Neutral Citation Number: [2024] EWHC 2847 (Ch)

Case No: PT-2023-000540

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

IN THE ESTATE OF CARRY MARION FANNY KEATS DECEASED

The Rolls Building
7 Rolls Buildings, London, EC4A 1NL

Date: 15/11/2024

Before :

DEPUTY MASTER LINWOOD

- -

Between :

ANGELA FRANCES CREW (1) **Claimants**

DAVID MICHAEL CREW (2)

- and –

JOSEPHINE OAKLEY (1) **Defendants**

KEVIN WHITEHORN (2)

JASON PAUL WHITEHORN (3)

LEON ROBERT THOMAS WHITEHORN (4)

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Mr Simon Sinnatt (instructed by **ODT Solicitors**) for the **Claimants and 2nd, 3rd and 4th Defendants**
Mr Christopher Jones (instructed by **Everys Solicitors**) for the **1st Defendant**

Hearing: 15th-17th October 2024

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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.

This judgment was handed down remotely by circulation to the parties' representatives by email and release to the National Archives. The date and time is deemed to be 10.00 am on Friday 15th November 2024.

.**DEPUTY MASTER LINWOOD:**

1. This claim concerns whether the Deceased had sufficient mental capacity to make a deathbed revocation of her Will by tearing it in half thereby causing her estate to pass by intestacy to her sister, Mrs Josephine Oakley, as opposed to the other parties to this claim, who are, unlike her, beneficiaries under the Will. In other words, it is all or nothing for Mrs Oakley or those other parties. Behind this simple act of tearing is enmity in the wider family involving allegations of undue influence, greed and bullying, with an unseemly scrabble for the assets of the Deceased in the last couple of years of her life and after her death.

2. In this judgment I will refer to the parties by their first names for ease of reference with no disrespect, and likewise to Mrs Keats as Carry or the Deceased. References [ ] are to paragraph numbers in this judgment unless the context appears otherwise. I set out below the background, the issues, the law, the evidence of fact and opinion, my findings of fact and my determination of the issues.

BACKGROUND

3. I explain the background as neutrally as I can, indicating where allegations are one sided or not proven. Besides the general background I will also describe the relationship between Carry and Josephine. The estate the subject of this action consists of a bungalow known as Carron, land which is used as a caravan site, a mobile home and a field. There is no probate valuation due to the current paralysis in the administration of the estate, but Mr Sinnatt says in total it is worth about £500,000 net.

4. The Claimants, Angela and David, who jointly I will refer to as "the Crews", are brother and sister and are the executors and two of the residuary beneficiaries under Carry's 2020 Will. The 2nd, 3rd and 4th Defendants, Kevin, Jason and Leon are also residuary beneficiaries. The Claimants are cousins of Carry once removed, and those Defendants cousins twice removed. Josephine, currently 85, is Carry's sole sibling, and is 9 years younger.

5. Carry was born in 1930 and died aged 92 on 15th February 2022. Her husband Ron predeceased her in 2007. According to David, Carry and Ron had been very close to him and Angela, they having first met in 1962 when David, now 84, was just 22. David says their friendship continued over the years and was a close and trusted one between him and Carry, as shown by Carry appointing Angela as one of her executors

in her 2003 will, then adding him as an executor in the 2016 and subsequent wills and making a bequest of half of her residuary estate to them both in the last few wills.

6. Carry made six wills in all, her first being a mutual will with Ron in 2003, by Kirklands Solicitors, who prepared all of her wills. By her second will in 2013, drafted by Mrs Haffwen Webb, who had qualified as a solicitor in 2006, she appointed David and partners from Kirklands as her executors. A third one in identical terms (the second was invalid) was made in April 2013, and then a fourth in February 2016. Carry became her client as at some point Mr Michael Joy, a partner in Kirklands, handed her matters over to her. Mrs Webb became a partner in Kirklands in February 2022.

7. Throughout her career Mrs Webb has and continues to be a private client solicitor, specialising in wills, probates and powers of attorney, and is a qualified member of the Society of Trust and Estate Practitioners. Mrs Webb also prepared the fifth will in August 2018. In September 2019 Carry appointed Angela and David as her Attorneys under a Lasting Power of Attorney.

8. The ownership and development of various properties in the family has caused some of the rancour between the sisters. I need not set it out in detail but the family lived in Nomansland, Wiltshire. Carry and her husband owned and lived in a property there known as Carron from 1956 until Carry went into hospital shortly before she died. Carry and Josephine's father died in 1966. At that time Josephine was living in a bungalow on land her father had given her. A field ("the Field") to the north of the family home was given to them both in his will but it took until 2011 for a division of it to be agreed.

9. By then Josephine was living with her second husband in a property called Whitehorns. After he left her she developed the property by conversion of the garage into a house which she occupied from 2004 until it was repossessed in 2012 by the mortgagees as she could not maintain the mortgage payments. Josephine ended up transferring her part of the Field to a friend as she considered Carry's offer for it insufficient. The friend apparently reneged on a deal to retransfer it and legal action was necessary, which Carry financed by increasing her equity release mortgage. Josephine currently lives in a rented cottage in the Salisbury area.

10. Mrs Webb said this in her statement:

> "It is fair to say that while the deceased was a very good client in many ways, she could be quite a challenge to manage as she was stubborn and had very old-fashioned views. During my long experience of having the deceased as a client, it was clear to me that she liked to reward people who were in her favour. Indeed, if it were not for the deceased's history of changing her will, I would have been concerned that she wanted to change it again in November 2021 but this followed her pattern of will making. During that time I did not once consider that she had issues of capacity, rather her wish to change her will was down to her personality."

11. In the 2016 will I mention above, the Crews were executors and after specific legacies of the Caravan to Anthony and Marilyn Young and £1,000 to a Ms Thomson the residuary estate was bequeathed to the Crews and if they failed to survive then to Robert and Kevin Whitehorn. By the fifth will made in 2018, the Youngs were to hold the Caravan for life and then it was to devolve into the residuary estate, which by way of substantial change was to be divided equally between the Crews, Kevin and Robert.

12. In 2019 Carry asked the Crews to also be her attorneys under Lasting Powers of Attorney, ("LPAs") which were completed at the offices of David's lawyers as Carry told him she did not want Josephine finding out about the LPAs.

13. In July 2020 Carry instructed Mrs Webb again with regard to what became her sixth and final will ("the Will"). Instructions were taken by telephone due to the pandemic. The Crews were to remain as executors. They were also given the Caravan and 25% each of the residuary estate with the balance to Kevin (25%) and Jason and Leon (12.5% each). Carry was driven to Kirkland's car park by the Crews who at Mrs Webb's request went for a walk. Then Mrs Webb went through the terms with Carry who then executed that Will in the car on 21st September 2020.

14. Mrs Webb in her attendance note recorded Carry said about Josephine that:

> "…she had loaned so much money to her sister over the years. Her sister lived a very extravagant lifestyle …[she] has apparently sold over 4 houses and lives the high life and never has any money…[she] has told her she is not giving her any more money. Recently, her sister has been asking Paul, who works for Mrs Keats on the caravan site, what is in Mrs Keats's safe and also whether she is named in the Will."

15. A week later Carry called Mrs Webb as I set out at [21-23] below. This was the first time she asked for provision to be made for her sister in any of her wills, but that intent only lasted about 3 weeks. Mr Joy, when asking Mrs Webb to draft the second will, in his memorandum to her of 12th December 2012, referred to a longstanding dispute with Josephine which had been resolved the previous year and notwithstanding the repossession of Josephine's property, said Carry "…did not want to make any provision for [Josephine] in view of the animosity which has existed for many years."

Carry and Josephine's relationship.

16. Josephine in her witness statement says "It is fair to say that Carry and I had what I believe was a normal relationship between siblings where there is a considerable age gap; it was not without argument, but we always cared for each other." I think, in view of what I set out above and below, that is a misleading gloss on a relationship of animosity which was at times particularly fraught. Further, I fail to see how that age gap can have caused the deep divisions between them. What did was money or rather the lack of it on the part of Josephine.

17. David in his witness statement refers to many conversations he had he says with Carry concerning Josephine and that "Carry told me that throughout her life, Josephine was

always asking her for money which she never paid back, with requests for help preceded with a hard luck story of one sort or another, in effect abusing Carry's good nature." Mrs Webb and others at Kirklands recorded in their attendance notes similar statements by Carry regarding her sister over the years. I place quite some weight on their independence and the fact that what they say is recorded in contemporaneous attendance notes as any professional solicitor should maintain.

18. There is in the evidence correspondence around 2001 - 2005 between solicitors instructed by each sister. In essence it appears that there were substantial disputes over the development and use of land. The correspondence is not full, being some of what David says others in the family collected from Carry's property Carron, but it shows in part how the relationship the sisters had was unusual in that they fought via solicitors over property issues. This is also supported by the documentation on Kirkland's files. David said Josephine made life difficult for Carry in objecting to her proposed planning application. The passing of some decades to resolve the division of the Field also evidences the lack of agreement between the sisters on such property issues.

19. David also says that Carry felt "…worried and troubled by the bullying nature of Josephine's continual demands for money…" expressed in numerous telephone calls to him. Further, Carry was "disgusted" with Josephine after she had an affair when married which then ended in divorce. These matters were not put to Josephine when she gave evidence but I do not consider they are of relevance save in one respect – bequests under the wills.

20. I take a cautious approach to what David says; it is not that I doubt his honesty but some of the matters are of long ago, and a) he displays considerable antipathy to Josephine b) stands to inherit if the Will stands and c) much of his evidence is what he says Carry told him; hearsay. Having said that, as he states, Carry never made provision for Josephine in her numerous wills. She was aware of her exclusion of her sister as seen in the independent account of their relationship in the statement and contemporaneous attendance notes of Mrs Webb.

21. In her statement Mrs Webb says that after making the Will on 21st September 2020 about a week later she was telephoned by Carry who told her "…she wished to make a small provision for her sister…by giving her £5,000 and a Victoria china teapot." Mrs Webb continued "I had by then been aware that the deceased and her sister had a very much love-hate relationship. On 30th September 2020 I sent the deceased a will for her to sign…".

22. Mrs Webb's attendance note of 28th September 2020 adds more detail as to that first ever intended bequest to her sister, recording that Josephine was no longer talking to Carry as Carry:

> "…believes she has seen the Will which makes no provision for her. [Josephine] …has been letting herself into the property whilst Mrs Keats has not been in and rummaging through her papers. However, Mrs Keats clear that she doesn't like her sister not talking to her and needs her help to get to various doctor and hospital appointments. Every time she phones her sister at the moment, her sister is simply putting the phone

> down…her sister has had 4 houses and still has nothing to show for it as she has spent all her money."

23. Then on 14th October 2020 Carry telephoned Mrs Webb whose note records Carry saying "…her sister had annoyed her with her attitude…" and that she would leave her Will as is and make no provision for her. On 7th June 2021 Carry called Mrs Webb and said she was going to cancel the LPAs in favour of the Crews as they were proposing to put her in a nursing home if she had another fall. Mrs Webb explained that the LPAs could only be put into effect if she did not have capacity.

24. This marked a serious falling out between Carry and the Crews. David wrote to Carry on 29th June 2021, stating they had known each other for 40 years and had some good times together but he was very hurt by the accusation as to the care home and him selling her bungalow. He added that Angela and Eileen were disgusted with Carry and they had decided to end their relationship, concluding that it was a pity the Whitehorns would "…not get the land of their ancestors as we and your Father had hoped."

25. Carry replied in an undated letter to "David and Family" saying she had to write about their nonsense. It was clear that Carry was feeling pressured as to who would inherit what as she continued:

> "As for the caravan site and the mobile home this place doesn't belong to you yet and will stay as it is. Ron and I worked so hard to make it a place for people to enjoy. The Whitehorns will get a share as my will states there are others besides you"

26. On 1st July 2021 Carry saw her GP whose note records that she was a "…self-sufficient resilient and proud New Forester…". Josephine says that in July 2021 she reconciled with her sister. On 31st August 2021 Josephine called Mrs Webb to make an appointment for Carry to change her will. Carry then spoke to her the next day. Carry said the LPAs had been cancelled by her. They next spoke on 9th November when an appointment was arranged for Carry to attend at her offices to give instructions for a new will.

27. On the 16th November 2021 Carry met with Mrs Webb for just over an hour. Carry explained how she had fallen out with David and Angela as they indicated they would put her in a nursing home if she had another fall. That upset her as she had been friends with David for 40 years and was determined to die in her own home. She was in Mrs Webb's word adamant that she wanted to revoke her 21st September 2020 Will as she did not want the Crews to benefit. Nor were they to be her executors.

28. David flatly denies that such a threat was ever made. Apparently, Carry was told that the Crews intended that by one Paul Maunder who David distrusted. Paul had moved into a caravan on Carry's site at the start of the pandemic in 2020. David suspected Paul was trying to take advantage of Carry by assisting her in running site matters and tending to things generally. David says Josephine corroborated Paul's account.

29. The falling out between Carry and David was terminal to their relationship. Following the exchange of letters in June 2021 I mention above Kirklands wrote to David on Carry's behalf on 23rd July 2021 setting out her position and asking for a

withdrawal of David's allegations that Mr Paul Maunder was a conman. David replied saying he was pleased his attorneyship had been rescinded and he was glad to withdraw his comments about Mr Maunder who "…is a Angel sent from heaven…".

30. On 23rd July 2021 the Crews wrote to Josephine. They made various allegations over family matters, said she was up to her eyes in debt and that they wanted nothing more to do with sisters who deserved one another. Josephine's reply one week later was to say she was:

> "…disgusted to think you could even say to my sister that you didn't want anybody living in the garden in a caravan when you came to live at Carron when my sister was very much alive. What a presumptuous little man you are. Anyhow you won't be living there at all."

31. She continued by saying David was "…mad with rage and nastiness because he knows by his own volition he has let the cat out of the bag". She closed by saying she wanted the Crews to "…go away and get on with the rest of your sad miserable lives."

32. The letter writing continued with David replying on 1st August 2021 to the undated letter from Carry I mention above at [25] and saying, as to Carry believing that he was lying that he would put her into a home and sell her bungalow that "…no one shits on me as you have done". He states there will be no more contact and concludes "There will come a time that you will regret what you did to me. I will not know when that happens, but it will, sooner or later." However, he then wrote to Carry on 5th August stating his letter of 1st August was a trap for Paul and Josephine agreed between him and Carry. I cannot determine whether that was the case. In any event, it seems Carry did reply by that undated letter.

33. Carry then went to see Mrs Webb about a new will. This was a long meeting – 72 minutes discussing her will and 18 minutes on a right of way. Mrs Webb's long and detailed note of 16th November 2021 records her discussion that day with Carry as to how she should distribute of her residuary estate and that Mrs Webb raised "…her sister as a possibility but [Carry] was clearly not willing to leave anything to her sister due to the amount of problems she had caused her in her lifetime.". Later in that note Mrs Webb records her saying to Carry she had no issues taking instructions from her as "…she clearly had full capacity".

34. Mrs Webb sent a new draft will to Carry two days later with a detailed letter of explanation. She raised what she described as her:

> "…initial concerns …over gifting the caravan site to Paul, [Mr Maunder] especially as you've only known him for a couple of years. You said Paul had been a great help to you …. Since you have fallen out with David and Angela, you have relied more and more on Paul…You understood my concerns but you wished to benefit Paul by leaving him the mobile home and caravan site under your will."

35. Carry did not reply. Next, on 6th January 2022, Josephine called Mrs Webb and told her Carry was in hospital. Mrs Webb made several attempts to contact Carry but to no

avail. She then wrote offering to visit her in hospital to finalise her will. At this time, for a short while, Josephine was also in hospital. On 9th January 2022 a Mental Capacity Assessment completed by an Occupational Therapist for discharge noted that Carry could not retain information long enough to make a decision nor could she weigh up the information. On 17th January 2022, in response to a question on a form "Does the patient have capacity? (informal assessment)" the "No" box is ticked.

36. The hospital records then state on 21st January 2022 "Patient confused". Josephine is listed as updated Next of Kin. Under Nursing Notes it records that the staff declined to witness Carry signing some documents produced by Josephine due to "…Carry's fluctuating capacity. Unclear if she signed whilst we were not present".

37. Mrs Webb then telephoned the hospital on 25th January. The ward staff told her no visits were allowed due to the pandemic but on hearing she was a solicitor and it was to finalise Carry's will she was told a formal attendance was permissible. Mrs Webb tried to call Carry. Amazingly, as she put it, Carry answered but had little idea how to hold the 'phone and was:

> "…very disorientated…didn't give clear instructions about being to update her Will. She was very muddled. HW uncertain if Carry would be able to give instructions. However, Carry confirmed that she would like HW to go and see her and to attend tomorrow."

38. Mrs Webb went to the hospital on the afternoon of 26th January 2022. She changed into the protective clothing required and went in to see Carry. She had with her the original Will of 2020, the last draft from November 2021 and blank sheets of paper if she had to write a wholly new will there and then, as she knew Carry's condition was serious and she treated the visit as if for a deathbed will.

39. Carry was given some pain relief by the ward sister. In her attendance notes Mrs Webb refers to herself by her initials, HW. Mrs Webb says she was alert to the question of capacity and that Carry had capacity at first when she wanted to revoke the Will but it slipped away as Mrs Webb tried to take instructions for a new will.

40. Because of the importance in this claim of the evidence of Mrs Webb I reproduce her attendance note ("the Attendance Note") in full below. I have numbered the paragraphs to assist in referring to them:

"ATTENDANCE NOTE

CLIENT: Carry Marion Fanny Keats

MATTER: Will 2021

MATTER NO: KEA2/2

DATE: 26 January 2022

(1) HW in attendance at Salisbury District Hospital and meeting with Carry Keats. Just before HW was going in to Carry, the ward sister was going to give Carry some pain relief. This was given to Carry whilst HW was present.

(2) Carry knew why HW was there and also her name, and HW was confident that instructions could be taken. Carry was clearly in a lot of distress with her pain. She was on a vibrating bed and had boots on in respect of her bed sores. Carry was moaning and grimacing throughout the appointment that HW was with her, although the pain relief did seem to help a little.

(3) Carry not initially being 100% clear and said that her sister, Josephine Oakley, had attended her this morning. HW was surprised, as Mrs Oakley had said that she wasn't going to attend on Wednesday to see Carry, but clearly had changed her mind because she knew that HW was going to be attending that afternoon. HW telling Carry this and also that Josephine had asked to be present whilst HW was there, but she had told Josephine that she couldn't be, and I had to see Carry by herself.

(4) Josephine has clearly been spending a lot of time with Carry over the last few days, and appears to be visiting her daily. Discussing the situation with Paul and Josephine. Carry saying that Josephine says that Paul is just after the money and out to get what he can. HW saying to Carry it doesn't matter what Josephine says- it's what Carry wants to do with her estate that matters. Carry saying 'Paul's been good to me. My sister hasn't'. HW agreeing with Carry that she has had a love/hate relationship with Josephine over the years, and Carry has told HW about the amount of money and hardship that Josephine has caused her over the years. Carry not denying this.

(5) HW explaining to Carry that her current Will was still in place, and this appointed her cousins Angela and David as the executors and also passed a lot of the estate to them. Carry saying that she definitely didn't want this to happen. HW advising Carry that if she didn't want this to happen then she could tear up her current Will but then she would be intestate. HW confirming that if Carry was intestate then Josephine, as Carry's sole and closest relative, would be entitled to all of the residuary estate. Carry confirming that Josephine was her only sibling and no other previous siblings were part of the family.

(6) HW saying to Carry that if she was adamant that she didn't want David and Angela to deal with the administration and to inherit from her estate, that she could tear up her old Will. HW had brought the original with her, and Carry was happy to do this. Carry was able to tear around three quarters of the way through and then HW helped her tear up the rest of it.

(7) HW then trying to take Carry's instructions in respect of a new Will. HW saying that she had brought the draft Will that she had prepared back in November and had modified this slightly to ensure that it could work, as there had been some blanks in it. HW explaining the basic terms of the Will so that Carry could understand this. Carry wasn't happy with Paul receiving the caravan and the caravan site. She started saying that she wanted Josephine to have the caravan and caravan site and then Paul to have the bungalow. HW saying that the bungalow would probably be worth around £300,000 to £400,000, and was she happy for this to pass to Paul? Carry saying that Josephine stressed that Paul would knock down the bungalow and then do a new development on it, and he was only after the money. HW saying that Paul could well do that, but she didn't know and nor did Carry or Josephine. Once Carry gave any gift to a beneficiary under the Will then they were free to do what they liked with it. After considering this, Carry confirming that she wanted the caravan, caravan site

and other land to go to her sister, Josephine, with the bungalow and garden to only go to Paul. HW hand-amending the Will that she had brought with her and explaining to Carry that she had also included provision for a right of way to the caravan site, with a view that this was to be carried on as a caravan site. Carry was happy with this.

(8) HW then reading through the Will so that Carry was fully aware of the terms of the same. HW was aware that Carry was drifting out of consciousness, presumably because of the pain relief, and then when HW queried with Carry that she was happy with certain clauses in the Will, Carry was then contradicting herself, at one point even saying that David and Angela were to inherit the caravan and caravan site, but then saying that no, this wasn't correct. She kept on switching around who was to have the caravan and caravan site and who was to have the bungalow. At one point she said that she wanted Josephine to have everything, but then quickly back-tracked on this and said about various legacies and gifts of the bungalow. It wasn't clear at all to HW as to what Carry actually wanted.

(9) Whilst Carry had been lucid she had torn up the current, valid, Will and was aware that Josephine would get everything under the rules of intestacy, and Carry seemed quite settled with this. HW was unable to take Carry's instructions, as Carry's capacity had clearly dipped because of the pain relief. Carry was falling asleep also.

(10) HW saying to Carry that everything was ok and David and Angela were not going to benefit from the estate, and trying to make Carry understand that everything was ok and Josephine would deal with everything. Carry asleep but then still mumbling at the same time some random information.

(11) HW leaving Carry, but saying that she would write to her to confirm the situation.

(12) HW then speaking with the ward sister. The ward sister saying that Mrs Oakley had been saying that there was a man who was coming to see Carry and that he was no good. Presumably this would be Paul. Mrs Oakley was also asking about the estate, and the ward sister was saying that she couldn't tell her anything about it. HW explaining to the ward sister that she couldn't give any information to her either and also had spoken to Mrs Oakley in this regard. HW explaining that she was going to write to Carry Keats and would ask that this was put away in a private location so that when Mrs Oakley attended she could not see the contents of the letter, as this was not appropriate. The ward sister confirming that they would try to do this, and HW thanking her for the same.

(13) HW also asking about Carry's life expectancy. The ward sister saying that it was palliative care, but Carry was in quite good health. She was still eating and drinking and therefore it could be a few months. If Carry got an infection, then of course this could be a different situation. The ward sister didn't know how long Carry would be at Salisbury District Hospital for- it all depended on where they could get abed- but Carry would definitely be going into nursing care, because the level of care she needed would warrant this. Carry would not be going home.

Time in attendance: 60 minutes Time travelling: 60 minutes Mileage: 34 miles

HW"

41. Mrs Webb returned to her office and dictated the Attendance Note. The next day, 27th January 2022, she wrote to Carry as she had said she would in her Attendance Note at [40(11) and (12)]. She said she wrote further to their meeting and:

> "If you recall, you confirmed that you did not wish [the Crews] to have anything to do with your estate or benefit from the same. I advised you that [the Will] was still actually in place and this made provision for [the Crews] to act and inherit a large proportion of your estate. You tore this Will through, effectively destroying the same. As a result you are now intestate, meaning you do not have a valid Will in place."

42. The letter continues by confirming that without a valid will in place she was intestate and that Josephine would inherit everything. Mrs Webb states she did try to take instructions for a new will but she could not do so as she believed "…the pain medication that you receive affected your lucidity and you were contradicting what you wanted." She offered to attend again and concluded "Hopefully you will find peace in the fact that your sister will be inheriting, under the Intestacy Rules, as your closest living family member."

43. As Mrs Webb had mentioned to the ward sister at [40(13)] above this was the confidential letter that Josephine was not to see. Two days later the Occupational Therapist who completed the form I refer to at [31] above updated it but the terms remained the same in that Carry was not thought to have the capacity to weigh up what she need to as to discharge from hospital and her needs. Then, just over two weeks later on 15th February 2022, Carry died.

44. The next day Josephine phoned Kirklands. She refused to leave a message for Mrs Webb whose secretary recorded she said "Mrs Keats has paid this firm thousands and thousands of pounds over the years and she therefore has a right to speak to someone." Mrs Webb returned her call later that day, the 16th February. Mrs Webb emailed Mr Joy and said that Josephine would inherit all on an intestacy and that "Carry knew this and seemed to be at peace with her decision, despite her love/hate relationship with her sister." Mr Joy said he may attend the funeral "…to say farewell to "the feisty old bird.""

45. On 21st February 2022 Josephine approached Ms Bethan Creasey of Parker Bullen LLP to act on her behalf and to apply for a Grant of Letters of Administration which she was formally instructed to do on 2nd March. The day before, as she wanted to check that the will had been validly revoked, she telephoned Mrs Webb who confirmed capacity for destruction but not the making of a new will.

46. Then the Crews and others endeavoured to secure the properties which comprised the estate and so did Josephine, each side trying to take control, change locks and deny the other(s) access. These are not allegations I need to determine. These proceedings then commenced on 23rd June 2023.

47. **THE AGREED ISSUES**

1. Was the Will revoked by destruction pursuant to section 20 of the Wills Act 1837 by the Deceased tearing three quarters and being helped by her solicitor Mrs Hafwen Webb to tear the rest, in particular:
   (i) Did the Deceased sufficiently destroy the Will;
   (ii) Did the Deceased authorise Mrs Webb to complete the destruction or acquiesce in the same;
   (iii) Did the Deceased have the requisite intention to destroy the Will;

2. If the Will was revoked did the Deceased have the mental capacity to do so;
3. Can D1 criticise the report of Dr Series notwithstanding he did not give evidence, in view of the decision in *Tui v Griffiths* [2023] UKSC 48?

THE LAW

48. There is little difference in the main between the parties as to the law. I therefore summarise by subheading.

Revocation

49. Section 20 of the Wills Act 1837 provides:

> "…no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner herein-before required, or by some writing declaring an intention to revoke the same and executed in the manner in which a will is herein-before required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same."

Intention to Destroy

50. In *Clarke v Scripps* (1852) 2 Rob. Eccl. 563 Sir John Dodson said at 567 that intention may be proved:

> *"1.* By evidence of the expressed intention of the testator, especially if such declaration was contemporaneous with the act …"
>
> *2.* The intention may, in the absence of any express declaration, be inferred from the nature and extent of the act done by the testator; i.e. it may be inferred from the state and condition to which the instrument has been reduced by the act. From the face of the paper itself it may be inferred either that he did intend to destroy it altogether, or that he did not.
>
> *3.* The intention may, in some degree at least, be inferred from intrinsic circumstances. There may have been declarations, not

> directly as to the revocation, but such as would lead to the inference whether he did intend to revoke the will or did not."

Destruction

51. Theobold on Wills 19th Edition at 7-045 states:

> "There must be an actual, not a symbolical burning or tearing of the paper upon which the will is written…Although s.20, after referring to burning and tearing a will, continues, "or otherwise destroying the same", these words must be understood as intending some mode of destruction ejusdem generis, not an act that is not a destroying in the primary sense of the words… Cutting a will with the intention of revocation is effective…However, it is not necessary that the will be totally destroyed, burnt, or torn in pieces. If the will is burnt or torn in the slightest manner, this will be a good revocation if joined with the declared intent. As will be seen, the nature of the destruction may be evidence of the necessary intention. But an unsuccessful attempt to destroy does not revoke… Furthermore the act of destruction, in order to be effectual must not be left incomplete. The testator must have done all that he intended in order to effect destruction. If he is interrupted from completing the act or acts of destruction that he was performing, there is no revocation."

Mr Sinnatt submits that Josephine has to show the physical act together with intent, and that in the circumstances which obtained here according to Mrs Webb's evidence as destruction was incomplete without her assistance then that could not amount to revocation.

Authority/Acquiescence

52. Mr Sinnatt also submits that as Mrs Webb completed the destruction this may invalidate the revocation if Mrs Webb did not have authority to do so, citing Theobold at 7-051:

> "The revocation must be done with the testator's authority, and he cannot acquiesce in a destruction done without his authority, even if done in his presence."

53. *Barrett v Brem and Ors* [2012] EWCA Civ 52 concerned the signing of a will at the direction of a testator and s 9of the Act. Lord Justice Lewison said at [21] that "…something more than acquiescence or passivity on the part of the testator is required. What is required is something in the nature of an instruction.". At [22] he accepted counsel's submission that a "direction" to sign connotes a more active role on the part of the testator than a mere "acknowledgment" under section 9 (c).

54. In [23] Lord Justice Lewison referred to *Parker v Parker* (1841) Milward 541 where the testator attempted to sign and could not. His solicitor took the pen and asked if he should sign for him and the testator "…nodded assent and said yes". Lord Justice Lewison then said at [24] that:

> "The clear thrust of this passage, to my mind, is that the testator must make some positive communication of his desire that someone else should sign the will on his behalf. The reference to conduct and the res gestae is in the context of one who is capable of communicating by signs. We know that there are people suffering from conditions that make it almost impossible for them to communicate normally and that those who understand them can go to extraordinary lengths to enable them to make their wishes and feelings known."

55. *Barrett* is cited as authority in Theobold at [7-051] for the proposition that "Presumably the same degree of active direction is required as for the execution of a will at the testator's direction". Therefore, Mr Sinnatt submits, Carry had to give an actual instruction to Mrs Webb to complete the act of destruction and not merely acquiesce in her finishing the destruction in her presence.

Capacity to Revoke

56. Theobold at 7-053 states:

> "If a testator lacks testamentary capacity when he destroys his will, he cannot have a valid intention to revoke, and the will is not revoked; nor if he is so drunk as not to be responsible for his actions. The mental capacity required to revoke a will in such circumstances is the same as that required to make a will.

57. In *Banks v Goodfellow* (1870) LR 5 QB 549 at 565 Cockburn CJ stated that to establish capacity it was essential:

> "…that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, 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."

58. In their joint letter of instruction to Dr Series the parties' solicitors stated that the *Banks v Goodfellow* test of capacity to make a will is also that required to revoke one. Dr Series referred to that test in his report, citing Williams on Wills at [4.8] 11th edition:

> "At common law sound testamentary capacity means that four things must exist at one and the same time:
>
> (i) The testator must be able to understand the nature of making a will and its effects;
>
> (ii) they must be able to understand and recollect the extent of their property;
>
> (iii) they must be able to understand the nature and extent of the claims upon them both of those whom they are including in their will and those whom they are excluding from their will; and
>
> (iv) no insane delusion shall influence their will in disposing of their property and bring about a disposal of it which, if the mind had been sound, would not have been made."

59. Mr Jones submitted that it is unnecessary to prove that the testator had actual knowledge of (i), (ii) and (iii) but she must have the capacity to be able to understand them, citing *Goss-Custard v Templeman* [2020] EWHC (Ch) at [135], and Theobold at 4-010:

> "Notwithstanding the use of the word "shall" in the test as originally expressed, it is clear that the test is about the ability to understand these matters, rather than actual understanding. And as held in *Simon v Byford* "capacity depends on the potential to understand. It is not to be equated with a test of memory". This applies to all of the first three limbs of the test."

60. I have also considered the above authority *Simon v Byford* [2014] EWCA Civ 280 at [39-46] where Lord Justice Lewison concludes that:

> "…the classic formulations of testamentary capacity (quoted above) limit themselves to requiring the testator to understand no more than the *extent* of his property. They do not require him to understand the significance of his assets to other people."

The Golden Rule

61. In *Cowdery v Cranfield* [2011] EWHC 1616 (Ch) Mr Justice Morgan at [137] said:

> "The application of the Golden Rule assists in the avoidance of subsequent disputes as to capacity. However, in the present case, where the Golden Rule was not followed, and a dispute as to capacity has arisen and has to be resolved by the court, non-compliance with the Golden Rule does not demonstrate a lack of capacity. The issue must be decided by the court applying the correct legal principles to the court's findings of fact."

The Burden of Proof

62. Once a will, as is the case with the Will the subject of these proceedings, has been proved to have been duly executed then the burden of proof is upon the party alleging revocation. That presumption may be displaced by an assertion of lack of capacity; Theobold at [7-056] states:

> "First, where a will is known to have been destroyed by a testator who may have been lacking testamentary capacity at the time of destruction, the burden nonetheless lies on the person propounding the will to establish that the testator lacked capacity, so that the destruction was ineffective."

63. However, if the testator loses capacity after execution then a party relying on destruction must prove that happened whilst the testator had capacity: Williams on Wills at [18.31]. Here, the evidence in the hospital notes I have set out above and as referred to in more detail by Dr Series is that Carry did not have capacity before the destruction and lost it, according to Mrs Webb, very shortly afterwards.

64. Therefore I accept Mr Sinnatt's submission that the burden of proving Carry had capacity is upon Josephine.

Conflict of lay and expert medical evidence

65. Mr Sinnatt submits in his skeleton argument that:

> "D1's entire case rests upon convincing the Court that the view of HW that the Deceased had capacity trumps the joint expert that she did not. That in turn will rest on their argument that HW was an experienced probate solicitor and STEP qualified. That however is fatally undermined not only by HW's failure to comply with the Golden Rule, but critically, that if HW was properly addressing the relevant issues and was so experienced that her opinion should be preferred to the join expert why would HW have failed to record critical details such as being expressly instructed by the Deceased to complete the destruction of the Will, something that she only mentions two years later. Such a failure to record a critical detail in the Note makes HW unreliable and effectively attempting to shut the table door when the horse has bolted." (sic)

66. Mr Jones unsurprisingly states the opposite in his skeleton argument:

> "The Court should be slow to ignore the evidence of an experienced and qualified legal professional who knew Carry, actually met with her and took instructions, and formed a view as to her capacity in that moment. That is the best evidence before this Court as to Carry's capacity. The most obvious point to make here is that Dr Series never met Carry, he can only guess as to how she would have presented herself in assessment and must base his decision on the available records. Dr Series, in his addendum report, has chosen to interpret Mrs Webb's attendance notes and reject the evidence of her witness

> statement and does not appear to attach any weight to Josephine's evidence."

67. In *Key v Key* [2010] EWHC 408, Briggs J (as he then was) at [98] stated:

> "Finally, the issue as to testamentary capacity is, from first to last, for the decision of the court. It is not to be delegated to experts, however eminent, albeit that their knowledge, skill and experience may be an invaluable tool in the analysis, according insight into the workings of the mind otherwise entirely beyond the grasp of laymen, including for that purpose, lawyers and in particular judges. In the present case, both Dr Hughes (in his oral evidence) and Professor Jacoby (in his report) left me in no doubt that they both understood this limitation upon their role. Although they were both forthcoming in expressing their opinions, neither of them made any attempt to usurp the proper function of the court in that respect. Their contribution was of great assistance."

68. In *Simon v Byford* Lord Justice Lewison said at [47] deciding testamentary capacity was "…a holistic exercise based on the evaluation of all of the evidence both factual and expert", referring to and approving at [16] that the trial judge "…placed most weight on the evidence of what happened on the day when Mrs Simon made the disputed will."

69. In *Leonard v Leonard* [2024] EWHC 321 (Ch) Joanna Smith J set out her views as to the expert evidence generally at [135-141]. At [140] she stated the criteria in *Banks v Goodfellow:*

> "…are not matters that are directly medical questions, but are matters for common sense judicial judgment, depending, as they do, upon an analysis of the entirety of the evidence…".

70. At [141] she said:

> "Whilst there is possibly scope for experts in a case of this sort to opine (as they did here) as to the inferences that might be drawn from the evidence (as to, for example, the levels of executive function required to write particular documents or carry out specific tasks), and whilst I have on occasions found it useful to record the experts' views on some of the documentary evidence, I consider that the court must be very wary indeed of placing much weight on such opinions. Ultimately it is for the court and not an expert witness to determine what, if any, inferences should be drawn from the documentary and other evidence when seen in its proper context."

WITNESSES OF FACT

Mrs Hafwen Webb

71. As I have said above, Mrs Webb is a senior, experienced, specialist private client solicitor, having had some 16 years practice of probate, wills and estate planning by 2022. She is a member of STEP. This was the fourth death bed will she had been involved in, albeit fortunately one of those clients survived.

72. Mr Sinnatt's cross examination was relentless, forceful, focused but fair. Mrs Webb's evidence was clear and direct. She accepted immediately when Mr Sinnatt suggested that in retrospect another course of action would have been better. For example, he put to her that in view of her concerns as to capacity and the Golden Rule it was an omission on her behalf not to try and see a doctor or the ward sister and ask about capacity. Having said that, as Mrs Webb said, the ward sister took her into Carry's room; the hospital knew why she was there but they did not raise any concerns.

73. Mr Sinnatt put his case as to his expectations of what Mrs Webb should have done at its very highest; he looked for a counsel of perfection. For example, he asked when she saw pain relief being given why did she not ask what it was and what effect would it have? Her direct and unhesitating response was that she knew why Carry was in hospital, she was not a doctor and the name of the medicine would mean nothing to her; nor would she have any idea how powerful it was but "…seeing the level of pain she was in it was quite heavy duty. I knew I had a window to speak to her."

74. Mr Sinnatt asked Mrs Webb if she expected intravenous medication to have acted faster than pills and could she not have asked for information as to this? Mrs Webb confirmed she did not ask, which in view of time constraints appears understandable, rational and the correct approach in the then circumstances. Mrs Webb was then asked how many of her clients had had intravenous painkillers administered to them and her answer was one. Mr Sinnatt put to her that she had reached her conclusions with no medical knowledge and no knowledge of intravenous medicines with which she agreed. I have to say that is to only be expected of a competent, experienced and professional solicitor in those circumstances who attends as a solicitor and not someone medically qualified.

75. Mrs Webb was questioned as to how she had concluded Carry had capacity. She said that "Her character hadn't changed. She was still the same old Carry. She knew who I was and why I was there so I came to the conclusion she had capacity." Earlier, Mrs Webb had said that she was aware how capacity could come and go.

76. Mrs Webb was then asked about her attendance notes and whether she was very through in them. She confirmed she was aware how important they were, and that she tried to be as thorough as she could be but sometimes information could be left out, as she could not cover everything. She understood the importance of contemporaneous attendance notes as evidence and said that she would have dictated her note of this meeting within one hour of being back in her office (which was 30 minutes away) to get as much information in it as possible.

77. Mr Sinnatt refers to what he calls the four tiers of Mrs Webb's evidence:

(i)The contemporaneous Attendance Note;

(ii) The information conveyed to Bethany Creasey a month later;

(iii)The witness statement;

(iv) The oral evidence.

78. He submitted that the witness statement and her recollection two years later was unreliable as the Attendance Note only records the total time taken and does not break it down between, for example, a) entering the hospital and putting on Personal Protective Equipment b) getting to Carry's bedside and c) the revocation itself. I disagree. It would be highly disruptive for solicitors when attending upon clients to constantly check their watches/'phones to itemise every different action and to record those intervals. It would not assist the client or the solicitor and would be an unnecessary, time-wasting burden.

79. Mr Sinnatt then turned to Mrs Webb's recollection of how the time was spent. In her witness statement she said "In the first 15 to 20 minutes of the meeting, I reminded her what the existing will said". Mrs Webb confirmed that was her recollection, two years later, and it was as accurate as it could be.

80. Mr Sinnatt then referred Mrs Webb to an attendance note dated 1st March 2022 made by Ms Bethan Creasey who I have referred to at [45] above. Ms Creasey asked Mrs Webb whether Carry had capacity at the time of destroying the Will. Mrs Webb said "…for the first 15 minutes of the meeting [Carry] had capacity and was adamant she did not want her existing Will to exist". Mr Sinnatt pushed Mrs Webb as to her differing recollections as to time.

81. In particular, he said that Mrs Webb was not caught off guard without the file in front of her by the call from Ms Creasey as she had said under cross examination, as the call was in response to a letter regarding Carry's capacity from Mrs Webb. That criticism is unwarranted as a) the letter was not put to Mrs Webb in evidence and b) I think Ms Creasey was referring to the letter sent by Mrs Webb to Carry dated 27th January 2022 which Josephine obtained from Carry in hospital, a copy of which she must have passed a copy to Ms Creasey, her solicitor. The suggestion in Mr Sinnatt's closing submissions was that it was a letter suggesting a discussion so Mrs Webb was forewarned but despite that her account of the time changed again. That was not what happened.

82. Mrs Webb had also explained in her oral evidence that during the pandemic all will writing lawyers were extremely busy and she had numerous matters to attend to; this was just one of many. She said she just went by her memory and the call came in, unexpected. With the benefit of hindsight, she should have said she would get the file out but she didn't. It appears to me that Mrs Webb here was being helpful to a fellow solicitor acting for the sister of her late client; again professional and practical.

83. In summary, Mr Sinnatt's submissions focused on Mrs Webb's statement being "littered" with details she did not consider important enough to record in her Attendance Note, with especial emphasis on timings as within that 10-15 minute period (according to Mr Sinnatt) Carry was given her medication, the contents of the Will were discussed, there was a discussion as to how Paul had been good to her and Josephine had not, disinheriting the Crews was discussed, then the possibility of

destruction by revocation, what that meant and its effect and then the actual destruction. As Mr Sinnatt concluded on this aspect, there simply was not enough time for the *Banks v Goodfellow* test to have been complied with.

84. Mrs Webb when pushed again and again on that time period said she could not give an exact time – she did not look at her watch – and whether it was 15 – 20 or 25 minutes she could not give an accurate timescale. She was then asked why as to destruction she just said in her Attendance Note that Carry was able to tear about three quarters and then she helped her with the rest – see [40(7)] above, but her statement was more detailed. Mrs Webb said in retrospect she should have set out the instructions, adding she could not recall what Carry said but that she was adamant; she was a very forthright lady.

85. Mrs Webb also explained Carry's confirmation to her that she should help her tear the last part; she said "…when she was struggling I asked if she wanted me to help her and she nodded. That is not in my attendance note but that is what happened." Mrs Webb was asked if that troubled her in that she had said she saw the same old Carry but here she was not communicating verbally. Mrs Webb replied that "The physical act of tearing was very tiring for her…".

86. In re-examination Mrs Webb said Carry made eye contact with her when nodding and that whilst she could not be sure as to the time it took to tear it she thought it was less than a minute, and it was the moving her arms apart with the tearing motion she found difficult.

87. At [24] of her statement Mrs Webb said:

> "I have no shadow of a doubt that the deceased had the capacity at that time to give instructions and understand what she was doing. She was adamant as I knew she could be. She had previously declared her intention of revoking her will to me in November 2021 and she did so again before tearing the original Will. There is no doubt in my mind that the deceased had capacity when she tore the Will."

88. I found Mrs Webb to be a convincing witness who did her best to assist the court. She was as to be expected honest throughout. Whilst with the benefit of hindsight certain details were omitted that would been better included in the Attendance Note I am satisfied that she did not in any way embellish or develop her oral evidence. I accept all she said.

Mr David Crew

89. David when giving his oral evidence was somewhat slow and uncertain, save when he was making personal attacks on Josephine. He did have a tendency to ramble. His evidence does not assist me in determining the Issues, especially as he had not seen Carry after about June or so of 2021. Part of the way through his evidence Mr Sinnatt took instructions and abandoned what had been the fourth issue for me to decide, namely had Josephine exerted undue influence, on Carry to revoke the Will and/or make a new one to benefit herself, so he was discharged.

90. Mr Jones submits that save where his evidence is consistent with that of Josephine, it is denied and is contested. I do not think that is right as Mr Jones did not put to him the points he made as to Josephine, albeit as David said he was repeating what Carry had told him. In summary his evidence does not assist as to the Issues and I therefore need not have much regard to it.

Mrs Josephine Oakley

91. Josephine explained during the pandemic in 2020 she did her sister's grocery shopping every week and for the 18 months before she went into hospital. She also took her to hospital and doctor's appointments and took a roast dinner to her every week for the 2 years before she went into hospital. Then, she visited her almost every day save when she was in hospital herself from 7th – 17th January 2022. She confirmed her sister was often in excruciating pain, and that she thought all the pain relief was by tablets, not administered intravenously. In her statement at [10] she described how on 21st January 2022 she asked a nurse if they could witness Carry signing a document, but she said Carry was not alert enough having just been given some medication.

92. Then on 25th January she said Carry was much brighter so she asked again about witnessing the document, but a doctor said they were not allowed to do so, suggesting a dinner lady. No doubt was expressed by the doctor or anyone else as to Carry's capacity. Carry did sign and it was witnessed by a dinner lady. Two nurses were present at that time and Josephine suggested Carry should tell them what it was for. Carry she said it was to get back some land which had been stolen from them. Josephine said Carry was entirely lucid in the mornings but became sleepy after her lunchtime medication.

93. Josephine was mainly certain, clear and straightforward when giving her evidence. She did at times repeat herself but was otherwise quite sharp and focused. Having said that, I have in mind that Josephines's interests especially in view of her impecuniosity (as Mr Jones confirmed at the start of trial) meant she may not have been wholly impartial. In any event, I did not think her evidence went to the core of the Issues, but was helpful as to events leading up to and immediately after Mrs Webb's visit.

EXPERT EVIDENCE – DR HUGH SERIES

94. Due to the way his evidence unfolded with allegations of a conflict of interest in the background it is necessary for me to go through the background before I turn to his Report, the subsequent Addendum and finally his Answers to Part 35.6 questions.

The Background

95. Master Clark in her Order on directions of 3rd May 2024 ordered that a single Joint Expert ("SJE") should be instructed to give evidence on the issue of Carry's mental capacity at the time of the revoking of the Will, with joint instructions to be delivered by 6th June 2024 and the SJE to file and serve their Report by 6th September 2024.

96. Also on 3rd May 2024, ODT Solicitors wrote to Parker Bullen, who then acted for Josephine. They said they were concerned to learn that Parker Bullen had taken over

Kirklands, that Mrs Webb was now a partner in the merged firm and they were acting on a Conditional Fee Agreement basis. They said:

> "In our view, it is hard to imagine a more obvious conflict of interest and are surprised that …you can continue to act…the reliability of Mrs Webb's evidence is compromised by her interest in defending her reputation and the manner in which she acted."

97. If the evidence of professional independent witnesses such as Mrs Webb was compromised as ODT allege then this Court could not place much, if any, reliance upon such evidence. But that ignores the fact that solicitors are first Officers of this Court and their duty to the Court comes before that to their clients and thereafter their employer or partnership. Whilst it is not unknown for professional witnesses to defend their reputation and actions there was no evidence in what ODT knew then (being, at a minimum, Mrs Webb's attendance note and her witness statement) to justify that statement.

98. ODT invited Parker Bullen to reconsider their position and pushed, several times, for an answer. On 6th June 2024 a formal joint letter of instruction was sent to Dr Series by ODT and also Parker Bullen, copying in ODT, emailed him a single pdf of 1,164 pages ("the PDF"). On the basis of counsel's advice ODT then on 5th August 2024 threatened Parker Bullen with a *Prince Bolkiah* application if they did not come off the court record. The next day, 6th August, Josephine filed Notice of Change, stating Parker Bullen had ceased to act for her and henceforth she would be acting in person.

99. On 8th August 2024 ODT wrote to Dr Series. This was not a joint letter but marked as "cc Parker Bullen/Mrs J. Oakley". They first alleged that Mrs Webb's statement of 27th February 2024 had been provided to Dr Series in the PDF but not them and they only received it on 7th August, outside of the court date set for exchange, so Mrs Oakley, currently acting in person, could not rely upon it, albeit that she could apply for relief. That appears incorrect as that statement was in the PDF, copied to ODT.

100. ODT then said that:

> " …Ms Webb is now a partner in Parker Bullen…and therefore – in our opinion – has a clear conflict of interest between her duties to the court and her personal position as a partner of the firm representing Mrs Oakley…It is our view therefore that Ms Webb's statement should be treated with a degree of caution given we are questioning her conduct and in particular her failure to follow the guidance of the "golden rule" which we note has admitted."(sic)

101. This letter was inappropriate on a number of levels and it would have been best if it had not been sent. I appreciate that there was a substantial degree of frustration on the part of ODT with Parker Bullen's failure to engage with the conflict allegation, but notwithstanding that this unilateral approach was wrong as it reads as an attempt to influence Dr Series.

102. First, it is factually wrong as Mrs Webb's statement was in ODT's possession and had been for some two months. Secondly, the allegation of conflict of interest is hard to maintain as, as is stated in the letter, the statement is dated 27th February 2024, way before the merger. In addition, the majority of her evidence is in the Attendance Note, prepared on the very day of Mrs Webb seeing Carry in hospital. In other words, there was no question of a conflict of interest when the Attendance Note was prepared or the statement signed. Further, there was at one extreme another conflict of interest that ODT had not considered; as Kirklands' partners were one of the executors in the Will then Mrs Webb's interests were in capacity being disproved so they could then act.

103. Thirdly, Mrs Webb is an Officer of the Court. To say her conduct was questionable and so her factual evidence of the central issue should be treated with caution is a very serious allegation on, so far as I can see, no evidential basis. Finally, and in any event, it is quite common and acceptable for solicitors who prepared the will in question to give evidence at trial even when their firm acts for one of the parties; their first duty is to this Court, and their evidence is often the only evidence of such matters – as here.

104. What ODT should have done was agreed a letter to Dr Series or applied to this Court for directions. The difficulty this failure presents is that Mr Jones submits this letter may have resulted in unconscious confirmation bias on the part of Dr Series when preparing his Report.

105. Everys Solicitors filed notice of change on 2nd September. On 3rd September, Dr Series provided his Report to the parties and the Court. On 24th September Everys emailed Dr Series stating that they did not believe the statement of Mrs Webb should be treated "…with a degree of caution". A row over whether ODT had received that statement at the time Dr Series did continued, with Dr Series copied in, ODT also maintaining that there was no provision for him to give oral evidence or for Part 35.6 questions to be put.

106. On 25th September, ODT emailed Dr Series and said that they "…agree to your looking at the witness statement of Mrs Hafwen Webb without our objection to weight, and to confirm whether this alters your opinion and conclusion." Dr Series then provided the parties with his Addendum Report on 3rd October, mistakenly dated 10th October.

107. ODT then agreed to Everys serving Part 35.6 questions out of time ("the Questions"). Dr Series on Thursday 10th October asked if he was to address the Questions and ODT on Friday 11th October confirmed that he could. Just over an hour later, and one clear day before trial, the Answers to Part 35 Questions ("the Answers") were provided by him.

The Report of Dr Series

108. Dr Series summarises his conclusions with clarity and concision at the outset:

> "1.1.1 In my opinion on the balance of probability the medical records indicate that for some time either side of the day on which the solicitor took instructions the Deceased was experiencing delirium which fluctuated in intensity. At the time

> that instructions were taken, it appears to me that the delirium had not completely resolved. The attendance note does not suggest to me that the Deceased was able to express in a clear and settled way whether she had weighed the claims of potential beneficiaries of the estate and if so how she had done so. If that is the case, then it appears to me that she was not able to meet the third limb of the test in Banks for Goodfellow, and that she therefore lacked capacity either to revoke her old will or to make a new one. In my opinion it is more likely than not that she was able to meet the first limb, in that she understood that she was seeing the solicitor in order to make a will which would determine how her estate should pass, although if the Court considers that in order to satisfy the first limb, she would also have to have understood the full consequences of revoking her old will without making a new one – that her entire residuary estate would pass to Josephine to the exclusion of all others – then I think she would not have been able to meet that element of the test. In relation to the second limb, I think it is clear from the note that she understood that she had bungalow, a caravan, and a caravan site, but it is much less clear that she was able to understand their relative values."
>
> 1.1.2 In my opinion, it is more likely than not that when the Deceased partially destroyed her will, she lacked capacity under the test in Banks v Goodfellow, and therefore also lacked capacity to revoke the will."

109. Dr Series refers to the PDF as being the basis for his Report and specifically identifies Mrs Webb's witness statement. In his chronological table he reproduces the entirety of Mrs Webb's attendance notes of 25th and 26th January 2022, as well as the to be expected medical records for the material time. Under the heading Opinion he states at [7.1.10]:

> "In my opinion, over the period from at least 01.01.2022, when she was first described in the records as confused, it is more likely than not that she was suffering from delirium, which is a disorder of the mind, although the intensity of the delirium may have waxed from time to time."

110. Dr Series sets out in detail testamentary capacity. He finds at [8.1.10] that "Unfortunately the medication charts for that day [26th January] are not in the bundle and so it is not possible to say what medication was given and at what dose."

111. He opines that whether Carry had testamentary capacity when she tore the Will "…would depend on the degree of delirium she was experiencing at the time." Later at [8.1.16] he states:

> "The Court will of course make its own assessment of the attendance notes, but it appears to me that in the part of the interview leading up to the point at which the Deceased tore the will, the note suggests that here had not been sufficient

> discussion with the Deceased to show that she was able to meet the test. She may have understood that by tearing up the will she would die intestate so that her estate would not pass to David and Angela, but that is not the same as satisfying the test in Banks v Goodfellow. Later in the interview, she seems to have become more muddled and was more clearly unable to meet the test, to the extent that HW felt she was unable to take instructions."

The Addendum

112. Dr Series at [3] states that "The purpose of this addendum is to comment on whether consideration of Ms Webb's statement alters my opinion or conclusion". He continues by saying it does not add a great deal else to the attendance notes, and that her reference to "No shadow of a doubt…" is in stronger terms than the Attendance Note but that he attaches "greater weight" to the latter as drafted very close in time as opposed to being prepared for this claim. He concludes that even if he had not seen her statement his opinion would be the same, based as it is on the medical records and the attendance notes.

Dr Series' Answers to Part 35 Questions

113. Dr Series refers to being provided with Josephine's statement which does not alter his opinion as to capacity, as she offers no evidence as to her sister's mental condition on 26th January 2022. He reiterates that Mrs Webb's statement was considered in his Addendum and it did not alter his opinion in his Report. None of the points raised in the questions cause him to alter his original opinion, even if the evidence is true.

114. The third group of questions asked, on the basis that delirium may be so mild that a person retains testamentary capacity, if the court accepted Josephine's account of Carry recollecting her meeting with Mrs Webb, revoking her will and that her estate would pass to her sister, whether that assisted Dr Series in forming a view as to delirium affecting Carry when the Will was destroyed and/or whether she had testamentary capacity to so destroy it.

115. Dr Series answered no to both; first because recall of an event does not mean that person was not delirious at the time and secondly that it is not possible to read back with any accuracy what was in that person's mind at that time.

FINDINGS OF FACT

116. Carry knew her own mind – she was described by her lawyers as "stubborn" with old fashioned views and as a "feisty old bird." She "…liked to reward people who were in her favour." It appears that she mentioned either the prospect of an inheritance of a specific legacy coming their way or something unspecific to her relatives and sometimes others with whom she was in contact. Her wills reflected this and her changing priorities.

117. One constant was that never at any time did she actually complete a bequest to her sister; the minor amount that was intended as I set out in [21] above was rapidly withdrawn. Her reasons were that Josephine was always living beyond her means and

expecting Carry to give her money, Josephine and she fought over the Field given to them by their father and her conduct annoyed her.

118. I do not base this on David's evidence but the careful attendance notes made by Mr Joy and Mrs Webb of Kirklands, plus Carry's own correspondence. Josephine's impecuniosity is also shown by having her property repossessed by the mortgagees in 2012 and Mr Jones confirming same at the start of trial as I will turn to later.

119. Carry then had a major falling out with the Crews in the summer of 2021. Whether David did or did not say he intended to put Carry in a home if she had another fall I cannot determine on the evidence before me but it matters not; Carry decided to exclude them from her life and her Will. That exclusion was mutual.

120. Carry therefore on 16th November 2021 gave instructions to Mrs Webb to change her Will to exclude the Crews as executors and beneficiaries, and changed other bequests, specifically excluding her sister. Mrs Webb swiftly prepared a draft incorporating those instructions which she sent to her on 18th November 2021.

121. That was the last she heard until at Josephine's request on behalf of her sister she telephoned Carry on 25th January 2022. The upshot of conversations she had with Carry and Josephine was that she was uncertain if Carry had capacity to give instructions to update her Will. Josephine involved herself by saying she wanted to be there when Mrs Webb saw Carry, but she accepted that was not appropriate. Josphine did push issues as to Carry's will and her situation with her sister which Mrs Webb did not let herself get drawn in to.

122. At about 2.00pm on the 26th January 2022 Mrs Webb went to see Carry. She had with her the Will, the re-draft as of 18th November 2021 and blank paper in case she had to draft a will afresh there and then. She knew from her conversation the day before with Carry that capacity was in issue and that this was effectively a death bed will. The ward sister administered some pain relief at the outset of her visit.

123. Mrs Webb took a careful approach to Carry's capacity. She recorded in her attendance note at [40(2)] Carry knew who she was and why she was there. Carry responded to her in an appropriate manner, as she knew what she wanted, which to Mrs Webb was no different to what she had said in November; Carry was consistent.

124. Carry repeated what Josephine had told her of Paul being after her money. Carry stated "Paul's been good to me. My sister hasn't". Mrs Webb reminded her of her love/hate relationship with her sister and the money/hardship she caused her over the years.

125. Mrs Webb told Carry the Will was still effective with the Crews as executors and beneficiaries which Carry said she definitely didn't want to happen. Mrs Webb said to avoid this she could tear up the Will but then she would be intestate which meant Josephine would inherit all her estate. Mrs Webb told her that repeatedly and Carry said "My father would be pleased." Mrs Webb said again if she was adamant about excluding the Crews from the administration of her estate and stopping them inherit under it she could tear up her Will which she had with her.

126. Carry was happy to do this. Mrs Webb could not recall what she said but that she was adamant, as she was a forthright lady – she said she did not want the Will in place. Mrs Webb was certain that Carry knew if she tore up the Will she would be intestate.

127. Mrs Webb handed her the original Will, which consists of 5 pages. Carry took her Will and started to tear it. She managed to tear three quarters of it in a horizontal tear in the middle of the A4 pages but the effort became too much for her as her arms were by now spread too wide to continue – not that she had insufficient strength. About 25mm was left –roughly the size of the margin.

128. Mrs Webb, seeing she was struggling, looked at Carry and asked if she would like her help to tear the remainder. Carry looking directly at Mrs Webb nodded. Mrs Webb placed her hands on top of Carry's and helped her complete the tearing so destruction was complete. That act accorded with Carry's intention to revoke her Will and instructions to Mrs Webb to prepare a new one on 16th November 2021. This part of the meeting took about 15 minutes, possibly more, but Mrs Webb did not time it.

129. Mrs Webb then started to take instructions for a new will. What happened in that respect is set out at length in [40(8)] above. This account was not challenged in cross examination. It is careful and detailed. Mrs Webb explained the basic terms of the November draft will. Carry said she was not happy with Paul having both the caravan and the caravan site so her sister should have them and Paul the bungalow. Mrs Webb said that would be worth about £300,000 - £400,000 and was she happy with this to pass to Paul?

130. Carry repeated to Mrs Webb what Josephine had told her namely Paul would knock down the bungalow and do a development, he was only after money. Mrs Webb replied that he may well do that but no-one knew, as once Carry gave a gift to a beneficiary under her will they were free to do what they wanted with it. About this time a nurse came in and offered them each a cup of tea which Carry accepted and Mrs Webb declined. Carry drank her tea whilst Mrs Webb was there.

131. On further consideration Carry said she wanted the caravan, caravan site and the other land (the Field) to go to her sister and the bungalow and garden to Paul. Mrs Webb amended the draft will in manuscript and explained that she had already included a provision for a right of way to the caravan site, so that that land could continue as a caravan site, which Carry was happy with.

132. There was no mention by either of them of Kevin, Leon or Jason Whitehorn who were beneficiaries under the now destroyed Will at any time. Mrs Webb then read through what was now the final draft to Carry to ensure it met with her approval, but as she did so Carry started drifting in and out of consciousness.

133. Mrs Webb referred specific clauses to Carry who then started contradicting herself, even at one point saying the Crews were to receive the caravan and caravan site but then saying that was incorrect, then her sister was to have everything but then not so. Mrs Webb felt she could no longer take instructions as Carry's capacity had in her words dipped, she previously having been lucid. Further, Carry was falling asleep.

134. Mrs Webb left after saying the Crews would not benefit from her estate and Josephine would deal with everything, and that she would write to Carry. She then spoke with

the ward sister and said she would write to Carry and that it should be put in a private location so her sister would not see it, which the ward sister said they would try to do.

135. Mrs Webb returned to her office where she dictated her Attendance Note. The next day, 27th January 2022, she sent the letter I refer to at [134] above, confirming the position as to the destruction of the Will, that she was now intestate and Josephine would be entitled to the whole of her estate. She stated that she could not take instructions due to her capacity wavering but could attend in the future.

136. Josephine then went to see Carry on 28th January 2022. She found in the door frame an envelope as I have set out above, which was the letter from Mrs Webb. Carry confirmed she should open it and she read it to Carry. Josephine was shocked at what it said, especially that due to the destruction of the Will she would inherit all, so she asked if she should arrange for Mrs Webb to return so she could make a new will.

137. Carry said "No Jo, it is what dad would do", again showing that she had in mind how their father would have reacted, as she said to Mrs Webb. Carry told her sister to take the letter home with her, which she did.

THE ISSUES

138. I think it logical to determine Issue 3 first in view of its potential effect on Issue 2.

Issue 3: Can D1 criticise the report of Dr Series notwithstanding he did not give evidence, in view of the decision in *Tui v Griffiths* [2023] UKSC 48?

139. This Issue arose as having completed my reading in on the eve of trial, Monday 14th October, I emailed counsel and said as Dr Series had not been asked any Part 35 questions, and there was no permission for oral evidence, his report was therefore unchallenged. Accordingly, did the decision in *TUI* affect the approach I should take to his evidence?

140. Mr Jones informed me that the Friday before Dr Series had answered Part 35 questions and provided his response, no application had been made for him to give oral evidence but that he was available if required. Mr Sinnatt said Dr Series' findings should be accepted as unchallenged and that if Josephine had wanted to challenge him they should have applied to call him, but it was believed that he was not available. It subsequently appeared he may have been available.

141. On the morning of Tuesday, the first day of trial, Mr Jones made an application for permission to call Dr Series, at the expense of the estate, as Josephine had very little money and could not afford his fees for attendance. Mr Jones criticised the Report and the Addendum, the way these opinions came about and unsatisfactory Answers to the Part 35 questions. In essence he said Dr Series formed a view and when challenged doubled down on it. As a result, he could make submissions on weight and was not as he put it trapped by *TUI.*

142. Mr Sinnatt submitted that Dr Series is a pre-eminent expert in his field of old age psychiatry. He said that a party cannot simply criticise a report of an expert that was otherwise unchallenged by merely asking Part 35 questions, so Dr Series would have to appear, to which he objected. In his submission, the Report was unimpeachable.

143. Mr Jones emphasised that there was a distinction in that this matter concerned a medico/legal question, not a pure expert one, and that if the view was taken he had not put points to impugn the Report and Addendum, he made an application to call him. I refused his application in a short *extempore* judgment, as in essence a) there was no proper application b) it was too late in that it should have been made at least two weeks ago and c) it was not in accordance with the Overriding Objective. Counsel agreed this should be a separate issue and both made extensive and helpful submissions in their written and oral closing submissions.

144. Mr Sinnatt submits in essence that Dr Series' evidence following *Tui* must be given its proper weight as incontrovertible, but a) that still allows the Court to consider evidence of fact going to for example whether the four limbs in *Banks v Goodfellow* have been satisfied b) Dr Series recognises that is a matter for my determination but c) Josephine cannot impeach his findings of delirium "…waxing and waning" nor that it had not completely resolved. This, he submits, means Josephine has to prove that that delirium was not present at the time of the destruction.

145. Mr Sinnatt cited from *TUI* the propositions in [70(i)-(iii)]:

> "(i) The general rule in civil cases, as stated in Phipson, 20th ed, para 12-12, is that a party is required to challenge by cross-examination the evidence of any witness of the opposing party on a material point which he or she wishes to submit to the court should not be accepted. That rule extends to both witnesses as to fact and expert witnesses.
>
> (ii) In an adversarial system of justice, the purpose of the rule is to make sure that the trial is fair.
>
> (iii) The rationale of the rule, ie preserving the fairness of the trial, includes fairness to the party who has adduced the evidence of the impugned witness."

146. This, he emphasised, is the starting point in that to challenge the evidence of Dr Series he had to be cross examined. Further, Josephine has an additional difficulty; as a SJE his evidence was adduced by both parties.

147. The fourth proposition concerns fairness:

> "(iv) Maintaining the fairness of the trial includes fairness to the witness whose evidence is being impugned, whether on the basis of dishonesty, inaccuracy or other inadequacy. An expert witness, in particular, may have a strong professional interest in maintaining his or her reputation from a challenge of inaccuracy or inadequacy as well as from a challenge to the expert's honesty."

148. Here, Mr Sinnatt submits, Josephine is endeavouring to impugn the evidence on the basis of alleged inaccuracy and/or inadequacy; that is clearly where cross examination is the only fair way forward.

149. The fifth proposition is:

> "Maintaining such fairness also includes enabling the judge to make a proper assessment of all the evidence to achieve justice in the cause. The rule is directed to the integrity of the court process itself."

150. Mr Sinnatt submits that making a proper assessment means I can consider the evidence of Mrs Webb as to capacity but without cross examination and on the basis that none of the exceptions in [61-68] apply then her evidence must be judged in the light of the expert evidence being correct. Here, he submits, Dr Series is not seeking to subvert the role of the court but his finding of delirium means that proof switches back.

151. The next two propositions state:

> "(vi) Cross-examination gives the witness the opportunity to explain or clarify his or her evidence. That opportunity is particularly important when the opposing party intends to accuse the witness of dishonesty, but there is no principled basis for confining the rule to cases of dishonesty.
>
> (vii) The rule should not be applied rigidly. It is not an inflexible rule and there is bound to be some relaxation of the rule, as the current edition of Phipson recognises in para 12.12 in sub-paragraphs which follow those which I have quoted in para 42 above. Its application depends upon the circumstances of the case as the criterion is the overall fairness of the trial. Thus, where it would be disproportionate to cross-examine at length or where, as in Chen v Ng, the trial judge has set a limit on the time for cross-examination, those circumstances would be relevant considerations in the court's decision on the application of the rule."

152. Mr Sinnatt submits here there is no justification for relaxation of the rule as there had been sufficient time before the start of the trial to call Dr Series but that application was not made when it should have been and refused when it finally was.

153. The final, eighth, proposition refers to the circumstances in which the rule may not apply, of which examples are set out at [61-68]. The first five examples do not apply to the position here and nor does the seventh. The sixth example at [67] is:

> "Sixthly, as occurred in *Edwards Lifesciences*, an expert has been given a sufficient opportunity to respond to criticism of, or otherwise clarify his or her report. For example, if an expert faces focused questions in the written CPR Pt 35.6 questions of the opposing party and fails to answer them satisfactorily, a

> court may conclude that the expert has been given a sufficient opportunity to explain the report which negates the need for further challenge on cross-examination."

154. Mr Sinnatt submits this exception is only engaged if the Part 35.6 questions had been avoided or left unanswered. I disagree as the rule and thereby the examples of where it may be disapplied are to be applied flexibly – see [69].

155. Here, Dr Series was asked how his opinion would alter if the evidence of Josephine and Mrs Webb was found to be true. His response was "I have already considered all of those points, and, even if the evidence is accepted as true, they do not alter my original opinion." So cross examination on that point alone would be disproportionate and unlikely to result in any more assistance from the expert to the court being forthcoming as Dr Series was certain he was correct on that point. As the need for further challenge by cross examination had been negated Mr Jones can make submissions but limited to the subject areas of the questions.

156. Mr Jones' first point concerned the correct approach to probate claims. Here the Court is concerned with testamentary capacity, which is an unusual jurisdiction as the Court may adopt a form of vigilance absent from other civil litigation, such as being put on inquiry or exciting the suspicion of the court. However, *Tui* involved a question of causation as a question of fact of which the expert evidence was all that was before the Court. In probate claims, the Court has to weigh up the factual as well as the expert evidence.

157. In this claim for testamentary capacity, Mr Jones submits, even if Josephine is prohibited by *TUI* from criticising the Report, it does not mean that expert evidence is determinative. I have in mind in that respect *Leonard* at [141], [158] and *Key* at [98]. Mr Jones emphasised that *TUI* was concerned with scientific and technical evidence where expert evidence is very necessary whereas testamentary capacity in the final analysis is for the judge.

158. This was emphasised by Lord Hodge at [36] where he said:

> "…the expert must not usurp the functions of the judge as the ultimate decisionmaker on matters that are central to the outcome of the case. This, as a general rule, the judge has the task of assessing the evidence of an expert for its adequacy and persuasiveness."

159. Mr Jones submits that the approach urged by Mr Sinnatt wrongly seeks to elevate the role of the expert to be the prime decision maker whereas his report is just part of the evidence I am to assess. I agree and for those reasons.

160. Mr Jones' second point is, if *TUI* does apply here, what is the rule? He reiterated – and I accept – the very different backgrounds in that in *TUI* there was no factual causation evidence whereas here there is. Then Mr Jones submits the evidence here of Josephine and Mrs Webb has not been properly considered by Dr Series, which has prejudiced her case.

161. With regard to Part 35.6 questions Lord Hodge specifically referred at [81] to how:

> "A defendant can ask focused CPR r 35.6 questions which articulate clearly the challenge or challenges which the defendant wishes to make and give the expert the opportunity to explain his or her evidence in response to those challenges, thereby obviating the need to seek the expert's attendance for cross examination."

In Mr Jones' submission, even if *TUI* does apply, Josephine is not prevented from criticising the Report.

162. Mr Jones' third submission is, are the exceptions engaged? He submits the first at [61] is in that there is no unfairness to the witness as the witness does not require an opportunity to answer. I cannot accept that; Dr Series was given no opportunity and the position is as per the last sentence of [61] as this is an attack on the competence of Dr Series.

163. Likewise I do not accept that as he puts it the Report is "manifestly incredible" and wrong so much so that there is no point in cross examination. Indeed, if that was the position, it does not sit with his application to cross examine on the first day of trial.

164. Then Mr Jones submits the third exception in [63] applies as Dr Series has made bold assertions of fact without reasoning to support it – such as the weight he attaches to Mrs Webb's attendance notes in preference to her witness statement, without having met her. I do not accept that. Dr Series has set out his reasoning namely that he places more weight on the Attendance Note than the statement which is sufficient in my judgment.

165. Mr Jones does not mention the fourth exception. He also maintains the fifth exception in [66] applies namely the evidence of the witnesses may be contrary to the basis on which Dr Series expressed his view. But Dr Series has confirmed he has seen it but it does not alter his opinion. That does not mean this exception arises.

166. Mr Jones next submits the sixth exception, [67], namely the opportunity to respond to criticism of or otherwise clarify his report applies. I agree, for the reasons I have set out at [154-155] above.

167. The principles I take from *TUI* in this testamentary capacity claim and Josephine's rights to criticise the Report, Addendum and Answers are:

1) Where there are mixed questions of law and fact the court cannot be bound in the absence of proper challenge to an expert's opinion to that view, as the expert has not heard the oral evidence of the witness(es) of fact. That would amount to evidence being paper based without the important element of that oral evidence.

2) However the absence of substantial challenge by cross examination of Dr Series does limit Josephine's ability to make criticisms as it contravenes the propositions in *TUI* as I have set out above.

3) The burden of proof in these circumstances also changes to resting upon Josephine.

4) In this claim I am satisfied that Josephine can make submissions on the matters covered by the Part 35.6 questions for the reasons I have given.

5) Josephine is also entitled to make submissions on possible confirmation bias as that is not something that can be properly explored or tested by cross examination.

6) Ultimately in assessing the totality of the evidence notwithstanding either a) no permissible challenge or in the alternative b) one as here limited as above the question of testamentary capacity and thereby compliance with the four limbs of *Banks v Goodfellow* is for this court.

Issue 1: Was the Will revoked by destruction pursuant to section 20 of the Wills Act 1837 by the Deceased tearing three quarters and being helped by her solicitor Mrs Hafwen Webb to tear the rest, in particular:

(i) Did the Deceased sufficiently destroy the Will?

168. The evidence of Mrs Webb as to destruction and the circumstances that obtained at that time was simple and clear. She explained to Carry that to stop the Crews from dealing with her estate or benefitting she could tear the Will up, and she had it with her. Carry, happy to do this, took the Will and started to tear it with the intention of tearing it in half but could not extend her arms further and so only got three quarters through – about 25mm or the width of the margin was left.

169. Mr Sinnatt submits that an unsuccessful attempt to destroy does not revoke citing *Doe v Perkes* (1820) 3 B. & Ald 489 where a testator annoyed with a beneficiary began to tear his will with the intention of destroying it. Having torn it into 4 pieces he was prevented from further tearing by a bystander and the persuasion of the beneficiary. When the testator had calmed down he expressed "…satisfaction that no material part of the writing had been injured and it was no worse" and the court refused to set aside the verdict of the jury that it had not been revoked as he had not finished what he intended to do.

170. I do not accept this authority assists Mr Sinnatt as 1) it predates the Wills Act 1837 2) the judges were construing the Statute of Frauds 1677 and 3) the testator clearly changed his mind and wanted the will to stand so even if I am wrong as to 1) and 2) it is distinguishable on the facts.

171. Mr Sinnatt also referred me to *Doe v Harris* (1837) 6 Ad & El.at 216 where it was held where a testator threw his will upon a fire, it being snatched off by another person with only a small part burnt, that person promising to destroy it later, but did not, then it was not revoked. Again this does not assist Mr Sinnatt as it predated the Wills Act 1837 and is distinguishable on its facts as there was a wholesale interruption as opposed to the continued act of tearing with Mrs Webb assisting. Carry's hands were upon the Will from the start to the end of the tearing – there was no interruption.

172. Those two points are the answer to Mr Sinnatt's submission that there was no revocation as the attempt to destroy was unsuccessful, citing *Theobold* which at 7-045 states:

> "Furthermore the act of destruction, in order to be effectual must not be left incomplete. The testator must have done all that he intended in order to effect destruction. If he is interrupted from completing the act or acts of destruction that he was performing, there is no revocation."

In my judgment there was actual tearing combined with intent (as to which see below).

173. Mr Jones submits in his final written note that if I find on the balance of probability Carry intended to tear the Will as revocation but not by an entire tearing then the physical act of revocation is made out. I find that the tearing had to be complete, as that is the logical result of Mrs Webb offering to help Carry tear the remainder and she accepting her help. That would not have been necessary had Carry believed the partial tear was sufficient.

174. My answer to Issue 1(i) therefore is that Carry did sufficiently destroy the Will as it was entirely torn in half as she intended. But Josephine still must prove authority as opposed to acquiescence for Issue 1(ii) and requisite intent for Issue 1(iii).

1(ii) Did the Deceased authorise Mrs Webb to complete the destruction or acquiesce in the same?

175. As I have found above, when Carry could not complete the tearing, Mrs Webb looked at her and asked if she could help her tear the remainder. Carry, looking directly at Mrs Webb, nodded. Mrs Webb placed her hands upon Carry's and helped her so the tearing was completed. Mr Sinnatt submits as the destruction was completed by Mrs Webb, Josephine has to prove that act was done with Carry's authority and that mere acquiescence is insufficient, even if done in her presence: *Theobold* at 7-051. He adds that there is no authority that a nod is a sufficient direction to Mrs Webb to complete the destruction of the Will, and that Carry delegated the completion of the tearing.

176. Mr Jones differs, referring me to *Cooper v Chapman* [2022] EWHC 1000 (Ch). That claim concerned whether a will which was only found in draft and electronic form on the deceased's computer was valid and had not been revoked. At [86] HHJ Klein sitting as a Judge of the High Court cited *Theobold* as to the acknowledgement requirement of signature in s.9 of the Wills Act 1837:

> "The testator may acknowledge his signature by means of gestures. A little as a nod of the head has been held sufficient."

177. Mr Sinnatt submits that concerns an acknowledgement as opposed to an active direction and referred me to the authority cited in the footnote that a nod is an acknowledgment, namely *Goodall v Hadler* The Times, 20th October 1960. The case digest states:

> "The testatrix had not signed her will in the presence of the three attesting witnesses, but having signed her name beforehand indicated her approval, while they were appending their signatures, by nodding her head. The defendants, who had previously opposed the will, did not appear. Marshall J. held

> that the testatrix, who had been fully aware of what was happening, had impliedly acknowledged her signature, and pronounced for the will in solemn form of law"

178. Therefore, in his submission, the authority Mr Jones relies upon is not on point. Mr Sinnatt relies upon *Barrett v Bem* – see [53-55] above. Mr Sinnatt also in his Supplementary Submissions on "Nodding", referring me to [19-24] of *Barrett* said that whilst a nod may be good enough to give authority as acknowledgement of a signature, it is insufficient where a direction to sign is required unless it is impossible for that person to communicate normally.

179. I do not agree. I do not think [24] goes as far as to exclude or prohibit those who can for example communicate verbally by communicating in another way. Lewison LJ was commenting on the authority in [23] namely *Parker v Parker* (1841) Milward 541 and the need for positive communication. In my judgment, someone who can speak should not be prevented from, for example, positively communicating in a non-verbal way.

180. They could, for example, type into a 'phone or other electronic device or write in manuscript the direction. Likewise, they could indicate by a "thumbs up" sign or, as here, by nodding; the key point is that it is a positive communication. During oral closing submissions various physical methods of binding communication were raised, including nodding at auctions, hand gestures and so on, but no authorities have been submitted in support or otherwise of such physical gestures.

181. Mr Jones emphasises that *Theobald* at [7-051] states "*Presumably* the same degree of active direction is required…" (my emphasis). I accept his submission that this is speculation and not a proposition of law and no authority is cited and note that active direction in *Barratt* as opposed to acquiescence is "…something in the nature of an instruction" at [21].

182. Mr Jones cites [36] in which Lewison LJ states:

> "In my judgment the court should not find that a will has been signed by a third party at the direction of the testator unless there is positive and discernible communication (which may be verbal or non-verbal) by the testator that he wishes the will to be signed on his behalf by the third party"

183. Here, in these facts and circumstances, I find there was a positive communication and not mere acquiescence, as Carry looked at Mrs Webb and responded to her direct offer with a physical command or instruction reflecting her wish that Mrs Webb should actively assist her to complete the tearing in half of the Will. I think it would be artificial not to permit a testator to communicate as they wished in those circumstances at that time, and [24] of *Barrett* is not authority for that.

184. As per [36] the communication must be positive and discernible, which I find the nod is in these factual circumstances and it may be non-verbal, as here.

185. My answer to Issue 1(ii) is that Carry properly authorised Mrs Webb to complete the destruction of the Will for the reasons above. Her nod was not a mere acquiescence but a positive and discernible non-verbal communication.

1(iii) Did the Deceased have the requisite intention to destroy the Will?

186. Mr Sinnatt submits that notwithstanding Carry's lack of capacity an intention to revoke the Will that does not get Josephine over the hurdle of actual destruction as intended, citing *Martin v Browne* [2008] EWCA Civ 712 and *Clarke* (see [50] above).

187. Mr Jones relies upon the act of destruction with intent to revoke, also citing *Clarke* as intent in the absence of express words or declaration may "…be inferred from the nature and extent of the act done by testator; i.e. it may be inferred from the state and condition … [of the Will]." I am satisfied on the evidence of Mrs Webb that there was sufficient intent on the part of Carry to destroy the Will. I say that because of Mrs Webb's evidence:

i) "…it was the same old Carry..." who intended this; and Carry was known as being stubborn and feisty,

ii) that she specifically advised Carry of how destruction would remove the Crews from the Will and

iii) this accorded with Carry's intentions in their meeting of 16th November 2021 and the draft will that Mrs Webb prepared in accordance with Carry's instructions at that meeting, which she never countermanded.

188. If I am wrong as to that and there was not sufficient evidence of an express intention to revoke then I find it can be inferred from the completion of the tearing and the positive direction to Mrs Webb to assist.

189. My answer to Issue 1(iii) is that Carry had the requisite intention to destroy her Will. Accordingly, to summarise my answers to Issue 1, I find the Will was destroyed pursuant to s.20 of the Wills Act 1837 by Carry tearing it as to three quarters and Mrs Webb at her direction assisting her to tear the remainder.

Issue 2: If the Will was revoked did the Deceased have the mental capacity to do so?

190. The starting point is testamentary capacity is presumed. That presumption is first challenged by the hospital notes. I will not review them in any detail as I have the considerable benefit of Dr Series' Report, Addendum and Answers, (collectively "the Opinions") but those notes record Carry lacked capacity to sign papers as at 21st January 2022, although on 24th January she was "less confused." On 25th January Mrs Webb was of the view from their telephone conversation Carry lacked capacity.

191. The next day, 26th January, the hospital notes record at 09.30 "Known fluctuating confusion... Doesn't feel very well today…Note gabapentin only increased this morning." Dr Series at [1.1.1] of his Report states the medical records show for some time either side of the 26th January Carry suffered from delirium which fluctuated in intensity. Relying on the Attendance Note only as the statement of Mrs Webb is not

referred to he opines Carry was not able to express in a clear and settled way whether she had weighed the claims of potential beneficiaries and therefore lacked capacity to either revoke her old Will or make a new one.

192. Dr Series states there is no evidence of Carry suffering from dementia but at [7.1.10] he opines at least from 1st January it was more likely than not she was suffering from delirium the intensity of which "…may have waxed and waned over time." He notes at [8.1.5] that mild delirium may not necessarily undermine capacity and that "…it is possible that a person suffering from delirium may experience a relatively lucid interval in which they have testamentary capacity…whether the Deceased had testamentary capacity when she tore the Will would depend on the degree of delirium she was experiencing at the time".

193. I reject the wide-ranging attack upon Dr Series' Opinions made by Mr Jones save as to the limited matters I have found under Issue 3. Further, as I have indicated above, the burden is upon Josephine to establish Carry had capacity. What Dr Series and Mrs Webb do agree upon is that Carry could meet the first limb of *Banks v Goodfellow* in that she knew she was seeing Mrs Webb when she was at her bed side about 2.00 that afternoon to make a new will to determine how her estate would pass.

194. The Attendance Note is punctilious in recording what happened and in particular what Carry told Mrs Webb as to her sister and Paul – see [40(3-5)] above, which also records Carry differentiating and balancing the expectations of both of them, saying "Paul has been good to me. My sister hasn't". Then Carry at [40(6)] states she "definitely" did not want the Crews to inherit and that Josephine was her only sibling. The then destruction of the Will took place.

195. As is set out in [40(8)] Mrs Webb tried to take instructions for a new will. She recorded Carry weighing up what she had and who it should go to, and why. This marked a substantial change on the revoked Will with Josephine now receiving the caravan, caravan site and other land and Paul the bungalow. As is clear on the face of the last draft will bearing the contemporaneous handwritten amendments of Mrs Webb after the existing specific legacies of £500 to two persons then the new bequests appear namely all of the properties, free of tax, are devised to Josephine and Paul.

196. The residuary estate was to bear all tax, debts and expenses and the costs of the necessary right of way and then divided, with half going to Kevin, Leon and Jason Whitehorn and the other half to 5 charities. It appears to me that on the face of it the residuary estate would amount to very little. In any event, on completion of the instructions Mrs Webb read through the new will to ensure Carry was fully aware of the terms but she drifted in and out of consciousness, started to contradict herself and lost capacity so much so Mrs Webb could not take instructions, as she records at [40(9-11)].

197. Mrs Webb's evidence of Carry's capacity waxing and waning accords with Dr Series' opinion. Josephine then went to see her sister two days later on 28th January. Her evidence, that she found Mrs Webb's letter, read it to Carry, who said she did not want a new will prepared, and was content with Josephine inheriting all, was unchallenged, as was the remark Josephine says Carry made, namely "No Jo, it is what dad would do", which echoed a similar remark she made to Mrs Webb.

198. Mr Sinnatt submits, rightly in my judgment, that a) a bare assertion from a legal professional of capacity cannot be sufficient to establish capacity, as then there would be no need for the test b) Mrs Webb did not follow the Golden Rule, c) she had no medical evidence to support her assertion of capacity. Mr Sinnatt also makes a wide-ranging attack upon what Mrs Webb did and did not do. I turn to those matters below.

199. First, that Mrs Webb could not have taken instructions and completed the destruction of the Will in 15 minutes. I think that entirely possible when looked at in the factual context which obtained then; Mrs Webb and Carry knew each other well over quite a few years. Carry was especially accustomed to making wills which specifically meant consideration of who was to benefit and who was not. Never at any time was Carry unaware of her assets.

200. The strong desire to exclude and disinherit the Crews was clear from her instructions 2 months before at their meeting on 16th November 2021. Further, I accept Mrs Webb's evidence that that was very much an estimate of the time and it could have been 20 or 25 minutes. I therefore do not accept Mr Sinnatt's criticisms in this respect.

201. Secondly, the evidence of Mrs Webb came through in tiers; the Attendance Note, the conversation with Ms Creasey about 1 month later, 2 years after that her statement and finally her oral evidence. Mr Sinnatt submits her evidence is accordingly unreliable, referring to the way the "nod" came about – not mentioned until the oral evidence. Mr Sinnatt submits the witness statement is littered with details which Mrs Webb did not consider important to record in the Attendance Note despite this being treated by her as a death bed will.

202. Again I do not accept this criticism. First it is not the case Mrs Webb did not consider those details important; Mrs Webb was very clear in her oral evidence accepting in retrospect it would have been best for her to have recorded those matters. But again this must be looked at in the context of a solicitor attending to take instructions; the destruction of the Will was, after she was satisfied as to capacity, relatively straightforward.

203. What was not were the instructions for what the new beneficiaries were to inherit. That is what the bulk of the Attendance Note goes to compared to destruction. In other words, Mrs Webb was looking forward as a professional solicitor in the interests of her client in taking instructions as to what she now wanted, as a matter of fact, as opposed to contemplating how best prepare to give her evidence in a hypothetical appearance before this court.

204. Having said that, it may be appropriate for solicitors in such circumstances to record their attendance by video on a telephone or other electronic device, subject to permission and the privacy of others who may be there.

205. Whilst Mr Sinnatt rightly says the Golden Rule of having a medical practitioner present was not followed, again context must be considered. Mrs Webb formed the opinion Carry did not have capacity the day before she attended. She arrived and found Carry had capacity. The matter was urgent, time was limited and to engage a doctor to attend would have been difficult. As Dr Series made clear, her delirium

waxed and waned. Likewise Mrs Webb found Carry lost capacity whilst she was there.

206. Mr Sinnatt criticises Mrs Webb for not enquiring as to exactly what the medicine was that Carry was given as she started the attendance. I do not accept that; as Mrs Webb said, she has no medical knowledge and the name would have meant nothing to her.

207. Dr Series relies upon the Attendance Note at [40(8-9)] for his opinion in his [8.1.21] that when the instructions were taken it appeared to him that the delirium had not completely resolved. He continues by saying the Attendance Note does not suggest to him Carry "…was able to express in a clear and settled way whether she had weighed the claims of potential beneficiaries of the estate and if so how she had done so." Therefore, Dr Series continued, she could not meet the 3rd limb of *Banks v Goodfellow.*

208. Mr Jones criticises this; first that the fact it was not recorded Carry did weigh the claims of the potential beneficiaries meant she did not and therefore failed the test. But the test is not one of memory nor compliance with a set procedure but whether the person actually had capacity, which Mrs Webb is certain of. Mr Jones cited *Hawes v Burgess* [2013] EWCA Civ 94 where Lord Justice Mummery at [55] said:

> *"…the deceased knew she was making a new will and knew the extent of the property available for disposal. It is reasonable to expect that a testatrix, who is capable of understanding that much, would normally be capable of understanding the claims arising to which she ought to give effect in her family situation."*

209. Mrs Webb's evidence that Carry could process these matters was unchallenged. I reiterate the factual context I set out at [195]. Mr Jones' second criticism was that Dr Series had assumed against the professionalism of Mrs Webb, her evidence and good practice with her specialist experience going back many years, citing *Hawes* at [57]. Besides the context I have mentioned above the terms of the draft will "…were not, on their face, inexplicable or irrational" ([57] again).

210. In my judgment, both criticisms by Mr Jones are sustainable, and can be made as they concern mixed law and fact and therefore are not caught by the restrictions I find arise due to the lack of challenge by cross examination – [167 (1)] above. I therefore do not accept Dr Series' opinion as to the 3rd limb of *Banks v Goodfellow.* I also find on the facts that Carry had weighed the interests of potential beneficiaries as the major proposed differences were the substantial bequest to Josephine, changing the gift to Paul from the caravan and caravan site to Carron, her home, and the removal of the Crews.

211. Dr Series poses the question in [1.1.1] that if the court considers to satisfy the first limb of *Banks v Goodfellow* it was necessary for Carry to understand that by intestacy her sister would inherit all then he thinks she would not be able to meet that requirement. I do not think it was so necessary, as again this is not a memory test.

However, if I am wrong about that and it was necessary, it is pellucidly clear from the evidence of Mrs Webb that Carry understood her entire estate would pass to her sister.

212. Dr Series then turns to the 2nd limb namely ability of Carry to understand and recollect the extent of her property. He acknowledges that she understood she had a bungalow, a caravan and a caravan site but opines it was much less clear she could understand their relative values. First, it is not a memory test – *Simon v Byford* at [40].

213. Secondly, Mrs Webb confirmed in her oral evidence she had *Banks v Goodfellow* in mind when seeing Carry and Carry in her view knew the value of her assets. She added value was not merely knowing the cash value. I agree. In my judgment, value, or "extent of the property" as stated in *Banks v Goodfellow* is a subjective matter for the testator. It can be either the monetary value or as here as appears in the various attendance notes over the years for all the wills the value to Carry in terms of value as a gift to the beneficiary. She placed a good deal of weight on who would receive what based on their usage or needs.

214. Value can also be a mixture of both cash and value to a person. Here, Carry had capacity to understand value, as shown by the care she took over who was to have what. Mr Sinnatt also submitted in his oral closing that failure to raise the position of the Whitehorns first being disinherited by intestacy and secondly not being acknowledged as to the bequests to them made it difficult to see how Mrs Webb complied with *Banks v Goodfellow*, there not being a single mention of them, and on that basis alone there is no evidence of Carry having capacity.

215. I disagree. The key point was the removal of the Crews and Josephine inheriting all due to the revocation. The Whitehorns remained in the draft will. Further, this is not a memory test; failure to name them does not of itself indicate failure to comply with the 3rd limb of *Banks v Goodfellow*.

216. My answer to Issue 2 is that I accept the opinion evidence of Dr Series but find Mrs Webb's evidence as to the bed side meeting recorded in her Attendance Note especially in the context of the other evidence regarding Carry and her wills and relationships so convincing that I find Carry did meet the *Banks v Goodfellow* test and therefore had the requisite mental capacity to revoke her Will. I find that Carry had a sufficiently lucid interval during which the revocation took place, which accords with the possibilities raised by Dr Series.

217. I find Carry had capacity in that narrow window as I accept and prefer the evidence of Mrs Webb, who was actually present, and for these reasons:

1) She had as of January 2022 16 years' experience in probate and will drafting. She is a conscientious professional solicitor who knew the law as to capacity and how she had to apply it.

2) She knew Carry very well over quite a few years; she knew of her family relationships and how she liked to reward people who were in her favour. The destruction of the Will and the initial instructions for the new one accorded with this knowledge.

3) Capacity was at the forefront of Mrs Webb's mind as shown by the attendance notes of 16th November 2021, 25th January 2022, the Attendance Note and her letter of 27th January 2022.

4) Mrs Webb is an impartial witness who I am sure would not have let the revocation proceed if she had any doubts. The opposite happened; Mrs Webb saying she had "…no shadow of a doubt that [Carry] had capacity…she was as adamant as I knew she could be…".

218. I have reached my above decisions without reliance upon Mr Jones' criticisms of Dr Series as to the Part 36 Answers or confirmation bias. I now do not need to consider them further.

219. In summary I find Carry had testamentary capacity to revoke the Will, the intention to do so and revoked it by destruction in accordance with s.20 of the Wills Act 1837. I therefore dismiss the claim and find for Josephine on her counterclaim.

220. I wish to record my thanks to both counsel for their skeleton arguments and two sets of written closing submissions, plus their oral submissions. I was particularly assisted by their written closings for which I am grateful.

221. I mentioned at the outset the unseemly scrabble for Carry's assets before and after her death, and how she like to reward people in her favour. In *Van Alst v Hunter* (1821) 5 Johnson NY Ch Rep at 159 quoted with approval in *Banks v Goodfellow* the Chancellor said:

> "It is one of the painful consequences of extreme old age that it ceases to excite interest and is apt to be left solitary and neglected. The control which the law gives to a man to dispose of his property is one of the most efficient means which he has in protracted life to command the attentions due to his infirmities."

222. Nothing in human nature has changed over the last 200 years since that was said nor I presume will it in the future. So these disputes will continue unless resolved by negotiation, which I can only urge future parties to engage in realistically and effectively.

Deputy Master Linwood 15th November 2024