lack of preparedness on the part of the questioner. Fairness to her also involved limiting the questioning to matters of relevance, and one can see the Deputy Master being concerned about that, perhaps particularly so in light of certain of David's lines of questioning of Dr Qaiyum (mentioned above). In the same vein, but looking at it from the point of view of the Defendants themselves, the Deputy Master was also concerned that aspects of David's questioning might not in fact be helping their case.
101. One can see these factors illustrated at a number of points, including at p. 103, where the Deputy Master said:
- "And also, I have to say on past form, an awful lot of the questions asked are really not helpful. So, if you want to ask some questions, I am going to make sure, by intervening if necessary, that they are to the point and necessary. And always remember, to keep on asking questions from an adverse witness, there is a great risk that all that happens is that they strengthen their case at your expense."*
102. I do not detect here any animus towards the Defendants or their case, or any inclination to be unfair to them; instead, the Deputy Master was trying to do the opposite. He was trying to be fair by holding an appropriate balance between the legitimate interests of the Defendants and the interests of others involved in the process, meaning in particular Rita.
103. I agree with Mr Howard that the Deputy Master's mistake over who had put certain questions to Rita during the course of the early part of her evidence was unfortunate, but I do not think it rendered the process overall unfair. That is for at least two reasons. The first is that, looking at the course of Rita's examination-in-chief, the

Approved Judgment

mistake was an understandable one, because what Rita's counsel was doing at least for part of the time was *putting the Defendants case* to her. Thus at p. 25 Mr Ward-Prowse asked:

*“Q: They say that you prevent – your brothers say that you prevented third parties from visiting your mother and your mother vising them. Is that right?”*

104. And shortly after, between pp. 28-29 he put the following points:

*“Q: Your brother refers the Court to what he says is your repeated use during text messages of the word abandon, do you see that?”*

*A: Yes.*

*Q: It is suggested that your mother would not have used the word abandon and it is suggested that you have put the idea, the idea of being – that your brothers abandoned her, that you suggested that to your mother. What do you say to that suggestion?*

*A: I did not ever, no.*

...

*Q: It's suggested by your brothers that you influenced your mother in what she provided in her will, in particular leaving her home, her property, to you. What do you say to that accusation? ... I'll ask you it directly. Did you influence your mother in what she provided in her will, in particular did you influence here in leaving her property to you?*

*A: No.*

*Q: It's suggested that you pressurised your mother, you put pressure on her, into making the will that she did. Did you pressurise her?*

*A: No.*

*Q: It is suggested that you misrepresented, in other words, you didn't tell your mother the truth about your financial position and your ability to rehouse yourself. Did you do that?*

*A: No.*

*Q: It's suggested that you misrepresented how near your brothers were living to your mother and you misrepresented their willingness to care for your mother. Did you do that?*

*A: No.*

Approved Judgment

*Q: And it's suggested that you said things about your brothers to your mother so as to poison her mind against your brothers and that's why your mother made the will that she did, leaving her property to you. Did you do that?*

*A: No."*

105. It seems to me that in putting these questions, Mr Ward-Prowse was seeking to assist the Defendants, by making sure that the key elements of their case had been put to Rita, as they needed to be. In any event, whatever Mr Ward-Prowse's motivation, the Deputy Master was right to note that the questions had been asked and answered by the witness, and that there was very likely little to be gained, and from the Defendants' point of view possibly something to be lost, in going over the same ground again.
106. The second reason I consider that no unfairness arises from the Deputy Master's error is because of what happened next. What happened next, and indeed took up most of the remainder of the afternoon session (pp. 110-122), is that the Deputy Master himself undertook a careful examination of Rita, designed precisely to ensure the Defendants' case was properly put to her. Moreover, he took time to explain what he was doing at the beginning:

*"DEPUTY MASTER ARKUSH: You see, you are absolutely entitled to put your case and indeed, not entitled, but bound, to put your case to this witness, all right?*

*Mr REA: Yeah.*

*DEPUTY MASTER ARKUSH: So, I am going to ask a few questions, which will help you do that.*

*MR REA: Okay.*

*DEPUTY MASTER ARKUSH: On things that you might not have fully covered yet, all right?*

*MR REA: Okay, yeah?*

*DEPUTY MASTER ARKUSH: And arising out of my questions, you can come back if you want?*

*MR REA: Okay, thank you."*

107. Once more, this was not a matter of the Deputy Master descending into the arena, but instead of him seeking to assist by being flexible and adopting an inquisitorial role.
108. The Transcript shows the Deputy Master questioning Rita on a number of topics raised by the Defendants as part of their case, including: (1) the degree of contact Reno, Nino and David had with Anna in the periods before her death, (2) Rita's finances and whether she had portrayed a false picture of them to her mother, including the circumstances which led to sale of her flat, and (3) whether Rita had



Approved Judgment

misled Anna about the degree to which the three brothers were prepared to be involved in her care.

109. Having concluded his questioning, the Deputy Master made it clear that the Defendants could ask any follow-up questions if they wished, which David duly did (pp. 119-122), but only having first thanked the Deputy Master, saying: “*Yes, Your Honour, I can see you’re professional at your job.*” David’s further questions were punctuated by some more interventions by the Deputy Master, but in order to try and assist him, including by way of direct challenge to Rita (for example at p. 120G: “*So you accept they gave your mother some care?*”)

110. The examination then concluded as follows.:

*“DEPUTY MASTER ARKUSH: I think I did ask the questions that can properly be put.*

*MR REA: Yeah, I don’t think – have you got any questions? I think we’re done with the questions, thank you very much for your help.”*

111. *The Deputy Master’s Day 1 summary (above para. [42]):* As noted, Mr Howard’s criticism of this passage was that it involved the Deputy Master giving too heavy an indication at such an early stage of the way he was thinking.

112. What this really amounts to is a complaint that the Deputy Master had formed his judgment prematurely and thus in a manner which was necessarily unfair.

113. I do not agree with that criticism. I do not detect unfairness in the Deputy Master’s approach. Once more, he was seeking to balance a number of factors. By this stage, at the end of Day 1, he had heard the critical evidence of Mrs Sukul and Dr Qaiyum. They were independent, professional people who gave evidence to the same effect and in a manner which supported the Claimant’s case – i.e., they both considered that Anna was aware of what she was doing when she made her Will and did not show signs of coercion. It was appropriate for the Deputy Master to point that out. In doing so, he was doing no more than pointing out what should have been clear to the Defendants anyway, but he was perhaps fearful that as litigants in person, they did not appreciate the significance of the evidence they had heard. He wanted to encourage them to think about it, and to think carefully about the related issue of the increasing costs of the proceedings. To put it simply, he wanted to give them a reality check.

114. In the circumstances, I do not think this was unfair. There is a difference between prejudging a case and, in appropriate circumstances, encouraging a reality check. Prejudging involves closing one’s eyes to the possibility that matters may change as the evidence unfolds. I see nothing in the Transcript to suggest that the Deputy Master was in that position, whether because of an instinctive hostility to the Defendants’ case or otherwise. In fact, his position seems to have been entirely different. He was concerned about the fairness of the overall process to the Defendants, and about their ability to evaluate the state of the case objectively, given both their entirely understandable emotional involvement in the issues and their lack of any legal adviser. The Deputy Master saw this combination of factors possibly unfolding in a manner which was unfair to the Defendants, in the sense that it might

Approved Judgment

well involve them becoming exposed to a materially increased costs burden if left unchecked. Rather than remaining passive, he decided to take a more active role and give some guidance while there as still utility in him doing so. In any event, the closest the Deputy Master came to expressing a view was in relation to the capacity issue (“*They saw no sign of lack of capacity and that is very close to defeating your case*”), and nothing can turn on that because it was a point the Defendants did not wish to pursue (see again [17]-[18] above).

115. In proceeding as he did, the Deputy Master in my view was doing just what Lord Wilson advocated in the Serafin case at [45], i.e., he was making an allowance for the fact that the Defendants were appearing in person. He was showing a degree of flexibility and trying to fill the gap left by the fact that the Defendants did not have the benefit of legal advice. In my judgment, he was justified in doing so and his approach did not result in unfairness of the type described in Serafin.

**Conclusion**

116. It is sufficient to refer back to [57] above, and to the decision in the Serafin case. The issue there was that the Judge did not allow the claim to be properly presented, and so was not in a position fairly to appraise it. In my judgment, for the reasons given above and for the additional reasons explained in my comments in the attached Schedule, the present case does not fall into that category. The Deputy Master was well able to appraise the Defendants’ case fairly, and in part that was because he made substantial efforts himself to ensure it was fairly presented. I reject the notion that he sought to stifle appropriate and relevant lines of inquiry, or was hostile in a manner suggesting an animus against the Defendants, or treated the two sides unequally. He was presented with a difficult and challenging case and in my view worked hard to deal fairly with all those who were involved in it, including the Defendants, about whom he was particularly concerned given their status as litigants in person. For all those reasons, in my judgment the appeal must be dismissed.

**SCHEDULE**  
**Passages relied upon by Defendants/Appellants**

**(1) 1/33B: Deputy Master Arkush (DMA) refuses a request for time to prepare cross-examination of Rita Rea, after extended examination in-chief (26 pages' worth)**

DEPUTY MASTER ARKUSH: And so, Mr Remo Rea, are you going to be the person asking the questions? Do you want to ask any questions? You do not-

MR REA: I'm David Rea and I'll be asking the questions, Your Honour.

DEPUTY MASTER ARKUSH: Sorry, you will be asking the questions?

MR REA: Yes. Would I like to ask for a short adjournment, say 30 minutes, so we can discuss what's been said so far and make questions up?

DEPUTY MASTER ARKUSH: No, I do not think that is necessary. You have got your two brothers next to you, who can pass you notes.

MR REA: Okay.

DEPUTY MASTER ARKUSH: I mean I will give you five minutes if you want-

MR REA: Can we get 10 minutes - maybe 10/15 minutes?

DEPUTY MASTER ARKUSH: I will give you five minutes, but, you know, by now you know everything about the case. I will give you until 11.55am, that will also enable the claimant to have a short break. 11.55am I will expect you back here. Thank you.

MR REA: Thank you.

*Comment: See Judgment at [72]-[78]. This was somewhat stern, but essentially was a case management decision, and in any event did not give rise to unfairness having regard to the manner in which Rita's cross-examination in fact developed, including after it was resumed (see Judgment at [97]-[110]).*

**(2) 1/45C-E: DMA closes off a line of questioning by picking up a distinction (sharing everything equally/cake) so that the questioner (D Rea) does not pursue it and the witness's non-answer stands.**

Q. So during our younger lives, we would spend a lot of time together and Mother was on her own, she looked after the four of us. She shared everything equally and her main point in life, she told everybody that everybody would get – her children would always get the same in equal amounts, no matter what it was, is that true?

A. I can't remember.

Q. You can't remember Mother ever sharing cakes or anything in her life that was shareable?

A. You're confusing me, you asked me one question and then you went on to cakes.

DEPUTY MASTER ARKUSH: You asked the question, whether your mother said that everything would be shared equally?

MR REA: That's correct, yeah?

DEPUTY MASTER ARKUSH: And the answer was, 'I cannot remember her saying that'? And then you moved to a different subject about whether she would share cake, which is slightly different.

Q. Yeah, okay sorry, I was trying to make a fact that Mum, her mum shared everything in equal amounts, throughout her life since we were young.

Approved Judgment

*Comment: This is not a fair criticism. The Deputy Master did not close off a line of questioning. He was plainly responding to Rita's apparent confusion by trying to separate out the two points David had put to her. That was intended to help David and the witness. In any event, the main point was about whether Anna generally shared everything, and an answer was given to that question, which was that Rita said she could not remember.*

**(3) 1/50G-51E: DMA intervenes to hurry the questioner. Then suggests that the questioner puts specific documents rather than ask generalised question so the questioner reserves that line until after the lunch adjournment**

Q. Okay, I think I'd like to move on, Your Honour, to Mother's understanding of English?

DEPUTY MASTER ARKUSH: Yes, I think if you can try to take the questions a little bit more quickly?

MR REA: Yes, I will try, Your Honour.

DEPUTY MASTER ARKUSH: I think it would be helpful and it would be more helpful to your case as well.

Q. Yes, I will try and as I said, this is my first time and I'm learning as fast as I can. So, in the doctor's reports, which we have in the bundle, there's many times where you was there to help translate for Mother. And in these doctor's reports, they would quite constantly say that 'Mother could not speak English, Daughter was there to help translate'?

DEPUTY MASTER ARKUSH: I think you have to take the witness to a page number and a reference –

MR REA: Okay.

DEPUTY MASTER ARKUSH: Rather than put a generalised statement that may or may not be accurate?

Q. Well –

Discussion sotto voce.

MR REA: Sorry about this, Your Honour?

Pause.

MR REA: Your Honour, I'll come back to that, I think?

DEPUTY MASTER ARKUSH: You will have the lunch adjournment –

MR REA: Yes?

DEPUTY MASTER ARKUSH: – to collect your thoughts and write any document references down.

MR REA: Okay.

DEPUTY MASTER ARKUSH: And it might be an idea to have them written down so that you can put the question, without the delays?

Q. I'll try, Your Honour. Okay, let's go to the letter which you supplied today, which we've only just seen. You've bought the original out and you supplied two letters –

*Comment: See Judgment at [79]-[83]. This is best considered in conjunction with Items (6) and (15).*

**(4) 1/58A-D: The witness Giustina Vatti, not called but important on command of English and translation. See also [2/59E]**

DEPUTY MASTER ARKUSH: Yes if you look at clause four?

MR REA: Yes, Your Honour?

DEPUTY MASTER ARKUSH: Do you think your mother would have understood that?

Approved Judgment

MR REA: But Your Honour, my mother at that time, had an Italian interpreter, [Gustina Vatta?].

DEPUTY MASTER ARKUSH: Is there any evidence of that?

MR REA: Yes, she's made a statement.

DEPUTY MASTER ARKUSH: So that would have been explained to her?

MR REA: In Italian, with an interpreter.

DEPUTY MASTER ARKUSH: Where is the statement you are talking about, whose statement is that?

MR REA: It's Justina Vatta.

DEPUTY MASTER ARKUSH: 437, I think.

MR REA: As you can see from that statement, Your Honour, she knew my mother since 1957.

DEPUTY MASTER ARKUSH: Yes, I see.

*And at 2/59E*

DEPUTY MASTER ARKUSH: Well this is getting into submissions. I mean I understand the point you are making. Is Justina Dutta coming to give evidence?

MR D REA: No she's too ill, Your Honour, she can't get out of even a chair.

DEPUTY MASTER ARKUSH: I see. Thank you.

*Comment: See Judgment at [69]-[70]. It was not the Deputy Master's responsibility to call Ms Vatta as a witness. In any event, the Deputy Master seems to have had her evidence well in mind and to have taken on board the point arising from it, namely that Anna had a translator at the time of the 1986 will, but not the 2015 Will.*

**(5) 1/59C-E: DMA changes the question so the original and intended question is not asked**

Q. Is it possible, because you explained things to Mother, that you told Mum what was in the Will, so that she could just say, 'yes', to the solicitor, because she trusted you?

A. I don't understand the question? Can you repeat –

Q. Is it possible that you told Mum what was in the Will, just so that she could say, 'yes' to the solicitor, because she trusted you?

A. Do you mean at the time of writing that when we went to the solicitors?

Q. Yeah, the Will?

DEPUTY MASTER ARKUSH: I think the better question would be, when you were at the solicitors, who explained the Will to your mother? Was it you or was it the solicitor?

A. The solicitor.

Q. So did you have any discussions regarding the 2015 Will, before you went to the first appointment on 17 November?

A. Did I have any discussions with Mummy?

Q. Yes?

A. About what?

Q. Regarding the Will?

A. What Will?

Q. The one that was made in 2015?

A. You mean, did I talk about it with her?

Q. Yes?

A. When? No I didn't.

Approved Judgment

*Comment: The criticism here is unjustified. This is an example of the Deputy Master seeking to be helpful, by assisting David in formulating a question after an exchange in which Rita said she did not understand what David was asking. The question suggested by the Deputy Master having been dealt with, David then came back to his own line of questioning about discussions Rita had had with Anna.*

**(6) 1/62: Interrupts evidence of Rita Rea to interpose the two professional witnesses Mrs. Sukul (solicitor) and Dr. Quaiyum.**

MR WARD-PROWSE: Sir, can I just raise one matter, that the doctor and the solicitor are attending at 2pm.

DEPUTY MASTER ARKUSH: Right?

MR WARD-PROWSE: Is it your intention to interpose those two witnesses? Only I think it will create difficulties for them if they have to come back?

DEPUTY MASTER ARKUSH: Right.

MR WARD-PROWSE: We can check that over the luncheon adjournment?

DEPUTY MASTER ARKUSH: Right, well check that, Mr Rea, you heard the question. I mean, the solicitor and the doctor are independent professional people.

MR REA: Yes?

DEPUTY MASTER ARKUSH: And in principle, I would be quite happy to interrupt the claimant's evidence so that their evidence can be heard and taken in court, so that they can get back to work?

MR REA: And then we go back to Rita afterwards?

DEPUTY MASTER ARKUSH: Yes.

MR REA: Yes, that's fine, Your Honour.

MR WARD-PROWSE: I'm very grateful, that's very helpful.

MR REA: Your welcome, thank you.

DEPUTY MASTER ARKUSH: 2.10pm.

*Comment: See Judgment at [79]-[83], dealing with Items (3), (6) and (15). This was a legitimate case management decision and did not result in unfairness.*

**(7) 1/70H-73C: DMA takes over the cross-examination after 2 questions to establish Mrs. Sukul's evidence to the benefit of the claimant**

Cross-examination by MR D REA

Q. Hello Mrs Sukul, just a few questions really. When you made the actual reading of the Will on 7 December, did you read the complete Will, word for word, to my mother?

A. I did and I explained it in layman language too, the Will was reread to her. I read every clause and I explained every clause in layman terms.

Discussion sotto voce.

Q. And did you feel that Mother understood them complicated paragraphs, even in layman's terms?

A. I said it in layman's terms she understood. I couldn't tell you if she understood, as you call it, the complicated terms, but as a solicitor, I do not expect a lay client to understand complicated, legal terms. That is where my duty comes in for my client to explain every single, complicated legal term to my client and I did that for Anna Rea. I did, I explained – any complication in the Will, I explained. And if you're referring to the trustees' clause in the Will and the trustees' powers, I explained what that does and how trustees have a duty in the

Approved Judgment

law to administer her estate according to the law. So whether or not Anna Rea understood the legal terms, as you are putting it, I can tell you, that she understood the layman's terms as I explained it to her. Because she responded to me and as I said, quite clear, I told her she can revoke her will any time she wishes and she said, she will not be revoking it. I told her all her sons were disinherited and she said that's her wish. I explained what 'disinherited' means, I said they would not be inheriting anything from your estate, save the residue. And that, 'the residue will be after the payment of your funeral expenses from your bank account because you were giving the property to your daughter'.

DEPUTY MASTER ARKUSH: Can we just pause for a moment there, as I need to get this evidence written down? I explained, 'you were disinheriting your sons and they would not get anything'.

A. Because the bank account has £5,000 she told me and so it had to take off her funeral expenses. So I wanted her to be clear that there would be nothing left in this residue. The residue I told her –

DEPUTY MASTER ARKUSH: Steady up, slow down, slow down, slow down, I cannot write that fast. 'Because the bank account was £5,000 and the funeral costs would have to come out of it'?

A. Yes.

DEPUTY MASTER ARKUSH: 'I wanted her to understand', go on slowly?

A. That there was a possibility that her sons would not inherit anything from her estate.

DEPUTY MASTER ARKUSH: 'That there was a possibility her sons would not inherit anything from her estate', yes, go on?

A. And I explained that means they will get nothing.

DEPUTY MASTER ARKUSH: 'I explained that means they will get nothing', yes?

A. And she said she understood.

DEPUTY MASTER ARKUSH: 'She said she understood'.

A. At all steps of my instructions, I made it absolutely clear to Anna Rea, that this property is going to her daughter and there is a likelihood her sons will not get anything from her estate.

DEPUTY MASTER ARKUSH: 'At all steps of my instructions, I made it absolutely clear to Anna Rea, that her property was going to her daughter and'?

A. Her sons may not get anything.

DEPUTY MASTER ARKUSH: 'Her sons may not get anything'. Can I ask you at this point, were you satisfied that she understood you?

A. Definitely, sir definitely.

DEPUTY MASTER ARKUSH: 'I was satisfied that she understood me'. You obviously heard that she was not a native English speaker?

A. Yes.

DEPUTY MASTER ARKUSH: Presumably, she had an accent, an Italian accent or some sort of accent?

A. Not that I recall, because she was answering in English and I couldn't recall that.

DEPUTY MASTER ARKUSH: 'I do not recall an accent, she was answering in English'. Did it seem to you that she could understand everything that you were saying to her?

A. Yes, yes.

DEPUTY MASTER ARKUSH: 'It seemed to me that she could understand everything that I was saying to her'. You know you sometimes get an elderly person who is, what one might call, 'suggestable', that will just agree to everything. Was Anna Rea like that in your recollection?

A. No, not at all, because in the first meeting, when Rita Rea was there and the question came up about the residue. Rita Rea was - she looked at Rita Rea and said, 'this is what I'm going to do'. And then Rita Rea said, 'don't you want to consider your grandchildren and Paula'?

Approved Judgment

And I said to Rita Rea, ‘that’s not for you to say, I am taking instructions from Anna Rea’. And then Anna Rea said to me and to Rita, ‘no I am giving my estate how I want to’. So it wasn’t a case where she could have been suggested to do something, certainly that didn’t come over to me.

DEPUTY MASTER ARKUSH: So let me just take the note? ‘She said I am giving my estate how I want to and when at one point Rita asked whether she wanted to give anything’ –

A. To her grandchildren.

DEPUTY MASTER ARKUSH: ‘To her grandchildren or Paula’?

A. Or the social worker, I think it said in them, Paula the name was Paula. Something along that, I can’t remember exactly but that was the suggestion. And she said, ‘no’.

DEPUTY MASTER ARKUSH: As far as you are concerned, do you believe that Anna Rea knew exactly what she was doing?

A. Definitely and if I had any concerns, I would have raised it and flagged it with the doctor and requested again, for him to double-check. But I had no concern because she was engaging with me.

DEPUTY MASTER ARKUSH: ‘I definitely believed she knew exactly what she was doing. If I had any concerns, I would have raised them with the doctor, but she was engaging with me and I did not have concerns’. Is that a fair –

A. That’s fair.

DEPUTY MASTER ARKUSH: – summation of your evidence?

A. Yes and even at the time of execution of the Will, again with Dr Qaiyum present, I raised those questions as to –

DEPUTY MASTER ARKUSH: ‘And I raised those questions at the time of execution of the Will’?

A. That the property is going to Rita Rea and that there was a likelihood that her sons will not inherit –

DEPUTY MASTER ARKUSH: ‘That the property is going to Rita Rea and the likelihood was that the sons were not going to inherit’?

A. That’s correct, that’s correct, sir.

DEPUTY MASTER ARKUSH: And?

A. And she said, yes, she understand and then I say to her, you can revoke your Will any time during your lifetime. And she said that she would not be revoking this one.

DEPUTY MASTER ARKUSH: Thank you.

Q. Mrs Sukul, my mother had a very, very strong Italian accent and I’m very surprised that you say otherwise and she had a very hard time understanding English. Even though you broke these clauses down into layman’s terms, did my mother ask you any questions at all, regarding the clauses in the Will?

*Comment: See Judgment at [86]-[88]. The criticism mischaracterises the nature of the Deputy Master’s intervention, which was largely a matter of him repeating the evidence already given to ensure it was properly captured in his note.*

**(8) 1/74F-75B: DMA intervenes to stop a line of questions**

Q. And my mum never asked you one question?

A. She didn’t ask me no questions. She asked me – whatever questions she asked me, I have answered.

Q. Did you not –

A. If –

Q. Sorry?



Approved Judgment

A. If there is a specific question you want me to recall, then I will try my best. But you are asking me a very wide question. In a Will meeting, when you are explaining a Will to a client, you don't verbatim write every single thing that the client asks you or you say to the client. Because you are explaining a Will, you are going through it clause by clause. But if you want to put to me, to ask me something specific, I'll do my best to answer.

Q. Yes I agree and you explained to us in layman's terms, certain or what that paragraph meant. But to be honest with you, I still don't understand it and I don't think my mum understood it. And my mum must – not understood it, she would have asked questions and yet you say she didn't ask no questions?

A. No –

DEPUTY MASTER ARKUSH: That is a submission, you have asked the question, the witness has given her reply that she felt that there was understanding.

Q. Okay?

*Comment: This was not an unfair intervention by the Deputy Master, and it is a mischaracterisation to say that he stopped a line of questions. The relevant questions – as to whether Anna had had explained to her, and had understood – the technical legal language in the Will, had already been asked and answered (see Item (7) above). Mrs Sukul had also given her evidence that Anna had not asked her any questions. The Deputy Master was correct to say that the remaining points were ones for submission.*

**(9) 1/95B-D: DMA intervenes to stop a line of questions to Dr. Quaiyum**

Q. But you overlooked that didn't you?

A. Sorry?

Q. But you overlooked that because it says – states in your statement, 'this has been overlooked. To provide the evidence had been overlooked', why?

A. And the box on the second page, the bit where I ticked the boxes on the front of one page. I tick all the boxes but on the back of the second page, I think there was a column to write what I've asked, which I missed there, to write there.

Q. You missed that so, you made a mistake, you made a mistake?

A. I missed, yes I'm admitting that I missed the question, yes.

MR WARD-PROWSE: He misunderstood.

Q. A genuine mistake?

A. I'm a human being so I made a mistake.

MR WARD-PROWSE: I think, in fairness to this doctor, I don't think it was a mistake, it was probably an omission.

DEPUTY MASTER ARKUSH: I do not know really where this is going –

MR WARD-PROWSE: No.

DEPUTY MASTER ARKUSH: – to take us? What you need to be asking the doctor, is whether he was satisfied that Anna Rea has capacity?

*Comment: See Judgment at [91]. This was a fair intervention to make. Doctor Quaiyum's evidence was that he had made a mistake and there was little to be gained in labouring that point. The Deputy Master correctly identified the issue of real concern on which Dr Quaiyum might have further evidence to give, and he sought to direct David towards asking about that issue (not knowing at the time that it was not in fact an issue the Defendants wished to pursue: see Judgment at [17]-[18]).*

**(10) 1/98C: DMA shows impatience**

Q. No, so she understood every question?

A. She understood the questions, yes.

Q. When you make assessments, do you generally make the on your own forms or do you get forms from other people that bring them in?

DEPUTY MASTER ARKUSH: It is irrelevant, I am not going to allow that question, it is completely irrelevant. If you have got a question about the form or a problem about the form, then let us take the doctor to the form and the court to the form. And then say if you are going to ask him if there is something wrong with it?

Q. Okay, sorry about that, so let's go to page, what was it, 88?

*Comment: See Judgment at [92]-[96]. I agree the Deputy Master showed signs of impatience, but I do not consider that this resulted in any unfairness. David was keen to interrogate the question of the uncompleted form which the Deputy Master had already indicated was not a helpful topic for David to be focusing on. Where the form came from had no legal relevance, and in any event the Defendants did not wish to pursue any point about capacity.*

**(11) 1/99B-E: DMA shows impatience**

Q. Do you not normally use your own form to fill in to give advice –

DEPUTY MASTER ARKUSH: I am sorry, again I just do not see that this matters. He could have used a form you got from WH Smith, if it said the right things, it said the right things. Now, are you saying there is anything wrong with this form, if so, let us get to the point?

MR REA: Okay, I am saying, Your Honour that there is something wrong with this form. That parts of it were not filled in which should have been filled in at the time because Savita Sukul has relied on it to make a Will.

DEPUTY MASTER ARKUSH: That is a submission, you have made the point about the empty box at the top of 49, right?

MR REA: Yes?

DEPUTY MASTER ARKUSH: And counsel asked the question and he got the answer that, 'I asked questions A-G', now if you want to ask questions directly about that, can we please get to the point? I am not going to allow this case to run on interminably on matters which are simply not assisting me.

MR REA: Your Honour, please bear with me because I've not done this before, it's my first time.

Pause.

Q. So, can I ask you, Rita was in the meeting with you, was she?

*Comment: See Judgment at [92]-[96] and the Comment under Item (11) above.*

**(12) 1/103B-D: On the recall of Rita Rea, DMA refuses time, with asperity**

DEPUTY MASTER ARKUSH: Now, we will have the claimant back. We have used up quite a lot of the afternoon, but I would still like to complete her evidence today if it is humanly possible?

Approved Judgment

MR REA: Your Honour, I would appreciate it, if we could carry on tomorrow, because there's a lot of questions that we have prepared and we would like to have this evening to may be prepare them?

DEPUTY MASTER ARKUSH: Well why have you not prepared them, you knew you were coming to trial?

MR REA: I knew on Thursday –

DEPUTY MASTER ARKUSH: Well I suggest you move on with it, quickly. The court has to have in mind the availability of resources, generally and I do not want there to be any risk of this trial running on. And also, I have to say on past form, an awful lot of the questions asked are really not helpful. So, if you want to ask some questions, I am going to make sure, by intervening if necessary, that they are to the point and necessary. And always remember, to keep on asking questions from an adverse witness, there is a great risk that all that happens is that they strengthen their case at your expense.

MR REA: Thank you, sorry about this Your Honour, we've been thrown from two witnesses to another and back to the other one.

*Comment: See Judgment at [98]-[110]. The Deputy Master's approach was not unfair, bearing in mind factors such as (1) the time the Defendants had had prior to the hearing to prepare their questions, and (2) the need to be fair to the witness and to protect her from unnecessary and possibly repetitive examination. Critical also is the fact that, having refused to adjourn, the Deputy Master then made considerable efforts himself to ensure that any gaps in the Defendants' questioning of Rita were effectively plugged, after which David thanked him ("Yes, Your Honour, I can see you're professional at your job"), and was given the opportunity of following up with his own questions, which he did.*

**(13) 1/104-106D: The questioner rapidly loses confidence in the face of further asperity and asks for 30 minutes which is refused. Then a break to 4.10 is allowed – about 10 minutes**

Q. So the Will was sent to you was it?

A. I can't remember.

Q. Was there a copy of the draft Will ever sent to you before –

A. I just said, I can't remember.

DEPUTY MASTER ARKUSH: It would not have been sent to Ms Rea, it would have been sent to your mother.

MR REA: That's correct?

DEPUTY MASTER ARKUSH: And all this was gone over and questions were asked about it earlier today, I think by her counsel? No, it was in answer to you. She said, 'the issue of making a new Will was first discussed around 2015. We were at home, Mummy was in the kitchen reading the newspaper. She read an article about Wills, she read it to me. She said things like, wanting to be cremated. It was her idea to make a new Will, not mine, I'm sure about that. Mummy asked me to make an appointment to see a solicitor. I did as she asked, but not straightaway, it may be about two weeks later'. And then you asked her about paragraph 306 in Nino's statement and how the word 'abandon' had got there, do you remember that? And then you asked lots of questions, 'did you influence Mother in relation to the Will, in particular, leaving her property to you'? And the answer given was, 'no, I did not pressurise her I did not misrepresent anything to her about my situation. I did not misrepresent anything to her about my brothers' willingness to care for her. I did not poison her mind against them'. And I asked, 'whose idea was it to leave the house to you'? And the witness said, 'it was her idea to leave the house to me, she wrote the Will, I did not ask for or

Approved Judgment

encourage her to do it'. Now, I do not want to go over old ground and I do not think it will necessarily help you to go round and round and round. But I am not going to permit questions that go over the old ground.

*Note: the passage of which this appears (it was submitted) to be the Master's note is in this day's transcript at pages 26-29*

MR REA: Your Honour, I would like a 30-minute break, I don't feel well at the moment, to be honest with you.

MR REA: Your Honour, I would like a 30-minute break, I don't feel well at the moment, to be honest with you.

DEPUTY MASTER ARKUSH: There is no 30-minute break, we are going to sit and hear the matter until the end of the day. I really wonder whether you have any further questions that you wish to put to this witness?

MR REA: We do, Your Honour but –

MR [N REA?] Can we have a 10-minute break?

DEPUTY MASTER ARKUSH: Why?

MR [N REA?]: As you can see, David's a bit stressed, he hasn't done this before and he's a bit stressed out now.

DEPUTY MASTER ARKUSH: I mean, what are the subjects that you want to cover, have you thought about that?

MR REA: Yes, Your Honour they our [want of knowledge?], coercion, I do have questions –

DEPUTY MASTER ARKUSH: You have asked questions about all those matters. There is a risk of going over old ground –

MR [N REA?]: Well, Your Honour, we got a bit side-tracked because the doctor and the solicitor came in between our asking questions for Rita, so that really threw us today on that. So, if you just give us 10 minutes to try and recap some of the questions?

DEPUTY MASTER ARKUSH: No, I am not going to have recapping questions.

MR [N REA?]: Well, I don't mean that, I'm phrasing that – just recap – just a 10-minute break to get our thoughts together.

MR REA: Your Honour, we didn't actually expect Dr Qaiyum and Mrs Sukul to be here today –

DEPUTY MASTER ARKUSH: What is the difference?

MR REA: We thought they were going to be here tomorrow with the other witnesses.

DEPUTY MASTER ARKUSH: You will have until 4.10pm to finalise what questions you are going to put to this witness and I will not have the court go round and round in circles on old ground. Any matters we have covered before we will not be covering again.

MR REA: Thank you.

DEPUTY MASTER ARKUSH: 4.10pm

*Comment: See Judgment at [98]-[110] and the comment under Item (13) above.*

**(14) 1/107: Further asperity on resumption. At F-G a legitimate issue – changing the locks, which As say was before the testatrix died – is treated harshly**

MR REA: It's when I went to the house afterwards, yes –

DEPUTY MASTER ARKUSH: Well again, how is this going to help your case?

MR REA: Well, she –

DEPUTY MASTER ARKUSH: It is going to cast a lot of light on an episode that does not do you very much credit.

Approved Judgment

MR REA: No, definitely not, I understand that. But what I was trying to get to, is Rita stated that we could go to the house any time we wanted, but she changed the locks so we couldn't get in.

A. Not true.

MR REA: And she changed the locks before my mother died.

DEPUTY MASTER ARKUSH: Does it go to your mother's capacity at the time she made her Will?

MR REA: No, but it shows –

DEPUTY MASTER ARKUSH: Or is it just about throwing mud about?

MR REA: It's – no, no ...

*Comment: This is not a valid criticism looked at in context. The Deputy Master was correct that the changing of the locks after Anna had passed away had no relevance to the question of her capacity at the time she made the Will, and David acknowledged that. The Deputy Master's intervention was designed to limit questioning on a topic of no apparent relevance and which was likely to paint the Defendants in a bad light, because Anna's evidence was that she changed the locks after the Defendants gained unauthorised entry to the House. David persisted in the point that the locks had been changed before Anna's death, but the Deputy Master picked up that line of questioning on the next page of the Transcript (p. 108) and it was put to Rita, who denied it. David then went on to raise the separate topic of whether Rita had coerced Anna, and the Deputy Master assisted David in formulating his point and put a series of questions to Anna on David's behalf at Transcript p. 109. At one point David said: "Okay, I think you took the words right out of my mouth, Your Honour."*

**(15) 1/109E: The questioner sits down, without having put the medical records which he might have listed in the lunch adjournment.**

DEPUTY MASTER ARKUSH: I think those are the questions you wanted asked?

Q. Yes, can I just say that I put it to you, that you are lying?

DEPUTY MASTER ARKUSH: You have challenged and you are suggesting to this witness, that she is not telling the truth and that question is put and your answer to that is?

A. I'm telling the truth.

Q. That's it well, thank you for your help. We do not have any more questions for Rita at this stage?

DEPUTY MASTER ARKUSH: You see, you are absolutely entitled to put your case and indeed, not entitled, but bound, to put your case to this witness, all right?

MR REA: Yeah.

*Comment: See Judgment at [79]-[83] and the comments under Items (3) and (6) above. In summary, the Defendants were not deprived of the opportunity of putting the medical records. In any event, the Deputy Master had them well in mind as documents which spoke for themselves and which he would treat as matters of submission.*

**(16) 2/20G-22E: DMA takes over examination of Angela Contucci to reach the answer: she would understand something in English if explained in simple terms. Then 22F stops any further examination directed to what that might mean, to 23D "Let us move on" at which the questioner sits down.**

DEPUTY MASTER ARKUSH: Can I ask you –

Approved Judgment

A. Yes.

DEPUTY MASTER ARKUSH: You weren't in court yesterday?

A. No.

DEPUTY MASTER ARKUSH: The solicitor who your aunt went to –

A. Yes.

DEPUTY MASTER ARKUSH: - described your aunt as strong-willed. Would you agree with that?

A. Yeah she could be at times. I mean I don't if the latter, when she was drawing out the will if she was still, she was very strong-minded. No she could be stubborn.

DEPUTY MASTER ARKUSH: Have you got much else Mr Rea? I think you have possibly got everything –

MR D REA: Just a couple of questions.

DEPUTY MASTER ARKUSH: - from Ms Canducci that she can say on the subject.

Q. Yeah, Contucci.

A. Contucci.

DEPUTY MASTER ARKUSH: Contucci. I am so sorry.

A. That is all right.

MR D REA: Was Aunty the sort of person that would protect everybody she loved?

A. Yes.

Q. In equal terms?

A. She was very diplomatic. She was very level-headed. Well I mean, I'm going to when we were all growing up together. She treated everyone the same. There was no favouritism or anything like that from what I remember. The latter part of her life, I'm not sure, I don't know.

Q. And her knowledge of legality –

A. She'd need help.

Q. She would need help.

A. She would need help. I need help. My mum would need help.

DEPUTY MASTER ARKUSH: She would need help with a legal document?

A. Oh yeah, definitely. Definitely.

DEPUTY MASTER ARKUSH: Thank you.

A. She's not reading The Sun, Your Honour, so it's different. I would, you know, even I find it difficult in some - some of the legal terms that are used.

MR D REA: Even if it was, you know, some of these legal documents are very hard to understand, even if that was told to her layman's language, do you think she still would need someone?

A. Yeah I think so. Depends on how layman it's explained to her. Personally, just in my view, my opinion, I would have had an interpreter, definitely.

DEPUTY MASTER ARKUSH: If someone was able –

A. Yes.

DEPUTY MASTER ARKUSH: - to explain to your aunt in simple language –

A. Yes, language.

DEPUTY MASTER ARKUSH: - in English –

A. Yes.

DEPUTY MASTER ARKUSH: - what a document meant –

A. Yes.

DEPUTY MASTER ARKUSH: - do you think she would have been able to understand it?

A. If it was – yeah of course. If it was simplified then I feel that she would have understood it.

DEPUTY MASTER ARKUSH: 'If it was explained...' –

Approved Judgment

A. In simple terms, yes.

DEPUTY MASTER ARKUSH: - ‘...in simple terms, in English, she would have been able to understand it. Of course’. You said, ‘of course’?

A. Yes.

DEPUTY MASTER ARKUSH: Is that fair?

A. If it was simple and straightforward, yeah I think so. I think even my mum would understand if it was explained.

DEPUTY MASTER ARKUSH: Thank you.

A. In a simple manner.

MR D REA: How simple would you say, what you mean by simple –

DEPUTY MASTER ARKUSH: No I do not think we need to have this discussion. Again, it is not for the witness. You can make submissions on it.

*Comment: The Deputy Master’s intervention was seeking clarification. Looked at in context, it is not correct to say that he “took over” the examination. Before the Transcript extract above, Angela had already been questioned by David about Anna’s command of English (Transcript p. 12), and had said that her Aunt read The Sun newspaper. In response to a question by the Deputy Master at p. 13A she had said that Anna did not need an interpreter to do so. The passage above is a development of the same theme. It was legitimate for the Deputy Master to clarify what Angela was saying, and the answer given (if legal matters were explained in simple terms, Anna would have understood) was entirely consistent with the evidence Angela had given earlier, and indeed consistent with the earlier evidence of Mrs Sukul and Dr Qaiyum.*

**(17) 2/110-112D: DMA expresses impatience at the examination-in-chief of David Rea by Remo Rea, from “my generosity is now at an end” [110F] to Remo Rea being persuaded to sit down [112E].**

DEPUTY MASTER ARKUSH: -and you are just asking generalised questions. That is not what you are permitted to do. These paragraphs in the witness statement I am receiving as David Rea’s evidence. It is as if he is speaking them in court. They are taken as read. This is not an opportunity just to repeat them. Mostly, in courts, witnesses do not get any of these questions. Their witness statement is taken as read and then they are asked – cross-examined on it by opposing counsel. I have been very generous in allowing you to ask lots of questions which basically only serve to repeat what the witness statement has already said, but I am not – my generosity is now at an end ...

*Comment: The Deputy Master had indicated at the beginning of Remo’s examination-in-chief of David that he should not be seeking simply to go over the ground in David’s witness statement (Transcript p. 100F). The extract above was preceded by approximately 10 transcript pages of largely uninterrupted examination by Remo. At p. 105 the Deputy Master said he was being quite indulgent about leading questions and (pp. 105 and 106) had explained how he would treat certain matters as matters of submission. His curtailment of the examination-in-chief at p. 110 was justified and was not unfair.*