Neutral Citation Number: [2022] EWHC 1533 (Ch)

Case No: PT-2019-000569

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL
Date: 28/6/2022

Before:

MASTER CLARK

- -

Between:

MR GAVIN BOAST **Claimant**

- and –

(1) MS LINDA BALLARDI
(2) MS GILLIAN OLDFIELD
(3) MR COLIN MCCROSSAN
(4) MR MICHAEL MCCROSSAN
(5) WAYNE BOAST
(as representative of the estate of MICHAEL BOAST (deceased))
(6) MR TERRANCE BOAST
(7) JOSHUA RANDALL PETTIT
(as representative of the estate of MS VALERIE PETTIT (deceased))
(8) MRS TINA LYNE
(9) MRS KAREN O'CONNELL **Defendants**

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Gareth Jones (instructed by **Premier Solicitors**) for the **Claimant**

Hearing dates: 4 December 2020, 19 August 2021

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Approved Judgment

I direct that this approved judgment, sent to the parties by email at 2pm on 28 June 2022, shall deemed to be handed down on that date, and copies of this version as handed down may be treated as authentic.

.....

Master Clark:

1. This is my judgment following the trial on written evidence of this probate claim brought by claim form dated 12 July 2019.

2. The deceased, Edward Henry Charles Smith died on 24 January 2016, aged 97. He was unmarried and had no children. The claimant, Gavin Boast, is the deceased's great nephew.

3. The claimant seeks orders:
   (1) pronouncing against a will dated 11 June 2013 ("the 2013 will")
   (2) pronouncing for a will dated 15 March 2006 ("the 2006 will").
   Both wills were professionally prepared by a firm of solicitors, Cross Ram & Co ("Cross Ram").

2006 will

4. The claimant is the sole executor of and sole beneficiary under the 2006 will.

2013 will

5. The claimant is also the sole executor of the 2013 will, under which he receives a legacy of £15,000. The 9th defendant, Mrs Karen O'Connell (referred to by her unmarried name, Karen Boothby, in the will) receives a legacy of £3,000. The residuary estate is left on trust for

> "such of my sisters Dorothy Mallard of 14 Castle Avenue, Duston, HN5 6LF and Constance McCrossan of 10 Churchill Avenue, Bootsville, Northampton NN3 6NY as shall survive me and if both in equal shares absolutely."

6. Both sisters predeceased the deceased. The persons entitled on the partial intestacy thereby arising are the deceased's nieces and nephews.

7. The claimant's evidence includes a family tree, supported by relevant certificates of birth and death, which evidences the following. I refer to the family members by their first names.

8. The deceased had 3 sisters:
   (1) Evelyn Eleanor Blanche Brown (née Smith);
   (2) Dorothy Lilian May Mallard (née Smith);
   (3) Constance Elsie McCrossan (née Smith).

9. Evelyn died on 19 September 2011. She had 5 children:
   (1) Linda Rose Ballardi (née Boast) - the 1st defendant;
   (2) Michael Edward William Boast (who died before the claim was commenced, and whose son, Wayne Boast was appointed to represent his estate in the claim by my order dated 22 April 2020) - the 5th defendant;
   (3) Terrance ("Terry") James William Boast - the 6th defendant;
   (4) Patrick Boast;
   (5) Barry Roy Reynolds.

10. Patrick Boast and Barry Reynolds were formally adopted. Under the Adoption and Children Act 2002, an adopted child is treated for the purposes of intestacy as the child of the couple or person who adopted him, and not as the child of his adopted parents: ss 67 and 144(4). Patrick Boast and Barry Reynolds have therefore no entitlement to the deceased's estate.

11. Dorothy died on 10 February 2015. She had two children:
   (1) Valerie Judith Pettit (née Mallard), who died on 6th March 2020, after the claim was issued – named as the 7th defendant in the claim form;
   (2) Tina Lyne (née Mallard) - the 8th defendant.

12. Constance died on 27 January 2015. She had 3 children:
   (1) Gillian May Oldfield (née McCrossan) - the 2nd defendant – whose usual residential address is in Tasmania, Australia;
   (2) Colin John McCrossan - the 3rd defendant;
   (3) Michael Ian McCrossan - the 4th defendant.

   Michael is a protected party. His brother, Colin acts as his litigation friend having filed a certificate of suitability dated 18 November 2019.

Consents to the claim

13. In 2018, before the claim was commenced, Michael, Terry, Valerie, Tina and Karen all consented in writing to the claim.

14. Following Valerie's death, by my order dated 14 July 2021, Joshua Randall Petitt, in his capacity as her personal representative, was substituted as 7th Defendant in her place.

The procedural background

15. It is not necessary to rehearse the various procedural misunderstandings on the part of Gavin's solicitors, including their mistaken assumption that an order could be made under s.49 of the Administration of Justice Act 1985, on the basis that a defendant who had failed to respond to a claim should be taken as having consented to it for the purposes of the Act. Ultimately, I directed that there should be a trial on written evidence.

16. The first trial, on 4 December 2020, was adjourned to enable Gavin to file submissions as to whether Gillian had been validly served in Australia, and evidence as to those persons who were entitled on intestacy.

17. The adjourned hearing was on 19 August 2021, when it became clear that the evidence relevant to whether the deceased had capacity when making the 2013 will was not complete. Most importantly, Cross Ram's file in respect of their preparation and the execution of the 2013 will, was not before the court. Since this file had been sent by Cross Ram to Gavin's solicitors in January 2018, its omission from the evidence was surprising and concerning.

18. I therefore directed that it be filed on the basis that I would either decide the claim without a further hearing, or direct such a hearing. Following the filing of the will file, it became apparent that the deceased's medical records were incomplete; and on 2 February 2022, I gave further directions, including setting out the documents that appeared to be missing. To the extent that they were obtainable, these were filed on 14 June 2022. Having reviewed this additional material, I decided that the claim could be determined without a further hearing.

Service of the claim

19. All the beneficiaries other than Gillian reside in England, and were served at their residential address. Colin, both on his own behalf and on behalf of Michael, has acknowledged service stating that he does not intend to defend the claim. None of the other English-based defendants have acknowledged service.

20. As to Gillian, Gavin's solicitors initially sought to serve her by ordinary post at her address in Australia without seeking permission to serve out of the jurisdiction. I granted permission for service out at the first hearing of the trial on 4 December 2020, which was adjourned for further evidence and submissions as to whether service by post in Australia is a method permitted by CPR 6.40(3).

21. This further evidence clarified that Australia does not permit service by post, unless it is by registered post, and Gavin's solicitors did not use registered post. There is evidence that pre-claim correspondence was exchanged with Gillian, and that she was aware the claim documents had been sent to the defendants (including herself). However, it is clear that valid service of the claim on Gillian in Australia was not effected.

22. On 4 September 2019, Gillian phoned Gavin's solicitors. The attendance note of that conversation is as follows:

> "JG engaged in receiving a call from Gillian Oldfield on 01604 715818

> She explained that she has been told she has received some papers in respect of Edward Smith estate.
>
> However, she is in the UK and so hasn't receive them, She asked for an extension of time. JG explained that she cannot advise her on this but can reissue the papers to her.
>
> She is at Collins address, 191 Boughton Green Road.
>
> JG noted and will resend the papers."

23. CPR 6.8(a) provides:

> "the defendant may be served with the claim form at an address at which the defendant resides or carries on business within the UK and which the defendant has given for the purpose of being served with the proceedings"

24. Ms Gherra, Gavin's solicitor, posted the claim documents to her on the same day. I am satisfied that Gillian provided Gavin's solicitors with an address for service in the UK, namely Colin's address.

25. Gavin's counsel suggested that, since the documents sent were photocopies, and not, as he put it, the original sealed copy of the claim form, service had not been valid for that reason, referring me to para 6.3.2 of the 2021 White Book. However, since the introduction in November 2015 of Electronic Working (CPR PD51O), the court does not provide hard copies of the claim form once issued. The court electronically seals the claim form and returns it to the claimant's Electronic Working online account, from where sealed copies may be printed off. Authorities to the effect that valid service can only be effected by service of a sealed hard copy provided by the court have not in my judgment survived the new regime.

26. Gillian was therefore, in my judgment, validly served. She has not filed an acknowledgement of service.

The claim

27. I turn therefore to the merits of the claim.

Legal principles

28. The applicable test as to testamentary capacity is set out in *Banks v Goodfellow* (1869-70) LR 5 QB 549:

> "It is essential to the exercise of such a power that a testator [a] shall understand the nature of the act and its effects; [b] shall understand the extent of the property of which he is disposing; [c] shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object, [d] that no disorder of the mind shall poison his affections, pervert

> his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.*"*

29. As to the burden of proof:
    (1) The burden is on the person seeking to establish the will ('the propounder') to establish capacity;
    (2) Where a will is duly executed and appears rational on its face, then the court will presume capacity;
    (3) An evidential burden then lies on the objector to raise a real doubt as to capacity;
    (4) Once a real doubt arises there is a positive burden on the propounder to establish capacity.

    See *Ledger v Wootton* [2007] EWHC 2599 (Ch), [2008] W.T.L.R. 235 at [5].

30. As to the principles governing a trial on written evidence, I refer to para 14-009 of *Theobald on Wills* (19th edn, 2021):

> "Where the court is asked to pronounce against what purports to be the last will of the deceased, evidence must be produced to show lack of due execution, incapacity or whatever ground is alleged for the invalidity of the will. It is the duty of the probate court to give effect if it can to the wishes of the testator as expressed in testamentary documents and it should not, therefore, pronounce against what it knows to be the last will in date without making an inquiry as to its validity."

Factual evidence

31. The documentary evidence as to fact consisted of:
    (1) the written consents to the claim of Michael, Terry, Valerie, Tina and Karen;
    (2) 1st witness statement of the claimant, Gavin, dated 29 September 2020;
    (3) affidavit dated 7 September 2020 of Sandra Block – of execution of the 2006 will;
    (4) affidavit dated 23 September 2020 of Susan Ann Gavin – of execution of the 2006 will;
    (5) 2nd witness statement of Gavin dated 1 June 2021;
    (6) witness statement of Gavin's solicitor, Jodin Gherra, dated 2 June 2021
    (7) correspondence between Gavin's solicitors and the beneficiaries of the 2013 will;
    (8) Cross Ram's file relating to the preparation and execution of the 2013 will.

Medical evidence

32. The claim was not supported by a CPR Part 35 compliant report. However, the evidence included correspondence and other documents, in which various medical practitioners set out their opinion as to the deceased's mental condition and his capacity, including extracts from his medical notes and:
    (1) letter dated 6 March 2012 from Dr Neil Ashford, consultant psychiatrist, to the deceased's GP;

(2) letter dated 16 May 2012 from Dr Ashford to Cross Ram;
(3) letter dated 9 May 2014 of Dr Ochuko-Emore, consultant psychiatrist, to the deceased's GP;
(4) letter dated 4 July 2018 of Dr Ochuko-Emore to Gavin's solicitors;
(5) letter dated 29 May 2019 of Dr Timothy John Morton, the deceased's GP, to Gavin's solicitors.

Facts

33. The deceased had a close relationship with Gavin and at least until he (the deceased) became ill, trusted him. On 15 March 2006, the same date on which the 2006 will was executed, the deceased also executed an Enduring Power of Attorney ("the EPA") in favour of Gavin.

34. Until 2011, the deceased lived in his own home, Willow Cottage, Rumburgh, Halesworth, Suffolk. Dr Ashford[1] describes him as coping fairly well until about mid 2011. In that year, he gave up driving and clay pigeon shooting.

35. He was admitted to hospital (there is no evidence as to why) in November 2011. When he was discharged, in late 2011 or early 2012, he went to live with Terry and his partner, Sila Holland, at Boast House, Boasts Industrial Park, College Lane, Worlingham, Beccles, Suffolk.

36. On 27 February 2012 he was seen by his GP on a home visit. The notes record that he was staying with family because he was not coping in his home at Rumburgh. He is described as "increasingly confused, paranoid ideas … lucid but disorientated in time and space. Fixed ideas about people preventing him having tablets"

37. He was seen by Dr Ashford on 6 March 2012. Dr Ashford describes him in the following terms:

> "over the last few weeks he has expressed various paranoid delusions and over the last week or so has become less compliant with care. He had been acutely confused for a while in Ipswich Hospital. Since staying with his family the persecutory delusions have mainly directed at Terence's partner, thinking that she is out to harm him in various ways. He thinks that she is a professional hypnotist and that he is therefore completely under her power as are various other people. He complained to his nephew about one of his carers stripping off in front of him and saying that he wasn't going to put up with that kind of behaviour. He has also expressed a lot of other rather odd or eccentric ideas about his own history, some of which was certainly news to his Great Nephew, Kevin (*sic*), and sounded pretty unbelievable to anyone. For example he talked about being an expert hypnotist himself and using this to treat victims of shell shock during the War.
> …

[1] in his letter dated 6 March 2012

> His short term memory would normally appear pretty good and mentally he would appear to be quite sharp. He is not normally repetitive of questions or conversation.
>
> **Mental State**
> He was calm, pleasant and cooperative with my examination but did express a few eccentric and possibly delusional ideas, including some rather grandiose sounding ones.
> …
> From the content of much of his conversation it would appear that he is actually an intelligent and well-read man, even if the material he prefers to refer to is many decades out of date."

38. On 9 March 2012 the deceased phoned Jonathan Margarson of Cross Ram to say that he wanted to cancel the EPA and to make a new will benefiting his sisters. Mr Margarson was aware from Gavin that the deceased had been diagnosed with dementia, and wrote to Dr Ashford seeking his advice.

39. On 15 May 2012, Dr Ashford reviewed the deceased again and recorded that review in his letter dated 16 May 2012 to Cross Ram:

> "I first met him on 05.03.12 … and diagnosed him with a dementia illness complicated by some psychotic thinking…
>
> … it is my opinion that this capacity to make decisions around his finances is already significantly impaired and that the Enduring Power of Attorney should probably be registered with the Court of Protection.
>
> I would have similar concerns about his testamentary capacity. Although he is aware that he owns a cottage in Rumburgh and has some savings, he believes that his savings are in the order of £27,000 when in fact I believe they are nearer £140,000. More importantly he continues to maintain various persecutory delusions that could influence his decisions about how he disposes of his property in his Will. For these reasons, I do not believe that he has testamentary capacity and I think it is extremely unlikely that he would ever regain that testamentary capacity."

40. On 24 May 2012, Mr Margarson, no doubt responding to Dr Ashford's letter, wrote to Gavin advising him that he was obliged to register the EPA if the deceased was (or was becoming) mentally incapable.

41. Some months later, the deceased wrote another letter to Cross Ram, the date of which is unclear, but which was received by them on 13 August 2012. The first part of the letter is entirely rational, saying that the deceased has heard that both his sisters have suffered strokes and are in straightened circumstances; and that he would like to leave them both £8,000 in his will.

42. The letter continues however:

> "since I have been at Boast House, my personal files have been removed from my care. I do not appear to be a free person and I don't know why?"

43. On 15 October 2012, the deceased was seen by the mental health trust in their memory clinic and diagnosed with memory loss. He was started on a trial of donepezil, a medication used in the treatment of dementia.

44. No further steps to contact Cross Ram seem to have been taken by the deceased until April 2013, when he wrote again to Mr Margarson:

> "The last (present) will made by myself does not reflect my wishes and I am desirous of making a new will.
> …
> I wish now, after my adverse experience at this Hell Hole, to change my will as at present, and make my 2 surviving sisters and their prodgny (*sic*) the sole recipients. In the past I was concerned that the money would affect their entitlement to benefit, by this is no longer the case. But they have a very basic income at present and are both widows with grandchildren."

45. Mr Margarson replied suggesting that the deceased be assessed by his doctor and asking him whether he agreed. The deceased replied on 21 May 2013, saying that he did not have a specific doctor and asking if Mr Margarson could provide a doctor. He continued:

> "I am OK mentally, it is physical, I am a bit doddery.
>
> There is no doubt that this Industrial Park is a shambles. My nephew has given over the whole enterprise to an Asian immigrant, Ms Selathemic. Who runs everybody and everything. By hypnotism (mass) she is extremely wealthy and, I fear, will disappear one day with all the assets, including mine if I do not remove them from her domain. She is an Asian immigrant from Laos and could disappear at any moment with all the cash she can lay her hands on. I am anxious to avoid this in my case, but my relatives are blind and deaf in this case, but I am not concerned with their fate. I wish my 2 sisters to have what I own legally."

46. Again, on 29 May 2013, the deceased wrote to Mr Margarson:

> "My Most Pressing Problem is to get my Present Will Cancelled so that I can get on with a replacement. I have [hired?] legal advice and am advised that My Relations are in Serious difficulties with Debt Collectors and Banks and Various Energy, oil and Gas Suppliers. My Relations have passed ownership to an Asian Female in a civil Partnership agreement who is a very big Spender in Bulk Purchasing and Dividend [?] based on Self Assement (*sic*) Income Tax Payments."

47. On 30 May 2103, Mr Margarson replied referring to the fact that the deceased was to receive a visit from his GP on 7 June, and continuing:

> "You will appreciate that for your protection (and mine) I feel it essential that we should have a medical opinion that you are competent to change your Will. Please discuss this with the doctor when you see him."

He concluded by enclosing a "fresh Will".

48. On 14 June 2013, Mr Margarson attended on the deceased at his home, Boast House. He was told that "the Doctor" (presumably the deceased's GP) had seen him earlier in the day. The deceased had already signed the draft will sent to him, with 3 attesting witnesses also having signed it.

49. At the meeting, Mr Margarson pointed out to the deceased that his previous will left everything to Gavin, but that his new will only left Gavin a legacy and everything else went to the deceased's sisters. The deceased said he felt that was appropriate because his sisters were both in difficulties financially because of their age and need for constant assistance and care. There is no record of any discussion as to alternative ways of achieving this aim, or of including substitutionary gifts in case the sisters predeceased him.

50. Mr Margarson expressed concern about the deceased's mental state, and the deceased assured him that he had no mental problems whatsoever, and that all his problems were physical. Mr Margarson seems to have accepted this without question.

51. Finally, Mr Margarson recorded his impression of the deceased:

> "1. He clearly has fixed view about foreign immigrants and probably coloured people. He is under the impression that the industrial site is actually owned by a foreign lady and feels she is making considerable money from all concerned. Mr Smith is rather fixated about this although it does not appear to alter his judgment as to other matters.
>
> 2. If a Doctor about 2 years ago had not cast doubts upon Mr Smith's mental competency, JM would have felt that he was sufficiently competent to make a Wil, he was able to discuss the matter with him and clearly had approved and executed the Will that had been sent to him. Mr Smith was perfectly able to read and understand what was in front of him.
>
> 3. Mr Smith told several stories about members of his family etc. (as many a 95 year old would do) and everything in this respect was perfectly rational. Thus apart from his fixation about the foreign lady mentioned above, JM really felt that he was still mentally competent though physically frail."

52. Mr Margarson did not take any steps to find out whether the deceased understood what his property comprised. He also does not appear to have appreciated that the "foreign

lady" was Terry's partner, and that the deceased's delusions about her were capable of affecting his testamentary intentions.

53. In a letter received by Cross Ram on 13 June 2013, the deceased wrote:

> "Dear Jonathan
> Just to give you an idea of What Cash my Relations are Handling each week by Debit Card. I have given them free hand, but they are Controlled by a very greedy female from Asia, Not Christian. My Relations have No Control over her expenditure (with My Cash). This makes me a bit misstrustfall of them both. I have always given Gavin free use of My Card.
> …
> I also had some evidence that Gavin has plans to make me a WARD OF Court. So I have joined law firm Liberty London."

54. This is clear evidence (and should have been appreciated as such by Mr Margarson) that the deceased's paranoid delusions about Sila were extending to and had affected his relationship with Gavin.

55. On 18 June 2013 the deceased was re-referred to the mental health trust.

56. On 23 June 2013, the deceased wrote with further instructions for his will: asking to add Gavin's sister to his will. Mr Margarson appears to have written on this letter "Wait for doctors?" This was followed by another letter undated but date-stamped as received in June 2013, headed "The enclosed is for your files. No acknowledgement required". It concludes

> "I do not require a reply to this, but would like to know if you receive my letter to Butterfly Hall? this was a Post Test, these are crafty people…. Furture (*sic*) very uncertain"

57. Finally, on 3 July 2013, the deceased again wrote to Mr Margarson asking for his bill and continued:

> "I would rather not involve Gavin B in this matter unnecessarily. I am not sure whose side he is on. The Asian female has got everybody Done and Dusted, including Gavin but he is unaware of it but I find evidence that she is planning to flit in the near future, leaving a possible collapse of the whole outfit."

58. On 31 July 2013 a "Best Interests Meeting" was held, where it was decided that due to the deceased's delusional beliefs associated with his dementia, it was in his best interests to move to residential accommodation.

59. On 9 September 2013, Gavin applied to register the EPA. The deceased objected to the registration. He was assessed for the purpose of the consequent Court of Protection

proceedings by Dr Ochuko-Emore who reported in a letter dated 9 May 2014. Her opinion was that he lacked capacity to appoint a new attorney:

> "[he] did not have an understanding of the risk and benefit of retaining his current attorney or appointing a new attorney. He was unable to weigh the information provided to him regarding the risk and benefit of appointing a new attorney to make a decision."

Discussion and conclusions

2013 will

60. I am satisfied on the evidence set out above that not only has Gavin raised a real doubt as to the deceased's testamentary capacity when he executed the 2013 will, but the evidence shows that the deceased lacked capacity. This evidence shows that he lacked capacity in May 2012, when he was assessed by Dr Ashford, and there is no evidence that his condition improved after that time.

61. The deceased's correspondence with Cross Ram demonstrates intensely irrational persecutory delusions about Ms Holland, which extended to Gavin, and were, I find, causative of his decision to exclude Gavin from receiving all but £15,000 under the 2013 will.

62. The only evidence the contrary is the attendance note dated 14 June 2013 of Mr Margarson, in which he expresses the view that the deceased had capacity.

63. However, as noted, Mr Margarson did take any steps to check whether the deceased understood what his property comprised – Dr Ashford having found that he did not. More importantly, Mr Margarson, having become aware of the deceased's paranoid delusions, did not investigate whether they were capable of affecting his testamentary decisions, either by asking further questions, or by instructing a qualified medical practitioner to assess this. Indeed, although Mr Margarson seems to have considered that the deceased should be assessed by a qualified medical practitioner before making the 2013 will, he did not ensure this was done.

64. For these reasons, I will pronounce against the 2013 will.

2006 will

65. The 2006 will is duly executed and rational on its face. The court has affidavit evidence of due execution by the two attesting witnesses, Sandra Block and Susan Gavin. I find therefore that the 2006 will is the last valid will of the deceased, and I will pronounce in its favour.