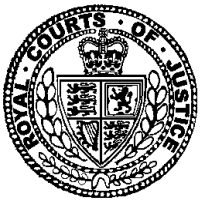

Neutral Citation Number: [2024] EWHC 321 (ChD)

Case No: PT-2021-000730

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

IN THE ESTATE OF DR JACK LAWRENCE LEONARD DECEASED (PROBATE)

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

Date: 20/02/2024

Before :

MRS JUSTICE JOANNA SMITH DBE

- -

Between :

(1) JONATHAN HENRY LEONARD
(2) ANDREW GORDON LEONARD
(3) SARA ELIZABETH LEONARD
(4) MEGAN LEONARD

Claimant

- and –

(1) MARGARET ROSE LEONARD
(by her litigation friend Sharon Thompsett)
(2) ZEDRA TRUST COMPANY (UK LIMITED)
(3) MARK LESLIE SMITH
(4) ELIZABETH LESLIE
(5) CHARLOTTE DENISON
(6) MICHAEL TURNER
(7) MELISSA WARD

Defendant

- -
- -

Ms Constance McDonnell KC and Mr George Vare (instructed by **Birketts LLP**) for the **Claimants**
Mr Thomas Dumont KC and Mr Edward Hicks (instructed by **Ashtons Legal LLP**) for the **First and Third to Seventh Defendants**
The **Second Defendant** did not appear and was not represented

Hearing dates: 28-30 November, 4-8 & 11-12 December 2023

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APPROVED JUDGMENT

This judgment was handed down remotely by email on Tuesday 20 February, 2024 by circulation to the parties or their representatives by email and released to the National Archives.

MRS JUSTICE JOANNA SMITH:

1. In this case, the Claimants, Dr Jack Leonard's children from his first marriage, invite the court to pronounce against a will signed by him at home in October 2015 ("**the 2015 Will**") without any professional supervision, and instead admit to probate an earlier will made in 2007 ("**the 2007 Will**"). The only issues are whether Dr Leonard had testamentary capacity at the time of executing the 2015 Will and whether he knew and approved the contents of that will. Although there are a number of important differences between the two wills, the principal difference is that, under the 2015 Will, Dr Leonard's children are considerably worse off financially than they would have been under the 2007 Will, because the effect of the 2015 Will is to bequeath a substantial portion of Dr Leonard's estate to the First and Third to Seventh Defendants, that is his second wife, Margaret, and her family (i.e. Dr Leonard's step-children and step-grandchildren).

2. The disputed 2015 Will went through a number of drafts and took two years to finalise. It was prepared not by a solicitor, but by a chartered tax adviser who did not take any precautions to ensure that Dr Leonard (who by this stage was in his early 80s) had capacity and that he understood the will that he finally signed. She did not see or speak (except by email) to Dr Leonard for nearly a year before he executed the 2015 Will, despite changes in his instructions and, what the Claimants contend, were obvious warning signs as to his cognitive ability. Nevertheless, the Defendants say that there is no reason to doubt Dr Leonard's ability to make the 2015 Will, that Dr Leonard had complete testamentary freedom to dispose of his estate as he pleased and that it is no surprise in any event that he wanted to benefit Margaret and her family.

3. It is common ground that the 2007 Will should be admitted to probate if the 2015 Will was invalid on either or both grounds advanced by the Claimants.

4. Throughout this judgment I shall refer to Dr Leonard ("**Jack**") and his family members and extended family members by their first names (as the parties have done throughout) with no disrespect intended.

Background to the Case

5. In order to place the evidence as to Jack's mental capacity and as to the circumstances of the making of the 2015 Will into a proper context, I must begin by setting out some largely uncontroversial details about Jack's life and his familial relationships.

6. Jack was born on 2 November 1931. He was educated at Manchester Grammar School before serving an apprenticeship at Ferranti and then going on to gain a BSc in Electrical Engineering at Manchester University in 1953. He earned his PhD in control systems there in 1957.

7. Whilst at Manchester University, Jack met Audrey, who was working as a secretary to the head of the Electrical Engineering Department, and they married in December 1958. Their marriage was very happy and they were devoted to one another for 40 years.

8. In 1965, Jack joined forces with several colleagues to form Eurotherm, a company specialising in the design and production of temperature control solutions. Eurotherm's business was extremely successful and in the early 1970s, Jack moved his family to the United States of America where he established a US branch. The family lived at this time in Virginia, buying a property at Vale Road in Oakton, Virginia in 1979 ("**the Vale Road Property**"). Not least by dint of Jack's own hard work and dedication, Eurotherm became very profitable in the US and Jack became the Worldwide Group Managing Director in 1977, steering the company to a flotation on the stock market in 1978.

9. Jack and Audrey had four children, the four Claimants in these proceedings, Jonathan, Andrew, Sara and Megan. All four remember a very happy and loving childhood, albeit that they were all aware of the demands of their father's job. In 1980, Jack relocated to the United Kingdom and settled close to the Sussex Downs. Sara and Megan, who were both still at school, returned with their parents, while Jonathan and Andrew remained in the US. By this time, Jack was a wealthy man. He retained the Vale Road Property and bought a substantial house named Downs Edge in Findon, West Sussex ("**Downs Edge**").

10. At around this time, Jack developed a passion for helicopters, becoming a pilot, purchasing a Robinson R-22 and setting up a business called Findon Air Services. In 1990, assisted by his accountant, Mr David Smart ("**Mr Smart**"), he incorporated a limited company, FAST Helicopters Limited ("**FAST**"), dedicated to providing flight training together with the hiring out of helicopters and pilots and the leasing of hangar space to other helicopters and aircraft owners. Jack and Audrey were both shareholders and directors of FAST. Jack retired from Eurotherm in the mid-1990s, three months shy of his 65th birthday, but continued to pursue his love of flying and remained involved in FAST.

11. In 1994, in circumstances to which I shall return, Jack purchased a pub in Hatherleigh, Devon, called the Tally Ho! using a new company set up for that purpose, LT Hostelries ("**LTH**"), which also ran the business. Jack was the majority shareholder in LTH. Once again, Mr Smart assisted him in setting up this new business venture.

12. Shortly after Jack's retirement, Audrey was diagnosed with terminal cancer and, after a short illness, during which Jack went to great lengths to ensure that she received the best possible care, she died in May 1998. Audrey left her estate (with a net value of £1,708,230) to Jack. The vast majority, if not all, of the money in this estate came from joint assets owned by Jack and Audrey, including their interest in Eurotherm.

13. Jack felt Audrey's loss acutely. However, he began internet dating and met Margaret, who became his second wife on 7 November 1999.

14. Margaret was a widow and had three children from her previous marriage to Thomas Leslie Smith ("**Thomas**") who died in 1994. The Third and Fourth Defendants, Mark and Elizabeth ("**Liz**"), are two of her children. Her third child, Melanie, very sadly died in March 2005 at the age of only 44. Melanie had three children before her death who are grandchildren to Margaret: the Fifth to Seventh Defendants, Charlotte, Michael and Melissa. I shall refer where necessary in this judgment to Margaret's children and

grandchildren collectively as "**Margaret's family**" to differentiate them from Jack's children and grandchildren.

15. It is common ground that Jack and Margaret had a very good marriage and were extremely happy together. They travelled extensively all over the world, enjoying each other's company and often sharing holidays with other family members, particularly members of Margaret's family.

16. In February 2000, Jack and Margaret purchased a new home in their joint names at 2 Hutton Place, Hutton, Brentwood, Essex ("**2 Hutton Place**"), at a price of £535,000, funded as to £50,000 by Margaret and the balance by Jack. For a while, Jack and his children continued to use Downs Edge as a family home where they could meet, but Jack sold it in 2005. In 2006 Jack bought a villa in Plan de la Tour in France ("**the French Property**") in his sole name, where he and Margaret spent time with family and friends. I understand the French Property to be worth something in the region of 600,000 Euros.

17. Jack's wealth enabled him to become involved in making financial investments and setting up tax efficient structures and he retained private bankers at Barclays to provide him with appropriate advice. His wealth also enabled him to be very generous to his children, his extended family and (as time went on) to Margaret and Margaret's family. Thus,

    a. he bought the Tally Ho! through LTH for about £380,000 with the intention that Megan and her then husband, Jason Tidy ("**Jason**"), would run it. Jason and Megan each had a very small percentage of the shares in LTH. Although Megan subsequently divorced from Jason in 1996 (with the financial assistance of her parents), Jack continued to run LTH until around July 2013 when the Tally Ho! was sold for £390,000. In July 2001, Jack loaned £75,000 to Megan and her new partner, Geoff Dawber ("**Geoff**") to enable them to purchase a property in Bolton, a loan they subsequently repaid.

    b. after Audrey's death, Jack sold the Vale Road Property (in which Andrew had been living) and bought a house in Warrenton, Virginia ("**the US Property**") for US$415,000. Andrew and his partner Melinda Jane Burnette ("**Jane**") have lived in the US Property ever since. Andrew has long term medical problems including a diagnosis of PTSD following an extremely traumatic incident which involved a head injury. For many years, Jack paid medical expenses for Andrew of between US$1,500 and US$2,000 per month, whilst from time to time also funding maintenance costs in respect of the US Property. The last of these payments was made in March 2016.

    c. during her time as a student in the 1980s, Jack and Audrey bought a small property for Sara in Brighton ("**the Brighton Property**"), which Jack gifted to Sara in 1996 with an agreed value of £72,500. In 2000 Jack provided her with additional funds to enable her to upgrade to a new property in Teddington ("**the Teddington Property**"), transferring some £338,476 to Sara's conveyancing solicitors in return for a repayment of £186,396 from the sale of the Brighton Property (a balance of £152,080). The net total value of these two gifts was

therefore around £224,000. On 4 February 2013, Jack gave £15,000 to Sara to fund her civil partnership celebrations with her partner Julie ("**Julie**") which took place in August 2013. I shall refer to these celebrations, as many of the witnesses did, as "**Sara's wedding**".

d. in 1990, Jack and Audrey purchased a bungalow as a residence for Audrey's older sister (Jack's sister-in-law), Marjorie Roberts ("**Marjorie**"), close to Downs Edge at 3 Hillview Rise, Findon Valley, West Sussex ("**the Findon Property**"). Marjorie's daughter, Susan Roberts ("**Susan**") also moved into the Findon Property and continues to live there to this day. From time to time, Jack paid to maintain the Findon Property. In her will, Audrey provided that, in the event of Jack pre-deceasing her, Marjorie and Susan would have the right to continue to occupy the property for their lifetimes, if they so wished.

e. in July 1997, Jack gave Jonathan a non-returnable gift of US$60,000 in connection with his purchase of a property in Reston in the US.

f. on 22 March 2013, on the advice of Barclays, Jack transferred £500,000 to Margaret which she then settled into a trust ("**the 2013 Transfer**").

g. in February 2014, Jack gifted £150,000 ("**the 2014 Gift**") to Margaret's granddaughter, Charlotte, to enable her and her partner, Howard Denison ("**Howard**"), to purchase a house in Rayleigh, Essex, close to good schools for Charlotte's son, Zachary.

18. In November 2005, Margaret made a will leaving her interest in 2 Hutton Place to Jack, and otherwise giving her estate to her own family in three equal shares; one share to each of her surviving children and one share to Melanie's children.

19. Also in 2005, Jack sold FAST, which had not been financially successful.

20. In October 2006, Jack began to explore making a will. He had an initial instructions meeting at Wortley Byers LLP ("**Wortley Byers**") on 3 October 2006 and gave instructions for a holographic French will together with the preparation of an Enduring Power of Attorney. The French will, which gave Margaret a usufruct over the French Property, was signed on 11 October 2006.

21. On 29 August 2007, Jack executed the 2007 Will, prepared by Wortley Byers. The 2007 Will applies to his worldwide estate. The Executors were Sara and Jack's nephew (through his sister, Joan), Robert Behrens ("**Robert**"). The key provisions were as follows:

a. all of Jack's interest in 2 Hutton Place was left to Margaret (if she pre-deceased Jack, then this would form part of the residue). This provision, mirrored in Margaret's will, was strictly unnecessary as 2 Hutton Place would pass to Margaret by survivorship in any event;

b. all chattels were left to Margaret;

c. the shares in LTH were left to the Claimants, subject to inheritance tax ("**IHT**") and any other tax;

d. there was an option for Andrew to purchase the US Property for the sterling equivalent of US$425,000. The option was to be offered to Andrew within 4 weeks of the Grant of Probate and thereafter Andrew was given three months in which to exercise the option failing which it would lapse. The trustees would not require Andrew to complete the purchase until sufficient sums had been distributed to him out of his share of the residuary estate to cover the purchase price. Any tax was to be paid by Andrew out of his share of the residuary estate;

e. Marjorie was to have the right to occupy the Findon Property for life and, subject thereto, the property was to go to Sara. The evidence, which is unchallenged and which I accept, is that it was understood amongst Jack's family that Sara would "do the right thing" in so far as Susan's continuing occupation of the Findon Property was concerned;

f. the residuary estate was left to Jack's children and to Margaret in five equal shares (and to Jack's children in equal shares if Margaret pre-deceased Jack);

g. An advancement of £100,000 to Sara was to be brought into hotchpot.

22. On the same day, Jack executed an Enduring Power of Attorney appointing Robert and Margaret jointly and severally as attorneys.

23. In 2010, Jack started to explore the possibility of the drafting of a new French will, and by 2012 there is evidence of Jack beginning to give consideration to the possibility of changing the 2007 Will to "leave everything" to Margaret on the basis that she would then leave the residue to Jack's children, subject always to his desire to leave the US Property to Andrew. At around the same time Jack started to investigate making an American will.

24. In the Autumn of 2012, Jack and Margaret attended meetings with Mr Rana Mutsuddi ("**Mr Mutsuddi**") at Barclays Wealth and Investment Management, at which they discussed their financial planning, proposals for tax mitigation measures and Jack's plans to change his will. At this time, Ms Ceri Vokes of Withers LLP ("**Ms Vokes**") appears to have been briefly involved with a view to providing global advice as to the preparation of new wills for Jack and Margaret in the UK, together with advice as to making provision for Jack's foreign assets. However, this was not pursued by Jack. In 2013, Ms Sophia Bultitude ("**Ms Bultitude**"), then of Barclays, began to attend meetings with him, becoming his private banker the following year.

25. On 10 October 2013, Jack contacted Ms Carol Wells ("**Ms Wells**") by email, expressing a wish to instruct her to draft new wills for both himself and for Margaret. He had been recommended to Ms Wells by Barclays. Ms Wells is a Chartered Tax Advisor who, at that time, worked in the Wills, Trusts and Probate department of Irwin Mitchell, a firm of solicitors.

26. Over the course of the next two years, Jack and Margaret liaised with Ms Wells from time to time over the content of their new wills. They had two face to face meetings with her, the first on 3 February 2014 and the second on 18 November 2014. They also spoke on the phone and exchanged emails. A number of drafts of Jack's will were provided to him by Ms Wells. A lengthy and complex will file evidencing these various interactions and drafts has been disclosed by Irwin Mitchell ("**the Will File**").

27. During this time Jack continued to liaise with his bankers at Barclays, with whom he had occasional meetings and telephone conversations about his investments, including a conversation over the telephone which also involved Ms Wells on 29 October 2014.

28. Jack was diagnosed with hearing difficulties in 2001 and wore hearing aids, although it seems clear that he was somewhat embarrassed by this manifestation of physical frailty and sometimes refused to put them in. On the Claimants' case, Jack began to show signs of dementia in about 2011. This is denied by the Defendants.

29. On 6 July 2015, Jack presented at his GP surgery in a confused state and was sent to hospital, where he underwent investigation. He was discharged on 9 July but subsequently saw two specialists in the fields of neurology and neuropsychology who reported on his condition, Professor Hawkes and Dr Fuller. These reports are of considerable significance in the context of this case and provide a useful evidential anchor. I shall return to them in due course. For present purposes I note that on 28 July 2015 Professor Hawkes diagnosed diffuse cerebrovascular disease and identified "clear impairment of cognitive function". Dr Fuller subsequently described this impairment as "mild to moderate".

30. On 19 October 2015, Margaret signed her new will ("**Margaret's 2015 Will**"), apparently with two witnesses present, Christopher Ward ("**Christopher**"), Melissa's husband, and a neighbour, Julia Ebdon. Her Executors were Jack and Barclays Bank Trust Company Ltd, now known as Zedra Trust Company (UK) Ltd, which was also appointed as executor to Jack's 2015 Will and is therefore named as Second Defendant in these proceedings. It has adopted a neutral stance and has played no active role.

31. The key provisions of Margaret's 2015 Will were that

    a. her chattels would go to the trustees to distribute in accordance with her wishes, and in default to Jack;

    b. 2 Hutton Place would be left to Jack. If Jack predeceased Margaret it would be given in three equal shares to her two children, Mark and Liz, and to Melanie's children;

    c. the residuary estate would be split into seven shares with 4/7 going to Jack's children and 3/7 to Margaret's family.

32. On 28 October 2015, Jack signed the 2015 Will in the presence of Christopher and Kevin Sisley, his gardener. The 2015 Will was applicable to all of his worldwide estate with the express exception of his assets in the US and France. It did not revoke the

2007 Will in so far as it concerned those assets. The Executors were Margaret and the Second Defendant. The key provisions were as follows:

a. 2 Hutton Place would be left to Margaret. If Margaret predeceased Jack, it would be given in three equal shares to her two children, Mark and Liz, and Melanie's children;

b. his chattels would go to Margaret;

c. Marjorie would have the right to occupy the Findon Property for life, and subject thereto, the property was split in seven equal shares with 4/7 going to Jack's children and 3/7 to Margaret's family;

d. the residuary estate (excluding assets in the US and France) would be held on trust for Margaret for life (with a power to apply capital) and subject thereto divided in seven equal shares with 4/7 going to Jack's children and 3/7 to Margaret's family on terms that:

   i. Sara was to account for an advancement of £200,000;
   ii. Megan was to account for an advancement of £100,000; and
   iii. Andrew was to account for a gift of the US Property (clause 9(f)) as follows:

> "I DIRECT that having left my property in the United States of America to my said son ANDREW GORDON LEONARD absolutely that he shall bring into hotchpotch upon the division of the Trust Fund such sum as shall equal the fair open market value of the property at the date of my death which he shall have inherited in the United States of America net of any United States Federal or State inheritance tax paid and I FURTHER DIRECT that the fair open market value shall be the value of the property as determined for United States taxation purposes as at the date of my death".

   The provisions of the 2007 Will by which Andrew had an option to buy the US Property were unrevoked.

33. In March 2016, Professor Hawkes provided a final diagnosis in respect of Jack's condition of "vascular dementia".

34. On 22 November 2016, Jack's Enduring Power of Attorney was registered. Jack died on 16 March 2019. Margaret survives Jack but, sadly, although she was initially able to instruct solicitors and provide instructions in these proceedings, she is herself now suffering from dementia. She is represented in these proceedings by a litigation friend and did not give evidence.

35. It is common ground that Jack's estate is worth about £5.4 million, including his interests in 2 Hutton Place, the Findon Property, a trust held by the Second Defendant worth about £1 million, cash and financial investments worth about £2.8 million and his two non-UK properties. It is difficult to estimate the precise impact of the 2015

Will on the financial provision for Jack's children owing to the fact that this necessitates a calculation of the net position after Margaret's death and after the payment of tax, together with an assessment as to the value of lifetime trusts (the details of which I shall return to later). However, the Claimants have roughly calculated that the provisions of the 2015 Will appear to leave them with, on average, approximately £459,000 each (as opposed to, on average, approximately £615,000 each under the 2007 Will), whereas the Third to Seventh Defendants are left with, on average £870,000 each (as opposed to, on average, £680,000 each under the 2007 Will). These approximate figures were not disputed by the Defendants.

36. The Claimants maintain that Jack's decision to depart from the provisions of his 2007 Will in this way and, in particular, his decision to provide for Margaret's family at the expense of his own family, was out of character in that it showed a marked deviation from his strong sense of moral responsibility towards his own children. They point to various issues arising on the terms of the 2015 Will and further, they say that (amongst other things) the omission to make proper provision for Andrew (to whom Jack had been providing financial support for many years) coupled with the failure to ensure that Susan would be able to continue to reside in the Findon Property, are strong indicators that Jack did not have capacity at the time he made the will. The Claimants point to (i) the medical evidence to which I have referred as providing an (unusual) degree of detailed information as to Jack's medical condition and the extent of his cognitive impairment only a couple of months prior to the signing of the 2015 Will; and (ii) the detail contained throughout the Will File and in papers disclosed by Barclays, which they say exhibit numerous mistakes and omissions by Jack together with "red flags" as to his cognitive abilities and thus his testamentary capacity. They also rely on medical and witness evidence supportive of cognitive decline in Jack. As for the question of knowledge and approval, the Claimants say that numerous errors made by Ms Wells in dealing with Jack's instructions, combined with the circumstances in which he came to execute the 2015 Will and the terms thereof, support the proposition that there was an absence of knowledge and approval.

37. Both parties invited me to carry out a careful analysis of all of the available evidence in the Will File and the Barclays documents, together with oral and written evidence as to the events that were going on in Jack's domestic life from late 2012 onwards in order properly to put the 2015 Will into context and to assess the claims.

Relevant Procedural Matters

38. As pleaded, the case originally advanced by the Claimants included the allegation (made by Sara in her capacity as Executrix of the 2007 Will and with the consent and approval of Robert) that Jack lacked capacity to make (i) the 2013 Transfer; and (ii) the 2014 Gift. This case was supported by their expert, Dr James Warner, in two reports together with an Addendum report. However, in a joint statement signed on 29 October 2023, shortly before the commencement of the trial, Dr Warner agreed with Dr Hugh Series (for the Defendants) that Jack "probably had the requisite mental capacity" to make both the 2013 Transfer and the 2014 Gift. This change of position on the part of Dr Warner caused the Claimants to abandon their case on these gifts, which are no longer the subject of challenge.

39. An important reason for Dr Warner's change of position was the late provision to the experts in early autumn 2023 of numerous contemporaneous documents to which one, or both, of them had not previously had access. Indeed, it is clear that the experts were originally instructed by reference to different sets of documents, a state of affairs which led to them signing off on a first joint statement dated 24 August 2023 which merely recorded that they were not in a position to proceed absent the provision of an agreed bundle of documents. This was plainly unsatisfactory and must inevitably have led to wasted expenditure on both sides.

40. The situation was not improved, however, by the very late disclosure by the Defendants:

    a. on 9 November 2023 of various emails from Jack's laptop;

    b. on 27 November (the day before the trial commenced) of emails between Jack and Ms Wells found on an iMac computer used by Margaret and, until his death, by Jack ("**the iMac**"); and

    c. between 28 November and 3 December (i.e. during the trial) of further emails and documents from Jack's laptop and the iMac.

    Late disclosure also occurred (albeit that it cannot be laid at the Defendants' door) in relation to:

    a. documents from Barclays, provided only on 20 November 2023; and

    b. an electronic version of the Irwin Mitchell Will File, provided on 23 November 2023.

41. The late disclosure by the Defendants led to orders being made for witness statements to be provided by the Defendants' solicitors explaining how and why these documents had only been discovered so late, together with a break during the trial to enable the Claimants to master the detail of the new documents prior to cross examining the Defendants' witnesses. The Claimants did not suggest that they could not continue with the trial by reason of this extremely late disclosure, but they did spend some time exploring with Liz in cross examination how and why it had occurred.

42. The Claimants were represented at trial by Ms Constance McDonnell KC and Mr George Vare. The Defendants were represented by Mr Tom Dumont KC and Mr Edward Hicks. I am grateful to all counsel for the lengthy narratives they provided with a view to assisting the court to navigate the documents and key events in the two year period prior to the execution of the 2015 Will and the period shortly thereafter.

Dr Jack Leonard

43. Before turning to the witness evidence, it is important that I seek to provide a thumbnail sketch of Jack's character, his priorities, motivations and his relationships with others. On this, there was really no material disagreement.

44. Jack was quite obviously an extremely intelligent man whose engineering background ensured that he liked to understand "how things worked". He loved technology and was keen to have the latest mobile phone or camera, sharing a love of photography with his daughter Sara. Mr Mutsuddi remembered that he was "very well read and kept up to date with everything", a description which I accept. Jack also appears to have been an astute business man who was capable of managing various businesses. He had worked very hard to achieve success at Eurotherm and, upon his retirement, he was all too happy to appreciate the life he had and enjoy the fruits of that success. Although he was not a lawyer, I see no reason to think that Jack would ordinarily have had difficulty in understanding the provisions of a complex will, subject to any "legalese" being explained to him.

45. Jack was also a man of very considerable integrity, rectitude and moral compass who appears to have been universally respected and well liked. Various witnesses at the trial recalled him with obvious affection as a warm, kind and generally delightful man. A life-long friend, Mr Lee Marks ("**Mr Marks**"), who met Jack in 1971 when he became counsel to Eurotherm, described him in an email sent to Sara in advance of Jack's funeral as having an appealing character because "what you saw was what you got. No pretence". There is evidence of a stubborn streak, no doubt a function of his fierce intelligence and desire to "do right by all", but it does not appear adversely to have affected his relationships with others. There is also evidence of occasions when he was, perhaps, overly direct in his dealings with others, albeit he appears to have been able to understand when he had been insensitive and to apologise.

46. Jack plainly placed great value on his family life and relationships; even when he was working long hours for Eurotherm his spare time appears to have been dedicated to his young family, rather than to any individual pursuits. It is common ground that Jack loved his own children deeply, although, once they left home and after Audrey's death, he saw Jonathan, Andrew and Megan relatively infrequently owing to the fact that Jonathan and Andrew have lived for many years in the US, and (at least since 2001) Megan has lived in Bolton. He continued to see Sara (who has lived at the Teddington Property since 2000) from time to time, including at 2 Hutton Place and at the French Property, but less frequently than had previously been the case.

47. It is clear that Jack's children were somewhat concerned at the speed with which he married Margaret after their mother's death, albeit they were generally happy that their father had once again found love and companionship. Megan, in particular, was upset at the news of Jack and Margaret's wedding and was unable to attend, but her evidence, which I accept, is that Jack was entirely understanding about this and bore no grudge over it.

48. Although Jack's family obviously feel that their interactions with him changed after his marriage to Margaret and that there were tensions between themselves and Margaret and her family, they continued to get together with Jack and Margaret for family occasions and for the odd meal or day out, when possible. Jack had a passion for football (he was a Manchester City supporter) and he occasionally attended football matches together with his children. Jack did not see his children as much as he saw Margaret's family (many of whom lived much closer to 2 Hutton Place and visited frequently), but he corresponded with them affectionately by email, sharing family

jokes and catching up on their news. The greater physical distance between them did not affect their underlying feelings for each other.

49. There is evidence from each of Jack's children that Jack wished to ensure that they were properly provided for and that, on occasions, he expressed this intention to each of them. In general terms I have no difficulty in accepting this evidence, which appears to me to accord with all the evidence as to the type of man Jack was, aside from also according with the inherent probabilities. Jack had benefitted from Audrey's substantial estate and no doubt felt a moral obligation to pass that on to his children. He was, as I have said, a generous and loving father, and it is entirely natural that he would want to make appropriate provision for his children on his death. This is particularly so given that, with the exception of Jonathan, Jack's children are not particularly well off and plainly in need of financial support and, in Andrew's case, a roof over his head.

50. During the course of his marriage to Margaret, Jack also developed a close relationship with her family, not least because he saw them very frequently and shared many holidays with them, often at the French Property. No doubt his love for Margaret ensured a feeling of great affection for her children and grandchildren and this feeling was quite obviously reciprocated by them. There is no monopoly on love and affection, and I have little doubt that Jack was just as generous with his affections towards members of Margaret's family, as he was with his hospitality and, on occasions, his wealth. That affection neither eroded nor competed with his relationship with his own children. His sensitivity towards, and support for, Margaret's family at the time of Melanie's tragically early death appears to have been impeccable. There is overwhelming evidence that, in the lead up to the 2015 Will, Jack was extremely concerned to ensure that, after his death, Margaret would have access to funds that would enable her to continue her lifestyle, a priority to which he returned time and again during meetings with his advisers. I do not consider this to be in the least bit surprising.

51. Jack himself would almost certainly have been both surprised and horrified to find his children and step-children at loggerheads in probate proceedings of this sort. The evidence shows that Jack returned time and again to his desire to have a simple will that left everything to Margaret, whom he trusted to distribute his assets in accordance with what she knew to be his wishes. In the event, however, the 2015 Will was a great deal more complex, a factor which is of significance in considering both Jack's testamentary capacity at the time he signed it and the issue of knowledge and approval.

The Evidence

(i) The Witnesses

52. I heard oral evidence from 25 witnesses. In general terms, it is worth noting that these witnesses were all dealing with events which occurred in the years leading up to, and shortly after, a will that was executed more than eight years ago. In such circumstances I must bear firmly in mind that some witnesses may, for whatever reason, have better (or less fallible) recollections than others and that, given the passage of time, it is unlikely to be the case that individual witnesses will be consistently reliable or unreliable. I must also bear in mind that parties on one side in a case of this kind may become entrenched in their prevailing view of events, genuinely believing it to be

accurate, notwithstanding that there may be an equally genuinely held view of events on the other side of the court.

53. Although it has been said that, in a case of this sort, the most important evidence is that of the persons present at the time of the making of the will (see *Simon v Byford* [2014] EWCA Civ 280 per Lewison LJ at [16]-[17]), the court has no such assistance here. This is because the only witnesses who were present at 2 Hutton Place at the time of execution of the 2015 Will have no real recollection as to what happened on that day (Christopher and Melissa), lack the capacity to give evidence (Margaret) or have not been called to give evidence (Mr Sisley).

54. Some of the witnesses gave very detailed accounts of their relationship with Jack, observations he had made about his testamentary intentions and key events in their lives. Although there was a substantial measure of agreement between all the witnesses as to the nature of the man that Jack was, there was significant dispute around precisely when he began to show signs of cognitive impairment and the severity of any such impairment. This primarily focussed around various events at which members of Jack and Margaret's families had the opportunity to observe and interact with Jack. Although many other issues arose between the families and were explored in evidence, I do not consider it necessary to make findings about every quarrel or tension that may have existed between them, not least because the mere fact of these proceedings is divisive enough without the court making findings which one side or another might consider to be hurtful and unfair, but which are not strictly necessary for the purposes of deciding the case. In my judgment, it is essential that I concentrate on the issues with which this case is concerned and the relevance of the evidence to those issues rather than becoming distracted by peripheral factual disputes. In particular, I bear in mind the useful guidance given by Norris J in *Wharton v Bancroft* [2011] EWHC 3250 (Ch) at [9], as follows:

> "The task of the probate court is to ascertain what (if anything) was the last true will of a free and capable testator. The focus of the enquiry is upon the process by which the document which it is sought to admit to proof was produced. Other matters are relevant only insofar as they illuminate some material part of that process. Probate actions become unnecessarily discursive and expensive and absorb disproportionate resources if this focus is lost".

55. In the case of all but one of the 25 witnesses, I have detailed witness statements. However, one of the Defendants' witnesses, Ms Bultitude, was the subject of a witness summons and was duly examined in chief by Mr Dumont before being cross examined.

56. Both the Claimants and the Defendants rely upon the written hearsay evidence of witnesses who were unable to give live evidence for various reasons, pursuant to Hearsay Notices served in accordance with section 2(1)(a) of the Civil Evidence Act 1995. Neither side made any application to cross-examine these witnesses or objected to the admission of their evidence. I will need to consider the weight to be attached to this evidence in due course and, in doing so, (i) must have regard to "any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of

the evidence" and (ii) may have regard to various matters, including whether the statement was made contemporaneously, whether it involves multiple hearsay, whether there was any motive to conceal or misrepresent matters and whether it was an edited account or made in collaboration with another or for a particular purpose (see sections 4(1) and 4(2) Civil Evidence Act 1995). For present purposes I observe only that I accept that it would not have been reasonable or practicable for any of these witnesses to have attended trial.

The Claimants' Witnesses

Megan Leonard

57. Megan was born on 2 January 1970 and is Jack and Audrey's youngest child. Her marriage to Jason, with whom she had a son (also called Jack), broke down not long after Jack's purchase of the Tally Ho! and they were divorced in 1996. Megan had no involvement in the Tally Ho! or the business of LTH after September 1998. Soon after her divorce, Megan met Geoff and had another son, Harry.

58. In addition to evidence about her childhood, the purchase of the Tally Ho! and her relationship with Jack and, later, Jack and Margaret, Megan gave evidence about various occasions on which she had seen her father in the years immediately prior to the making of the 2015 Will: specifically an occasion on 11 September 2011 when Jack and Margaret joined Megan and Geoff at a Dolly Parton concert in Manchester arranged for Jack's 80th Birthday; Sara's wedding in August 2013; her visit to see Jack in hospital after his fall on returning from holiday at the end of 2015; and a visit to Essex in August 2016.

59. Although Megan's oral evidence was not always entirely consistent with her witness statement, she was a transparently honest witness who thought carefully about her answers and was plainly making every effort to ensure that she gave accurate oral evidence. Where she was speculating, she acknowledged as much. An example of the straightforward nature of her evidence was her frank acknowledgment in cross-examination that under the 2015 Will her father had been as good as his word – she had received an inheritance from him (as he had promised). I have no hesitation in accepting her oral evidence (and her witness statement, save where it was clarified in cross examination) in its entirety.

Sara Leonard

60. Sara was born on 9 October 1963 and is Jack and Audrey's third child and eldest daughter. Amongst other things, Sara describes in her statement her childhood, her relationship with her father, the circumstances surrounding the purchase of the Teddington Property and her marriage to Julie in August 2013, which was attended by members of both Jack and Margaret's families. Very sadly, Julie was even then suffering from terminal cancer and she died in the autumn of 2016. Sara has a son, Henry.

61. Sara says that she began expressing concerns in 2012 to Jack and Margaret about Jack's health; in particular concerns around falls that he was experiencing. In her statement,

she refers to various episodes and incidents between December 2011 and November 2015 when she saw her father and observed his behaviour.

62. By and large, Sara struck me initially as attempting to answer the questions posed in cross examination in a straightforward, candid and truthful fashion. However, it became apparent that, at best, she had not been as careful in the preparation of her statement as she should have been; at worst, she had sought to embellish her evidence. Two examples will suffice: the first concerned her statement that her father had stopped making regular financial provision to her brother Andrew "prior to the signing of the 2015 Will, with no explanation given". Sara was ultimately forced to accept, upon being shown the evidence, that this was wrong, saying that her belief as set out in her statement must have come from Andrew. The second example concerns her statement that in October 2014, her father had begun sending birthday greetings to the wrong recipients – in fact, the email she herself had referred to in connection with this piece of evidence showed that he had mistakenly sent a birthday card to everyone in his contacts list, an occurrence which conveys a rather different impression from the one given in her statement, which apparently sought to suggest that this was an obvious sign of forgetfulness.

63. I was also particularly struck by Sara's evidence in respect of an email she had sent to her father after she had visited him on 13 October 2015, in respect of which (for reasons to which I shall return) I did not consider her oral evidence to ring true. Furthermore, on an important aspect of the evidence concerning her father's condition, Sara gave some additional evidence whilst in the witness box which she had not given in her statement, namely that in February 2013 she had met her father and he had given her a cheque for her forthcoming wedding. At that meeting she said that she noticed that he was more physically frail and more vague and difficult to communicate with than had previously been the case. She explained away her failure to refer to this meeting and her observations about her father in her statement by reference to the length of that document. However, this evidence potentially goes to the heart of the issue in this case and it is difficult to understand why it was not referred to previously.

64. Overall I formed the impression that Sara (no doubt having convinced herself of the truth of what she was saying) had embellished her evidence on occasions so as to fit the Claimants' view of events.

65. In all the circumstances, I consider that I must treat Sara's evidence with considerable caution, testing it where possible against the evidence of others and the contemporaneous documents, such as they are.

Jonathan Leonard

66. Jonathan Leonard was born on 2 October 1959 and is Jack and Audrey's eldest child. He lives in Virginia and flew in to London to give evidence at the trial. Jonathan is a Business Development Manager, Carriers and Carrier Ecosystem, with Amritsu, where he has worked for 16 years.

67. Jonathan describes in his statement the close bonds he maintained with his family notwithstanding his residence in Virginia, together with the various occasions when he

visited the UK from 2013 onwards when he was able to observe his father's behaviour and demeanour, whilst at the same time discussing various matters with him. This includes two occasions in 2013, one occasion in March 2014 and a couple of occasions in 2015.

68. Jonathan was generally a calm and measured witness. He was willing in his evidence effectively to concede that he personally had no indication of any decline in Jack's cognitive abilities in 2013 and 2014, although he did notice an increasing physical frailty together with events which he described as "out of character". He frankly acknowledged, however, that he had engaged in coherent email exchanges with Jack in 2013 and that Jack had been able to make all of the arrangements required to purchase tickets for a football match at very short notice in March 2014.

69. Although Jonathan elaborated on his witness statement to a certain extent, in particular in relation to Jack's condition in 2015, his evidence generally rang true. I shall have to examine in due course whether Jack was acting, at any time, "out of character", but I am inclined to accept Jonathan's evidence as to his interactions with Jack and his observations as to his cognitive decline.

Alicia Leonard

70. Mrs Leonard ("**Alicia**") has been married to Jonathan since October 1998 and they have two sons who are both at university. She works as an elementary school teacher. Alicia gave evidence remotely from the family home in Virginia. In her statement she describes various visits to England on which she saw members of the family. She and Jonathan attended Jack and Margaret's wedding in November 1999 and subsequently stayed with them on visits to the UK. Amongst other things, Alicia provides evidence of a few occasions when she saw Jack in the period 2013 to 2016: Sara and Julie's wedding in 2013; a meeting in London on 18 July 2015; a visit to Jack and Margaret's home in August 2016; and Julie's funeral in November 2016.

71. Alicia appeared to me to give her evidence with care, recognising that her evidence was only of limited scope and not seeking to speculate or elaborate on the facts. In one important respect (and bearing in mind Jonathan's evidence) I consider her recollection of the timing of events is probably flawed. She refers to a visit made by Jonathan to England in March 2014 following which she says that Jonathan told her that "Jack seemed to have slowed down quite a bit and seemed to have difficulty with his speech and memory and that he was very concerned". Given that it is Jonathan's evidence that he did not notice any cognitive decline in his father in 2014, I am inclined to think that Alicia is perhaps mistakenly remembering a conversation she had with Jonathan in the spring of 2015 after his return from watching a football match in Newcastle.

Susan Roberts

72. Susan is Audrey's niece. Her mother, Marjorie Leonard, was Audrey's older sister. Susan describes in her evidence the extensive contact during her childhood with Audrey and Jack and explains that in 1990 Audrey and Jack bought the Findon Property. Susan moved in with her mother at the same time and she continues to live in the same house today. Marjorie died in 2017.

73. Susan describes in her evidence two occasions (one in 2011 and one in 2013 or 2014) when Jack visited the Findon Property. After that she had no further contact with him although she spoke to Margaret over the telephone.

74. It was not suggested to Susan that her evidence was selfishly motivated and I have no hesitation in accepting that she was doing her best to assist the court.

Robert Behrens

75. Robert is the Parliamentary and Health Service Ombudsman; he has spent his life in public service. His mother, Joan, was Jack's sister. Robert and Jack shared a common interest in football and he visited Jack, Audrey and their family at their family homes over many years. Robert was appointed Executor in the 2007 Will and was given joint Power of Attorney (together with Margaret) at the same time.

76. In his witness statement (amongst other things) Robert describes occasions in 2013 (at Sara's wedding) and 2015 (in April 2015 at a family dinner and in August 2015 at the fringe in Edinburgh) when he met Jack and was able to observe his condition. Robert's cross examination went rather wider than this evidence however, touching particularly upon his duties under the Enduring Power of Attorney.

77. Rather surprisingly given his background, I found Robert to be an unsatisfactory witness. He was at times inclined to be argumentative and to make statements that did not respond to the questions he had been asked (by way of example, he made an entirely unprompted point because he wanted to "put it on record"). He was also inclined to obfuscate somewhat in his answers and I do not consider that he was always doing his best to assist the court in a neutral and impartial manner.

78. In particular, I found his evidence in relation to the provision of his consent (as an executor of the 2007 Will) to the original claim in these proceedings that Jack lacked capacity to make the 2013 Transfer to be extremely odd. On the one hand, he appears to have approved a claim that Jack lacked capacity at that time to make the transfer (albeit he has no independent recollection of doing so). On the other hand, he was unable to say that he had any concerns about Jack's mental state prior to August 2013. It was entirely unclear how he could properly have provided his consent to a claim being made against Margaret in respect of the 2013 Transfer in such circumstances and I do not consider that he provided a satisfactory explanation. I also found his evidence as to (i) the timing of his registration of the Enduring Power of Attorney; and (ii) his attempt to suggest that an attendance note of a call between him and Poh Shan Chong dated 24 October 2016 was inaccurate (in so far as it expressly recorded him as having been aware of "certain tensions with the Leonard family as it appeared Andrew was receiving favoured treatment financially") to be wholly unconvincing.

79. In the circumstances, I consider that I must treat Robert's evidence with considerable caution, checking it against the evidence of others and against the available contemporaneous documents.

Mr Lee Marks and Dr Sarah Elizabeth Zach

80. Mr Marks is a retired US lawyer who met Jack in 1971 when he was retained as corporate counsel for the Eurotherm companies in the United States. Mr Marks and his wife, Dr Sarah Elizabeth Zach ("**Dr Zach**"), became friends with Jack and Audrey. On a professional level, Mr Marks and Jack were also close. These friendships were maintained after Jack and Audrey moved back to West Sussex and from time to time the couples visited each other in the US and in West Sussex. When Audrey died and Jack met Margaret, Mr Marks and Dr Zach were introduced to her and liked her. They went on to maintain a friendly relationship, socialising when possible in the US and the UK.

81. Mr Marks and Dr Zach gave evidence remotely from their home in Philadelphia. Their evidence was largely concerned with a lunch they attended at 2 Hutton Place on 1 August 2015. I found both witnesses to be patently honest and doing their best to assist the court. Importantly, they were impartial witnesses with no financial or other incentive in relation to the outcome of this case. It was apparent that Dr Zach's recollection was, in some respects, rather clearer than Mr Marks' recollection. Accordingly, I accept their evidence, but, insofar as there were any differences between them, I prefer the evidence of Dr Zach.

Rebecca Pride

82. Ms Pride, a nursery practitioner, met Sara through work in 1987 and lived with her in an exclusive relationship for 7 years. During that time she was a frequent visitor to Jack and Audrey's home. She remained close to Sara after the relationship ended and she attended Sara's wedding to Julie in August 2013. The focus of her evidence is to record her contact with Jack at that wedding. I have no hesitation in accepting that her evidence was truthful.

Pamela Rodgers, Keith Morgan and Paula Morgan

83. Pamela is an accountant working for the NHS Staffordshire and Stoke Integrated Care Board. Keith is a retired Ministry of Defence Police sergeant who now carries out contract work for the Home Office. Pamela and Keith's mother was Audrey's identical twin. Jack was their uncle by marriage; Jack's children are their cousins. The families were close and spent a lot of time together at their respective family homes both in the UK and the US, as well as attending various family events over the years. As students, both Pamela and Keith were frequent visitors to Downs Edge. Their evidence primarily focused on various family events (attended by one or both of them) at which they had seen Jack. In particular, Sara's wedding to Julie in August 2013 (attended by Pamela), their own father's 80th birthday celebration in November 2014 (at which they were both present), a visit to HMS Belfast in the summer of 2015 (involving Keith) and the funeral of Sara's partner, Julie, in November 2016 (attended by both).

84. Mrs Paula Morgan, a specialist investigator with Thames Valley Police, is married to Keith but they separated in 2016. She also saw Jack at family events from 1998 onwards. She was also present at his 80th birthday celebration in November 2014 and Julie's funeral in November 2016.

85. I have no reason to doubt the evidence of Pamela, Keith and Paula, none of whom has anything to gain from these proceedings, and I accept it in full.

Further witness evidence given on behalf of the Claimants

86. The Claimants rely on the evidence of three witnesses admitted as hearsay evidence, together with one witness who was not required to attend court for cross examination by the Defendants.

Andrew Leonard

87. Andrew is Jack's youngest son. Owing to medical issues to which I have already referred, he was not able to attend court (either in person or virtually) to give evidence, due to the detrimental effect this would have had on his mental health.

88. Because he lives in the US Property, Andrew did not see his father much in the years leading up to the 2015 Will. However, he gives evidence in his statement of his observations at Sara's wedding in August 2013 and of a visit he made to see his father in August 2016. He also records an assurance that Jack made to him in August 2013 that he "*always wanted [Andrew] to have a roof over [his] head*".

89. Andrew is a party to this action and so potentially has a motive to give evidence which is supportive of the Claimants' case. However, given the limited nature of his evidence and the extent to which it tends to be supported by the evidence of other witnesses and by email correspondence between Andrew and his father, I am inclined to attach weight to his evidence, save where it involves multiple hearsay.

Gordon, Tessa and Christa Roberts

90. Gordon Roberts was at Manchester University with Jack and formed a life-long friendship with him. He worked with Jack at Eurotherm for some 20 years and he and his wife, Tessa Roberts, saw Jack and Audrey regularly prior to Audrey's death. After Jack's marriage to Margaret, Mr and Mrs Roberts did not visit them in their new home, but Jack and Margaret tended to visit the Roberts' home in Edinburgh about once a year. Sadly, Mrs Roberts is recently deceased and Mr Roberts, who is now 92 years old, suffers from a number of extremely serious health conditions which could put him at risk of a cardiac event if he were required to come to court to give evidence.

91. The statements of Mr and Mrs Roberts refer to a visit that Jack and Margaret made to their home in Edinburgh on 24 August 2015, and exhibit email correspondence between Mrs Roberts and Jack, together with an email that Mrs Roberts sent to her daughter, Christa Roberts, on 25 August 2015, describing the visit. Christa Roberts confirms receipt of that email in her evidence. Christa Roberts was able to provide oral evidence by video link but did not do so because the Defendants did not seek to cross examine her.

92. Mr and Mrs Roberts and Christa Roberts are all independent witnesses with nothing to gain from these proceedings and no motive for misrepresenting their last meeting with Jack. They were friends to Audrey prior to her death and subsequently to Margaret after

her marriage to Jack. There is no reason to suppose that they would favour one side of the family over the other. Given the contemporaneous exchange of emails between Mrs Roberts and Christa Roberts on 25 August 2015, I can safely infer that their recollections (which reflect that exchange) are accurate and I consider that I can attach considerable weight to their statements.

The Defendants' Witnesses

Mark and Diana Smith

93. Mark, the Third Defendant, is Margaret's oldest child from her marriage to Thomas. He has had a successful career in the family business. He has two children, Jennifer and Carolyn, with his wife Diana. Once the children started school, Diana joined him in the business. The couple sold the business in 2021 and are both now retired. Mark and Diana spent a great deal of time with Jack and Margaret, often holidaying with them at their villa in France and elsewhere. Relevantly, Mark and Diana give evidence about various occasions when they spent time with Jack between 2014 and 2019, including a holiday in Madrid in February 2014; a holiday in Alicante at Mark and Diana's villa in September 2014; Carolyn's wedding in August 2015; and two periods of a few months each when Mark and Diana stayed with Jack and Margaret at 2 Hutton Place (November 2016 – March 2017 and March-April 2018).

94. Generally Mark struck me as a witness who was trying to do his best to give accurate evidence, although he did not appear to have a particularly good memory of events and he was unable to answer a number of the questions he was asked. By way of example, he did not really remember the events surrounding Jack's admission to hospital in July 2015. Furthermore his evidence as to Jack's condition in 2016, which tended to suggest that Jack was still "on the ball" was, to my mind, plainly unrealistic and I do not consider him to be a reliable witness when it comes to his observations of Jack or understanding of his condition.

95. Mark made a couple of significant amendments to his witness statement in chief, changing his evidence that Jonathan had visited Margaret after Jack's death to say that in fact Jonathan had not visited, and also adding some wording to a conversation he said he had had with Jack in October 2015. I was also struck by the fact that (i) he had omitted to deal in his statement with a meeting that he had attended together with Margaret, Jack and Barclays in August 2016 to discuss Jack and Margaret's financial affairs and; (ii) in his oral evidence he was initially unable to explain why Margaret had sent a copy of her and Jack's 2015 Wills to him on 26 August 2016, ultimately saying (after initially suggesting that he may have needed the wills to register Jack's Enduring Power of Attorney) that Margaret may have sent them in case the hard copies of the wills were ever lost; i.e. he would "go with security" as the reason. In the circumstances, it seems to me that I must treat his evidence with caution, testing it against other available witness evidence and the contemporaneous documents.

96. Diana gave her evidence clearly and without hesitation, albeit on occasions providing what were, perhaps, unnecessarily long narrative answers. Rather disarmingly, she corrected her husband's recollection about Jack's use of hearing aids on a holiday in Spain. I have little doubt that Diana was generally doing her best to assist the court,

although, given the other available evidence, I consider Diana's evidence to the effect that she noticed no real change in Jack even by the end of 2016, beginning of 2017, to be unrealistic and the result, perhaps, of a flawed memory for dates and/or wishful thinking. Accordingly, I do not consider that I can rely on Diana's evidence as to Jack's condition at any given time, save where it is consistent with other, more reliable, evidence.

Liz Leslie and Andy Leslie

97. Liz, the Fourth Defendant, is Margaret's daughter. Since Margaret became unable to manage these proceedings through lack of capacity, Liz has had the most involvement in the sense of dealing with disclosure and liaising with the Defendants' lawyers. She is clearly extremely close to her mother and spends a considerable amount of time caring for her. In the final years of Jack's life, she also spent a great deal of time caring for him. I have no doubt that she is a devoted and loving daughter to Margaret and that she could not have been more delighted when Margaret married Jack, thereafter building a strong and affectionate relationship with him.

98. Liz has been married to Andy since April 2006. Andy is a very successful businessman and he and Liz have an extremely comfortable lifestyle. Between them they have four children from previous relationships, including Liz's two daughters, Francesca and Isabelle.

99. Andy was friendly with Jack by reason of their shared interest in flying helicopters for some time before he formed a relationship with Liz (who worked for FAST at the time). After they married, Liz and Andy spent a great deal of time with Margaret and Jack, joining them on regular holidays and attending many family celebrations and events. Andy confirmed the evidence of all other family members that Jack and Margaret were very close to all members of Margaret's family and Andy himself also formed a close bond with Jack, not least because he plainly enjoyed Jack's company a great deal.

100. Although Andy sought to "*put…on the record*" what he described in evidence as "second hand information" about the financial situation of Jack's children, which appeared likely to reflect a somewhat tainted view that may have come from Margaret or Liz, I nevertheless consider that, in general, he was a clear and straightforward witness, who was prepared to make appropriate concessions. In his statement he said that he saw Jack so frequently that "it is difficult to be precise about exactly when his condition changed", a difficulty that I find also afflicted many other members of Margaret's family.

101. Given this acknowledgement, I do not consider his evidence as to the timing of Jack's deteriorating condition to be reliable. I note in particular that Andy may not have understood the full extent of Jack's confusion in July 2015 when he appears to have been unconcerned about taking instructions (via Margaret) from Jack on the sale of his helicopter when Jack was in hospital, as is evidenced by email exchanges between him and Margaret on 7 July 2015. In an email of that day, Margaret told Andy that the GP had been "worried about the confusion etc." but did not elaborate and expressly told Andy not to mention anything to Liz, as Margaret did not want her to worry. I infer from this that Margaret did not always report the details of Jack's condition to members

of her family, perhaps because she did not want them to worry, perhaps because she did not want to believe that there was anything seriously wrong with him.

102. Liz was the subject of considerable criticism in cross-examination owing to the fact that very late disclosure was provided by the Defendants, including emails and documents contained on Jack's personal laptop and the iMac. Neither the iMac nor Jack's mobile phone (which appeared to have been wiped of all information, although Liz did not know why or by whom) had been searched adequately, if at all, until shortly before the start of trial. Having listened carefully to Liz's explanation, I have no doubt that in the early stages of these proceedings she had failed to appreciate (for whatever reason) the rigour required in the conduct of disclosure and had also failed to appreciate the scope of the searches that might be necessary, including in relation to individual devices. She was aware that disclosure had been provided in the form of the Will File and it was perhaps not unreasonable for her to believe that any relevant emails would be found on that file.

103. I do not believe that Liz acted deliberately in failing to search the devices to which I have referred until shortly prior to trial and nor do I consider that she made any attempt to obstruct the process of the court. I have no doubt that she did not wipe, or instruct anyone else to wipe, Jack's phone. Although there was a discrepancy in her evidence in respect of an email provided by her solicitors to the Claimants' solicitors during the course of the trial, I formed the view that this was most likely to have been the result of a misunderstanding; I certainly do not consider that there has been any foul play. Liz has plainly been under considerable pressure in recent months in trying to care and provide for her increasingly frail and cognitively impaired mother whilst at the same time being closely involved in her family's defence of this claim. She is not a lawyer and she cannot be expected to take a forensic approach to every document that she is shown, nor do I think it at all surprising that her evidence was that she had only read "some of" the, extensive, Will File.

104. Nevertheless, I found Liz to be a somewhat defensive witness, perhaps because she was (unsurprisingly) subjected under cross-examination to some early pressure on the issue of late disclosure. She was prone to argue the Defendants' case, as became very clear at the end of her evidence when she provided a lengthy explanation of the reasons why she thought she had been named in the 2015 Will. She also gave what I consider to be some unfortunate (and untrue) evidence about Jack's reaction to Sara's wedding. Whilst from time to time during her evidence she made appropriate concessions (including accepting candidly that Jack's own children mattered a great deal to him), overall I consider that I must treat her evidence with caution, testing it as appropriate against other contemporaneous evidence. In particular, I have formed the view that there are a number of important reasons why I must treat Liz's observations of Jack's mental capacity with considerable care:

    a. Liz did not accept that Jack's health problems (identified when he attended the GP in early July 2015) had been going on for six weeks (as Margaret had informed the GP) and gave the example of looking at Ordnance Survey maps with Jack while on holiday in France. Whilst this general recollection might have been true and whilst Liz might well (as she said) have "felt that [Jack] was able to understand very well" what she was saying to him, nevertheless, I consider that this evidence was apt to

give the wrong impression, particularly having regard to the contemporaneous account of Jack's health given by Margaret to his GP on 6 July 2015 and in an email to her niece, Helen Smith, on 15 July 2015. Further and in any event, it would seem that Margaret had sought to keep the full details of Jack's illness from Liz so as not to worry her.

b. Liz gave evidence that in her view Jack was "still very rational even after his diagnosis and after the EPA even", notwithstanding that by this time Jack plainly did not have the capacity to manage his own financial affairs. Whilst Jack may still have been able to function and interact with others in a domestic setting at this time, I consider this evidence likely to give something of a misleading impression of his overall capabilities, again having regard to the available contemporaneous evidence.

c. Liz expressed the view in cross-examination (no doubt genuinely held having experienced something similar with Andy's mother, who she says has experienced a series of "mini strokes") that Jack may have been fluctuating between periods of lucidity and periods of confusion at certain times, based on her evidence that "there were lots of occasions when we saw Jack in [2015] when he was fine". It appears to me to be important that she qualified this evidence with the words "it was very dependent on the situation", which seemed to me suggestive of an acknowledgement that there were certain tasks or activities which revealed that Jack was "not fine".

d. Liz gave (unlikely) evidence as to the possibility that Margaret had accessed relevant emails and forwarded them to Liz after she had been deemed to lack capacity to litigate owing to her own mental decline in February 2020. This appeared to me to display a level of optimism about her mother's likely capabilities which also tainted her evidence about Jack's cognitive abilities.

Charlotte Dennison, Michael Turner, Melissa Ward and Christopher Ward

105. Charlotte is Melanie's oldest daughter and half-sister to Michael and Melissa. They are the fifth to seventh Defendants.

106. Charlotte, Michael and Melissa first met Jack when they were children and spent a lot of time with Margaret and Jack when they were growing up, including during their mother's illness, inevitably becoming close to Jack and treating him as a grandfather. Melissa and Michael moved in with Margaret and Jack for a short time in 2006, after their mother's death. All three grandchildren remained close to Margaret and Jack into adulthood, seeing them regularly and spending time at the French Property. Charlotte gave evidence in her statement about the 2014 Gift.

107. Charlotte and Michael struck me as straightforward witnesses who were doing their best to assist the court. However, Michael says in his statement that Jack "slowed down" only after his fall in November 2015 and that although he saw Jack and Margaret once or twice a month he did not notice that Jack had "slurred speech". For reasons which will become clear, I am unable to attach any weight to this evidence and suspect that Michael's recollection for dates is flawed and that at this remove of time he is not accurately able to identify when Jack's symptoms began.

108. Melissa is married to Christopher and has two young children. Melissa works as an Employee Relations and Policies Associate Manager at a professional services company specialising in information technology services and consulting. Christopher is currently between jobs.

109. After Melissa met Christopher at the end of 2013, he would accompany Melissa on visits to Jack and Margaret. Christopher witnessed both Margaret and Jack's signatures on their respective wills.

110. Melissa and Christopher had no recollection whatsoever as to the circumstances in which Christopher came to witness Margaret's 2015 Will and little real recollection as to the circumstances in which Christopher came to witness Jack's 2015 Will on what was apparently a separate occasion only nine days later. This struck me as somewhat surprising, although Christopher's evidence about this was also reflected in an earlier witness statement made in February 2020 at a time when this dispute centred around whether Jack's 2015 Will had been duly executed. I shall need to return to the circumstances surrounding the execution of Jack's 2015 Will in due course, although for present purposes I observe that it may very well be that while the execution of a will may assume considerable significance for the person making the will, the events surrounding it may be of rather less importance to the witnesses concerned, who may also have little, if any, real understanding as to the potential significance of those events. On balance, therefore, I have no particular reason to doubt the evidence (such as it is) of Melissa and Christopher as to what took place. However, for reasons to which I shall return, I reject Melissa's attempt in her statement to suggest that Jack must have been "fine" because she could not remember anything to the contrary.

Francesca Cotton and Isabelle Aston

111. Francesca and Isabelle are Liz's two daughters. They met Jack when they were children and, like their cousins, Melanie's children, they saw him regularly and formed a very close relationship with him, treating him as their grandfather. They frequently went on holiday with Margaret and Jack and stayed with them at Downs Edge, and later 2 Hutton Place, on a regular basis. As adults, this close contact continued. Both Francesca and Isabelle gave evidence about occasions when they had contact with Jack from 2011 onwards.

112. Although it was apparent that Francesca and Isabelle had probably allowed their emotions to get the better of them when giving their evidence about specific occasions on which they had spent time with Jack, in the sense that they simply did not want to acknowledge that he was suffering from anything other than hearing difficulties, I do not consider that either was deliberately seeking to mislead the court. Francesca made a number of appropriate concessions during her oral evidence and Isabelle expressly accepted that her written evidence had been tainted by her emotions. Isabelle, with one exception, did not recall seeing Jack and Margaret in 2015 and, although Francesca had seen them in 2015, including at a dinner in London in July 2015, her evidence went no further than that she "[could] not recall" that Jack was any different on these occasions and "[could]" not recall that she was concerned about him. In the face of other evidence to which I shall return, I am unable to attach any real weight to this evidence.

Rana Mutsuddi

113. Mr Mutsuddi was Jack and Margaret's advisor between the summer of 2012 and 2013 when he worked for Barclays Wealth and Investment Management. He gave evidence of meetings he attended with Margaret and Jack and dealings he had with them during that period. In particular he was involved in advising on and putting in place various arrangements designed to mitigate the effect of Inheritance Tax, including the 2013 Transfer to Margaret to enable her to invest in a Discretionary Discounted Gift Trust ("**the DGT**"). He also attended one conference call with Jack and Margaret in October 2014, albeit he appears to have been there primarily to explain to Jack and Margaret's then advisers, Ms Wells and Ms Bultitude, the trust structures that had been put in place by Barclays for Jack and Margaret.

114. Although, in his witness statement, Mr Mutsuddi appears to have overstated the extent of his ability to provide evidence from his own recollection, a feature which became clear during his oral evidence when he frequently said that he was unable to recollect what had happened, I nevertheless formed the general impression that he gave his oral evidence in a straightforward and truthful manner with a view to assisting the court.

Carol Wells

115. Ms Wells is a Chartered Tax Adviser with over 30 years' experience in tax, but with no other legal qualifications. She trained in tax at KPMG and then worked briefly for a couple of other accountancy practices before joining Irwin Mitchell in November 2003, where she worked in the Wills, Trusts & Probate Department based in their offices in Sheffield until December 2016. By 2013, when she was instructed by Jack and Margaret, Ms Wells had approximately seven years of experience of drafting wills for clients. She specialised in wills for clients of high net worth and those that required bespoke advice on more complex estates or on tax mitigation by, for example, maximising the use of nil rate bands or creating life interest trusts. Her evidence is that as her career has always been in "private client", issues of mental capacity have always arisen and she was and is fully aware of the relevant test for mental capacity to be found in the case law.

116. During her work for Jack and Margaret, Ms Wells' husband was terminally ill and so was regularly in and out of hospital undergoing chemotherapy and other treatments. He sadly died in September 2015. Unsurprisingly, this distressing period of Ms Wells' life affected her ability to keep on top of all of her work and was, as she herself admits, a cause of some delay in drafting Jack and Margaret's wills. It may also explain the many unfortunate errors that are evident in the Will File.

117. By and large, Ms Wells struck me as a truthful witness who was prepared to make admissions and concessions where appropriate, including as to mistakes she had made in dealing with Jack's testamentary instructions. It was her written evidence that she had a clear recollection of her meetings with Jack and Margaret, together with her impression of them at the time, but this was not entirely borne out in her oral evidence when she was (unsurprisingly) often dependent upon what the documents showed and upon a likely reconstruction of events. Nevertheless, I accept that she had a good memory of Jack and Margaret as individuals together with a recollection of how they

talked about their respective families and what Jack wished to achieve in general terms by his new will.

118. In so far as it was Ms Wells' evidence that at no time did she think that Jack lacked testamentary capacity, whilst I do not doubt that Ms Wells was accurately reflecting what she believes she thought at the time, it is ultimately a question for me having regard to all of the evidence whether she was mistaken about this. It is the Claimants' submission that her evidence on this score is "worthless", owing (amongst other things) to her failure to comply with "the Golden Rule", a point to which I shall return later.

Sophia Bultitude

119. Ms Bultitude worked for Barclays between 2012 and 2019. She first met Jack in 2013 when she was line-managing his personal banker. Following a restructuring, she became Jack's private banker in early 2014, and last met him in August 2016.

120. It was clear that Ms Bultitude was extremely concerned to ensure that her evidence was accurate. She refused to sign a witness summary prepared for her by the Defendants' solicitors which she did not feel correctly reflected her evidence and in circumstances where she had not been able adequately to refresh her memory because (in her view) Barclays had failed to disclose all the relevant materials that should have been available on their files.

121. Although her general approach to her evidence appeared to be that she should educate the court on all sorts of detailed issues about which she had not been asked (which tended to lead to long and verbose answers to questions, particularly when giving evidence in chief), Ms Bultitude nevertheless struck me as an honest witness who was genuinely doing her best to assist the court in a way she thought most likely to be useful. From time to time, however, this willingness to help appeared to me to go too far in seeking to "interpret" documents.

122. Ms Bultitude had the opportunity to see and speak with Jack at various meetings and she also liaised with him by email and spoke with him over the phone. I have no doubt that she had a clear recollection of Jack as one of her "favourite clients" describing him in glowing terms. Barclays had an internal policy for dealing with elderly and vulnerable clients, but it became apparent during her evidence that it was "self-certifying" and that "if the client would say 'No', as Jack did" to a third party being present when advice was given, "that box was ticked and you would just proceed". Accordingly, as with Ms Wells, I must consider her evidence as to Jack's capacity with considerable caution.

Evidence given on behalf of the Defendants pursuant to Hearsay Notices

123. The Defendants rely upon the hearsay evidence of Mr David Smart of Smart & Co Accountants, Jack's accountant for over 25 years. Mr Smart is 81 years old and is suffering from prostate cancer, is on medication which makes him drowsy and also has a gravely ill wife.

124. Mr Smart was involved in the incorporation of FAST and LTH and he prepared the company accounts for those companies, which he would send to Deloitte to enable them to prepare Jack's personal tax return. Mr Smart gives evidence in his statement about the sale of the Tally Ho! in 2013/2014, and the subsequent liquidation of LTH, including his contact with Jack, together with his involvement in an investigation by HMRC in 2016 into Jack's tax returns, during which he attended a meeting with Jack. Mr Smart expresses the view, based on his interactions with Jack at this time, that Jack continued to have capacity to instruct him fully and to understand advice as to his financial affairs.

125. Mr Smart's evidence as to Jack's capacity in 2016 is inconsistent with the contemporaneous documents and, in the circumstances, I can attach no weight to that evidence. I infer that his recollection over Jack's precise mental state at any given time is mistaken.

Potential witnesses who were not called

126. In closing, the Claimants submitted that it was "worth considering" who had not been called by the Defendants to give evidence of fact. They were specifically referring to the other attesting witness to Jack's 2015 Will, Mr Sisley, and the neighbour who witnessed Margaret's 2015 Will on 10 October 2015. They also pointed out that there is no evidence from various individuals at Deloitte and Barclays who had dealings in the relevant period with Jack and that "it would have been open" to the Defendants to disclose a witness statement prepared for Margaret in 2019/20, before she lost the capacity to litigate, by Mishcon de Reya, her then solicitors.

127. I questioned Ms McDonnell in closing as to whether the court was being invited to draw inferences by reason of the absence of these possible witnesses or the failure to disclose Margaret's statement, but she indicated that she did not go that far. She was right to do so in relation to Margaret's statement, which is a privileged document in respect of which it would, in any event, be inappropriate for the court to draw any adverse inference. Given that the Claimants do not invite any adverse inferences to be drawn in respect of any of the possible witnesses, I do not consider these submissions to take matters further.

128. For the sake of completeness, I note that the Defendants asked me to discharge a witness summons in relation to Mr Aaron Cane (a solicitor who was involved in the sale of the Tally Ho!), which I did. In circumstances where he therefore did not attend to give evidence, I need say no more about him. In the trial bundle, the Defendants included a witness statement for Ms Patricia Mock, formerly of Deloitte, who was involved in assisting Jack with his tax returns and met him on one occasion in August 2016 in the context of the investigation by HMRC into his tax affairs. Although the Claimants indicated in their closing submissions that they did not challenge this evidence, the Defendants made no reference whatever to it at the trial and I can only infer that they agreed with the Claimants' submission that Ms Mock's evidence adds nothing of any weight to the evidence of Mr Mutsuddi, Ms Bultitude and Ms Wells, who all had more relevant interactions with Jack across the will-making period.

(ii) <u>The Expert Evidence</u>

129. Each side called an expert in old age psychiatry. The experts signed two joint statements, the first (dated 24 August 2023) simply identifying and confirming the necessity that they be instructed by reference to the same documents and the second (dated 29 October 2023) setting out the areas on which they were able to agree, together with areas of disagreement.

The Claimants' Expert: Dr Warner

130. Dr James Warner MD FRCP FRCPsych has been practising as a consultant psychiatrist since 1 November 1998, specialising in older adult's mental health. He is approved under Section 12(2) of the Mental Health Act 1983 ("**the MHA**") and is an Approved Clinician under subsequent amendments of that Act. He has substantial experience in assessing mental capacity and has undertaken primary research and published peer reviewed articles in this area. He teaches extensively on mental capacity to clinicians and lawyers. In addition to the joint statements, Dr Warner prepared three reports for the court, his first dated 8 August 2020, his supplementary report (replying to Dr Series' first report) dated 9 December 2020 and his Addendum Report dated 24 July 2023, setting out a much expanded chronology and commenting on the witness statements.

131. Dr Warner gave clear and helpful oral evidence, and obviously has a great deal of experience in the assessment of mental capacity. However, he was perhaps not always as careful as he might have been in giving his evidence; he confirmed the truth of all of his reports without acknowledging that his views had changed (very substantially) over time and he also did not mention (as he should have done when he first went into the witness box) that he had heard some factual evidence whilst sitting in court which undermined at least one of the opinions he had expressed in his Addendum report. On occasions when giving his oral evidence, Dr Warner also showed a slight tendency to argue a point on the documents.

132. Nevertheless, in general terms, I had no reason to question Dr Warner's views and the reliability of his evidence as to matters falling within his expertise and I do not consider the examples of a lack of care to which I have referred to be anything other than simple oversight. Importantly, to my mind, Dr Warner's willingness to change his view as to Jack's likely capacity to make the 2013 Transfer and the 2014 Gift seems to me to evidence an impartial and entirely proper approach to the giving of expert evidence.

The Defendants' Expert: Dr Series

133. Dr Hugh Series DM, FRCPsych, LLM, MA, MB, BS has practised as a consultant in the psychiatry of old age since 1995. He is also approved under section 12 of the MHA and is an Approved Clinician. He is trained and approved as a Deprivation of Liberty assessor and is a medical member of the First Tier Tribunal (Mental Health). Dr Series is a Fellow of the Royal College of Psychiatrists and a member of the Faculty of Law at the University of Oxford, where he was also an honorary senior clinical lecturer in the Department of Psychiatry between 1991 and 2014. In addition to the joint statements, Dr Series prepared three reports for the court: his first report dated 30 October 2020, his Addendum report dated 9 March 2021 (replying to the first report of Dr Warner) and his third report dated 1 August 2023.

134. Dr Series also gave clear and helpful evidence, illustrating his expertise in the field of the assessment of mental capacity. I had no reason to suppose that he was doing anything other than seeking to assist the court and I accept that he gave reliable and genuine evidence on topics that fell within his expertise. Although his view as to the likely absence of testamentary capacity on the part of Jack as at the date of the 2015 Will differs from that of Dr Warner, I think there is in reality very little between them.

The Expert Evidence Generally

135. Both experts agree in their second joint statement that when the 2015 Will was made, Jack was suffering from dementia, probably mixed Alzheimer's and vascular dementia. In so far as their agreement concerns medical matters, relevant to their expertise, they also agree (i) that dementia can affect executive function but that this is a matter of degree; (ii) that simple tests of cognition do not always reveal executive dysfunction; (iii) that the detailed neuropsychological assessment carried out on 5 August 2015 "indicated problems with executive function"; but that (iv) "although executive function is important in decision making, testamentary capacity should not be determined from tests of executive function alone". I have no hesitation in accepting this evidence.

136. Neither expert examined Jack in his lifetime and neither is able to say with certainty whether he had testamentary capacity on the date he signed the 2015 Will. They are dependent on what they can deduce from the contemporaneous medical records and the available evidence. They both acknowledge that it is ultimately for the court to draw factual conclusions as to Jack's testamentary capacity at the time he executed the 2015 Will and it is clear from their reports and joint statements that, put simply, their differing conclusions are primarily a function of the different views they take as to the available evidence. Thus, as Dr Warner says in his Addendum Report, his conclusions ultimately depend to a significant degree upon the extent to which the court accepts the Claimants' evidence as to Jack's cognitive decline. By contrast, Dr Series' conclusions place particular emphasis on the long and detailed process that Jack undertook in making his 2015 Will and on the statement of Ms Wells (as Jack's professional adviser) which, if accepted by the court, would in Dr Series' opinion, as set out in his third report, lend considerable weight to the view that Jack had capacity at the material time. These differences of approach (together with the different emphasis they each attach to the documentary evidence available to them having regard to the witness evidence) explain their differing views as to the likely severity of Jack's executive dysfunction as identified by the cognitive testing.

137. In the circumstances, this is not a case in which I shall need to prefer the views of one expert over another. They have based their opinions upon their individual reading of the facts without knowing what findings the court will ultimately make. Those opinions are not ultimately determinative of testamentary capacity.

138. Each expert carried out an analysis of the available contemporaneous documents with a view to identifying indicators from those documents as to the cognitive level at which Jack was able to function at the relevant time. In light of that analysis (and having regard to their approach to the evidence more generally), they each sought to opine on

the requirements for testamentary capacity as identified in the well-known case of *Banks v Goodfellow* (1869-70) LR 5 QB 549.

139. I was initially concerned that the court could derive little, if any, assistance from such an exercise and that concern was not much dispelled when I heard the experts give their oral evidence. While the court can potentially gain considerable assistance in a case requiring a retrospective assessment of mental capacity from the experts' analysis of existing medical records, their explanation as to the nature and likely cognitive impact of the condition from which the deceased was suffering, their analysis of investigations, scans and tests carried out on the deceased together with their assessment of the potential rate of cognitive decline, nevertheless there is only very limited assistance to be gained from their views (for example) of individual emails sent by the deceased or evidence given by the witnesses in their statements, particularly where they are being asked to give their views on individual documents in a vacuum, without any clear understanding of the totality of the evidence.

140. Furthermore, 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, including, importantly, the complexity of the relevant will (see *Simon v Byford* [2014] EWCA Civ 280 at [17] per Lewison LJ referring with approval to the decision of the Court of Appeal of New South Wales in *Zorbas v Sidiroppulous* (No 2) [2009] NSWCA 197).

141. 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. It is worth noting that the experts' reports did not, in any event, deal with the new documents disclosed from Jack's laptop and from the iMac.

(iii) <u>The Documents</u>

142. There are various categories of documentary evidence available to the court in this case. The Will File, the Barclays documents, Jack's medical records, documents evidencing Jack's financial and business affairs and his assets, together with numerous other documents, including the documents found recently on Jack's laptop and on the iMac. This abundance of documents means that the court has available to it, not only evidence of Jack's medical condition at the relevant time, but also evidence of Jack's interactions with his family and his advisers over the entirety of the period in which he was providing instructions to Ms Wells in respect of the 2015 Will.

143. It was no doubt the availability of these documents combined with the very different perception of each side's witnesses as to Jack's mental capacity at any given time which led the Claimants to submit that the court might wish to have regard to the oft-cited guidance of Leggatt J, as he then was, in *Gestmin SGPS SA v Credit Suisse (UK) Ltd*

[2013] EWHC 3560 (Comm) at [15]-[22] as to the fallibility of human memory and the importance of focussing on the contemporary documents as a means of getting at the truth. The Defendants did not disagree with this suggestion.

144. Whilst this is not a commercial case involving many thousands of documents, nevertheless I accept that, in general terms, the witness evidence must be tested against the contemporaneous documents (in so far as that is possible) and a determination reached as to the weight it should carry. Undisputed contemporaneous documents are likely to provide a better guide to the truth than oral testimony, which, as I have already said, is inherently unreliable, particularly where witnesses claim to be able to recall events or conversations which took place many years ago and where their recollection of events is necessarily overlain with events that have happened since and their willingness (unconscious or otherwise) to support one side or the other (see *Wrangle v Brunt* [2021] EWHC 368 (Ch) per Michael Green J at [22]).

145. Whilst the credibility of the witnesses is necessarily in issue, I consider the contemporaneous documents (to which I shall return in a moment) to provide an important means of discerning exactly where the truth lies. My findings of fact must, however, be based on an analysis of the totality of the evidence available to the court. I do not read *Gestmin* as disapproving of such an approach and, to my mind, it is the only approach to be taken in a case of this sort (consistent also with the later guidance given by Floyd LJ in *Martin v Kogan* [2020] FSR 3 at [88]). As the Claimants contend, the 2015 Will must be considered in its context, against the backdrop of Jack's character and previous testamentary intentions, as well as his family relationships, his health and his obligations to Margaret and to his children. Having said that, the abundance of documents in this case means that I cannot possibly refer to, or analyse in detail every document included in the 987 page core bundle provided by the parties after the hearing – instead, the approach I have taken is to refer to key staging posts together with documents and evidence from around the same date. When it comes to the Will File, I have tried to provide a detailed narrative of what took place over a two year period, whilst at the same time trying to remain circumspect about including too much detail, save where relevant.

146. I should mention at this juncture two additional points that were raised on the approach to be taken to documents. The first, concerned the suggestion by the Claimants in their opening submissions that the Will File contained "a number of unsatisfactory emails" from Jack, which the Claimants suggested might have been written by Margaret. This approach was objected to by the Defendants on the grounds that the Claimants had not served notice under CPR 32.19 challenging the authenticity of any documents[1]. However, in the event, I did not understand the Claimants to pursue this argument, making it clear in closing that they did not question the identity of the author of specific documents and saying that they wished to go no further than to suggest that Margaret had had some involvement in the preparation of documents. In the circumstances, I heard no detailed argument on the point in closings and I need address this point no further.

[1] The Claimants in fact then served a notice on 4 December 2023, but, in the event, they did not seek to rely on it.

147. Second, in their closing submissions the Defendants invited me to draw an inference that the recently disclosed documents from Jack's laptop and the iMac are of no real assistance to the Claimants in circumstances where Ms McDonnell did not seek the court's permission to take Dr Warner through those documents by way of evidence in chief. However, I do not consider this to be an appropriate inference to draw. Aside from the fact that, as Ms McDonnell pointed out in closing, such a course of action would have resulted in an unnecessary lengthening of the trial, the question of what inference is to be drawn from the documents is, as I have already said, a question for the court.

The Law

148. Before I turn to consider in more detail the evidence relevant to the issues before the court, I should first deal with the law relating to testamentary capacity and knowledge and acceptance. Much of this was common ground, although there were some differences of emphasis between the parties.

Testamentary Capacity

149. In addition to the procedural formalities with which a will must comply, a will must also be substantively valid. The basic legal requirements for validity are that people are mentally capable of understanding what they are doing when they make their will and that what is in the will truly reflects what they freely wish to be done with their estate on their death (see *Hawes v Burgess* [2013] EWCA Civ 19 per Mummery LJ at [14]). Thus a will lacks validity if (i) the testator lacks testamentary capacity; (ii) the testator does not know and approve of the contents of the will at the time of execution; (iii) the execution of the will has been procured by undue influence; or (iv) the will, or particular bequests in the will, has been obtained by fraud. I am concerned in this case with only the first and second of these grounds for negativing testamentary intention, as no case of fraud or undue influence has been pleaded by the Claimants.

150. It is common ground that the correct legal test for testamentary capacity in a case such as this, where the Court is assessing the capacity of a deceased testator retrospectively, is the common law test first articulated in *Banks v Goodfellow* (1870) LR 5 QB 549 per Cockburn CJ at 565:

> "It is essential…that a testator (i) shall understand the nature of the act and its effects, (ii) shall understand the extent of the property of which he is disposing; (iii) shall be able to comprehend and appreciate the claims to which he ought to give effect; (iv) 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".

I have inserted the numbering (i)-(iv) into this passage for ease of reference.

151. The *Banks* test, which is generally treated (as I have indicated) as divisible into four elements, or "limbs" as the parties before me put it, was described by the Court of Appeal in *Sharp v Adam* [2006] EWCA Civ 449 at [66] as having "stood the test of time", and was re-affirmed recently by Falk J (as she then was) in *Clitheroe v Bond* [2021] EWHC 1102 (Ch), who described the *Banks* test as "very well settled" and one "which has proved sufficiently flexible to take account of developments, in particular developments in medical understanding" [81].

152. Drawing together the strings of the authorities in which the scope and application of the *Banks* test has been considered, the following additional features appear to me to be worth restating:

a. as *Banks* itself makes clear at 564, freedom of testamentary disposition will sometimes produce the result that a testator makes a valid will which is influenced by caprice or passion or the power of new ties. However, as Lord Neuberger MR said in *Gill v Woodall* [2011] Ch 380 (CA) at [26]:

> "the law in this country permits people to leave their assets as they see fit, and experience of human nature generally, and of wills in particular, demonstrates that people's wishes can be unexpected, inexplicable, unfair and even improper".

Thus the question for the court is <u>not</u> whether the will is a fair one in all the circumstances of the case (see also *Cowderoy v Cranfield* [2011] EWHC 1616 (Ch) per Morgan J at [133]).

b. Nevertheless, if the provisions of a will and its outcome are surprising, inexplicable or irrational that may be material to the court's assessment of whether the testator did have capacity, or indeed, knew and approved the terms of the will (see *Sharp v Adam*; *Cowdery v Cranfield* at [133] and *Hughes v Pritchard* [2022] Ch 339 (CA) at [95] and [101]). In general terms this is because, as the judgment in *Banks* at 563 makes clear, and the Court of Appeal in *Sharp v Adams* reiterates at [67], the exercise of a testator's power to make a will involves "a moral responsibility of no ordinary importance".

c. It is not the law that a person suffering from reduced cognitive abilities owing to a mental illness has no testamentary capacity. The enquiry is whether, in a particular case, the mind is so unsound that "the testator cannot understand what he is about…or his ability to make a rational decision is absent": *Gardiner v Tabet* [2021] EWHC 563 (Ch) per Fancourt J at [91].

d. the *Banks* test concerns the ability or capacity to understand the matters identified therein; it does not require actual understanding or recollection and it is not to be equated with a test of memory. There is no requirement that the testator actually remembers the extent of his property and deficiencies of memory are not the equivalent of incapacity. If there is evidence of actual understanding and recall then that would prove the requisite capacity, but there will often be no such evidence, and the court must then look at all the evidence to see what inferences can properly be drawn as to capacity. (See *Hoff v*

Atherton [2004] EWCA Civ 1554 per Peter Gibson LJ at [33]-[34]; *Simon v Byford* at [40]-[41] and *Hughes v Pritchard* at [98]-[99]).

e. Relevant evidence may relate to the execution of the will, "but it may also relate to prior or subsequent events" (*Hoff v Atherton* at [34]).

f. When considering testamentary capacity, the court is concerned with the ability to make decisions, not merely the ability to understand a given transaction, or a particular choice that has already been made, which are issues to be considered under "knowledge and approval" (see *Perrins v Holland* [2010] EWCA Civ 840 at [64] and *Simon v Byford* [2014] EWCA Civ 2080 at [47]).

g. When evaluating limb 2 of the *Banks* test, there is no need for the testator to be able to compile a mental inventory or valuation of all his assets disposed of by his will, but merely to have "a general idea" of those assets (see *Todd v Parsons* [2019] EWHC 3366 (Ch) per HHJ Paul Matthews at [144]). He does not lack testamentary capacity because he is mistaken about, or fails to ascertain full details of his property (see *Minns v Foster* Ch, 13 December 2002 (unreported) at [115]). Furthermore, there is no need for knowledge of the actual value of assets (see *Blackman v Man* [2007] EWHC 3162 at [118] per Sir Donald Rattee J and *Schrader v Schrader* [2013] EWHC 466 (Ch) per Mann J at [81]).

h. When evaluating limb 3 of the *Banks* test, the testator must have capacity to comprehend the nature of the claims of others, whom by his will he is excluding from all participation in his property (See *Banks* at 568-70 where Cockburn CJ refers with approval to *Harwood v Baker* (1840) 3 Moo PCC 282 at 291). Reference to the terms of a previous will may be a helpful safeguard when seeking to confirm that the third limb is satisfied, but the relevance of any changes and hence the enquiry about them will depend on the facts of the case (*Hughes v Pritchard* at [94]). A testator who forgets family members' names will not necessarily lack testamentary capacity (*Edkins v Hopkins* [2016] EWHC 2542 (Ch) at [46]), although a testator who could not remember the identity of close friends or family members, or could not recognise them, has been found to lack it (*Couwenbergh v Valkova* [2008] EWHC 2451 at [278]-[279]).

i. A testator is not required to be able to recall the terms of a past will, or the reasons why it provided as it did, provided he is capable of accessing that information (if needed) and understanding it if reminded of it (see *Hughes v Pritchard* at [99]). The fact that a testator forgets a promise previously made about the disposition of his estate does not mean that he does not have capacity to appreciate moral claims on his estate (see *Todd v Parsons* [2019] EWHC 3366 (Ch) at [147]).

j. There is no requirement that a testator understands the collateral consequences of a disposition, as opposed to its immediate consequences (*Simon v Byford* at [45]), just as there is no requirement that the testator should understand or remember the extent of anyone else's property or the significance of his assets to other people (*Simon v Byford* at [46]).

k. The question with which the court is concerned when considering the *Banks* test is transaction and issue specific. The testator must have the mental capacity (with the assistance of such explanation as he may have been given) to understand "the particular transaction and its nature and complexity" (see *Hoff v Atherton* at [33] and *Hughes v Pritchard* [2022] Ch 339 at [65]). This would appear to encompass not only the complexities in the will itself (limb 1), but also the complexity of the testator's property (limb 2) and of the moral claims on his estate (limb 3).

153. Very recently, the *Banks* test was applied by the Court of Appeal in *Hughes v Pritchard* per Asplin LJ at [62]-[63]. Paraphrasing the questions posed in that case by Asplin LJ, the questions to be asked in this case when considering the first to third limbs of Banks are: (i) was Jack able to understand the nature of the act of making the 2015 Will and its effect? (ii) was Jack able to understand the extent of the property of which he was disposing? and (iii) was Jack able to comprehend and appreciate the claims to which he ought to give effect?

154. There was some argument at trial, in part prompted by Asplin LJ's identification of only three questions for determination in *Hughes v Pritchard*, over whether the fourth limb of the *Banks* test is really a sub-set of the third limb, or whether it stands on its own and, if the latter, exactly what it is intended to cover.

155. In my judgment, the fourth limb is plainly a separate element, as was illustrated by the decision in *Sharp v Adam* (a case involving a testator who had multiple sclerosis) where the Court of Appeal upheld the Judge's decision that only the fourth element of the *Banks* test was not satisfied owing to the fact that the testator's will was irrational. The Court of Appeal observed at [69] that, with reference to the fourth limb, the judge could have asked "whether [the testator's] human instincts and affections, or his moral sense, had been perverted by mental disease" (see also *Kostic v Chaplin* [2007] EWHC 2298 per Henderson J at [198]). The Court of Appeal went on to observe at [93] that the fourth limb is "concerned as much with mood as with cognition". It is in this way that it is to be distinguished from the previous three limbs, which are purely concerned with cognition. Consideration of the fourth limb will often arise in the context of a case involving "insane delusion" (and *Banks* was one such case), but it is clear that it is not solely applicable to such a case; a "disorder of the mind" is a more general and diffuse concept admitting of a myriad of different forms of mental disease. This interpretation is evident in *Gardiner v Tabet* [2021] EWHC 563 (Ch) at [144], where, in dealing specifically with the fourth limb, Fancourt J said that "although [the testator] did suffer a disease of the mind it was not such as to poison his mind [against potential beneficiaries] or such as to prevent him from making a just and rational testamentary disposition of his estate".

156. Against that background, I reject Ms McDonnell's submission that Asplin LJ's formulation of three questions in *Hughes v Pritchard* was intended to convey her understanding that the fourth limb of the *Banks* test forms part of the consideration of the third limb. On the contrary, in my judgment, Asplin LJ addressed only those three questions because they were the questions thrown up on the facts of that case. Asplin LJ did however expressly acknowledge (at [95]) that the existence of inexplicable or

irrational provisions in a will is likely to raise "serious doubt as to capacity", a reference which, to my mind, encompasses the fourth limb of *Banks*. Setting "insane delusion" to one side, the fourth limb requires the court to consider whether a "disorder of the mind" prevents a testator from making a just and rational disposition of his estate (whether because his affections have been poisoned, his sense of right has been perverted or the exercise of his natural faculties has been affected), the focus therefore being on the outcome of the disputed will.

157. In this case, the question for the court (ignoring the reference to "insane delusion" which does not apply on the facts) is: was Jack suffering from a disorder of the mind which poisoned his affections, perverted his sense of right or prevented the exercise of his natural faculties thereby causing him to bring about a disposal of his property which, if his mind had been sound, would not have been made?

Burden of Proof and evidence

158. It is common ground that testamentary capacity at the time of execution of a will may be presumed provided that the will is not irrational upon its face (i.e. in the way it is set out, not in terms of the rationality of its dispositions). However, if there is a challenge to the validity of the will so as to raise a real doubt as to capacity, or if there is evidence of insanity at any time prior to the execution of the will, the evidential burden will shift to the person propounding the will to prove that the testator was of sound disposing mind at the time when he made his will (see *Hughes v Pritchard* at [64]). The standard of proof is the balance of probabilities. Although expert evidence may be of assistance, the issue as to testamentary capacity is a decision for the court.

159. The doubt as to capacity must be 'real' and supported by evidence demonstrating a real possibility or probability that the testator lacked capacity. This must relate to the deceased's cognitive abilities.

160. The Defendants suggest that the Claimants have failed to raise a real doubt as to capacity on the facts of this case, relying on *Re Watson* [2008] EWHC 2582 (Ch) per Floyd J, as he then was, at [81]:

> "...a diagnosis of mild or even moderate dementia is not itself an obstacle to satisfying the requirements of testamentary capacity".

However, this observation was not made in the context of a consideration as to whether real doubt had been raised in that case, but rather in connection with an acknowledgement that the medical evidence showed that a testator suffering from dementia might possess testamentary capacity on one particular day, but not on another. I do not consider this to assist on the question of when the circumstances of a particular case give rise to a "real doubt". Equally, the fact that there are cases in which the court has found testamentary capacity on the facts notwithstanding a diagnosis of dementia does not mean that the "real doubt" threshold has not been met.

161. It is perhaps unsurprising that there is no clear statement in the authorities as to the nature of the evidence required to satisfy the requirement for real doubt, because in my

judgment, each case will inevitably turn on its own facts. Here, the evidential anchor to which I have already referred of the medical assessment conducted on Jack in July and August 2015 is plainly sufficient. When that is combined with (i) the agreed matters in the expert joint statement (including that the assessment on 5 August 2015 indicated problems with executive function); (ii) the fact that there is disagreement between the experts based on the evidence as to the impact of Jack's symptoms (i.e. whether his dysexecutive syndrome undermined his testamentary capacity) and (iii) that there is at least one aspect of the 2015 Will which, to my mind, appears surprising, I can see no basis whatever for any conclusion other than that this is a case of "real doubt". I note that in *Simon v Byford* the testatrix was suffering from 'mild to moderate' dementia which the experts agreed in that case put her testamentary capacity in doubt. In all the circumstances, the burden in this case falls on the Defendants.

162. Having said that, however, I observe that, as the Court of Appeal said in *Sharp v Adam* at [74],

> "[c]ases are only decided on the burden of proof if, exceptionally, the court is unable to reach an evaluative decision on the evidence taken as a whole". That is not this case. I have heard a substantial amount of evidence from which I am able to arrive at a conclusion, on the balance of probabilities, making all appropriate allowances for the usual fallibility of witnesses' recollections. I doubt it makes any real difference who bears the burden of proof. As Norris J said in *Wharton v Bancroft* at [28(h)], "identifying the legal and evidential burden is simply a tool to enable the probate judge to identify and weigh the relevant elements within the evidence, the ultimate task being to consider all the relevant evidence available and, drawing such inferences as the judge can from the totality of that material, to come to a conclusion as to whether or not those propounding the will have discharged the burden of establishing that the document represents the testamentary intentions of the testator".

163. In this context, it is worth identifying that it is likely to be more difficult to challenge the validity of a properly executed will that "has been professionally prepared on instructions and then explained by an independent and experienced solicitor to the maker of the will" than it is to challenge the validity of a will "where those prudent procedures have not been followed": *Hawes v Burgess* [2013] EWCA Civ 19 per Mummery LJ at [13]. Asplin LJ pointed out in *Hughes v Pritchard* at [80] that although the evidence of a solicitor involved in drafting the will:

> "…is of very considerable importance and should be given due weight, obviously, the judge must evaluate all of the relevant evidence in relation to capacity. There may be clear evidence contrary to that of the solicitor. Furthermore, it should be borne in mind that the weight to be given to the conclusions reached by the lawyer drafting the will depends on the circumstances. As Christopher Pymont QC, sitting as a deputy High Court

> judge, quite properly pointed out in In re Ashkettle, decd [2013] WTLR 1331, para 43: 'Any view the solicitor may have formed as to the testator's capacity must be shown to be based on a proper assessment and accurate information or it is worthless…' There may be good reason to place less reliance on the solicitor's evidence, depending on the circumstances."

164. As I shall explain in due course, there are reasons here to place considerably less reliance than might otherwise be the case upon the evidence of Ms Wells, who was not a qualified solicitor and who did not see Jack for almost exactly a year prior to his execution of the 2015 Will. Importantly, the Claimants submit, she did not comply with the so-called "Golden Rule", the substance of which is:

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

(per Briggs J, as he then was, in *Re Key Deceased* [2010] 1 WLR 2020 (Ch) at [7]). Although the non-compliance with this rule does not operate as a touchstone as to the invalidity of a will, nonetheless, it is the Claimants' submission that the failure to follow the Golden Rule by Ms Wells is startling given Jack's age and the alarm bells that it is suggested should have been ringing.

The rule in *Parker v Felgate*

165. The rule in *Parker v Felgate* 8 PD 171, was summarised by Asplin LJ in *Hughes v Pritchard* at [69] with reference to *Perrins v Holland* [2011] Ch 270 (CA), in the following terms:

> "…a testator who lacks testamentary capacity at the time of the execution of the will may make a valid will, nevertheless, if: he or she had testamentary capacity at the time when he/she gave instructions to a solicitor for the preparation of the will; the will is prepared so as to give effect to the instructions; the will continues to reflect the testator's intentions; and at the time of execution, the testator is capable of understanding, and does understand, that he is executing a will for which he has given instructions".

166. It is the Defendants' alternative case that, if Jack did not have testamentary capacity when he signed the 2015 Will, nevertheless this rule applies on the facts, because (as pleaded in the Defence) Jack:

> "had testamentary capacity when he gave the effective instructions for the 2015 will on 2 July 2015, the 2015 will was prepared so as to give effect to those instructions and, when he executed the 2015 will, [Jack] both had capacity to understand and did understand that he was executing a will for which he had given instructions".

Knowledge and Approval

166. It is common ground that the requirement of knowledge and approval of a will is a requirement that the particular will truly represents, on the balance of probability, the testator's testamentary intentions. The onus lies on the propounder of the will, the Defendants in this case (see *Fuller v Strum* [2001] EWCA Civ 1879 at [32], [59] and [70]). Where there is nothing to excite the suspicion of the court, knowledge and approval will be inferred from proof of due execution and testamentary capacity. Where, however, the circumstances are suspicious, the propounder must affirmatively prove knowledge and approval so that the court is satisfied that the will represents the wishes of the testator (see *Fuller v Strum* at [33]). This is a matter to be approached objectively; it does not involve a value judgment about the justice of the testamentary disposition or the circumstances in which the will was prepared and signed (*Fuller v Strum* at [34]).

167. For there to be knowledge and approval, it is not enough that the testator knows what the words say, he must know and approve the contents of the will in the sense that he understands both "what he is doing and its effect" (see *Hoff v Atherton* [2005] WTLR 99, per Chadwick LJ at [64] and *Gill v Woodall* [2010] EWCA Civ 1430, per Lloyd LJ, at [71]-[72])

168. In *Simon v Byford* [2014] EWCA Civ 280, at [47], Lewison LJ described the clear distinction between the capacity to make a will and knowledge and approval of the contents of a will in the following terms:

> "it is knowledge and approval of the actual will that count: not knowledge and approval of other potential dispositions. Testamentary capacity includes the ability to make choices, whereas knowledge and approval requires no more than the ability to understand and approve choices that have already been made."

169. Although in the past the courts tended to adopt a two stage approach to issues of knowledge and approval (focussing first on the question of whether there are circumstances to excite suspicion and second, if so, considering whether the propounder of the will has satisfied his burden of proof), that approach was doubted by Lord Neuberger MR in *Gill v Woodall* at [22] where he adopted the approach summarised by Sachs J in *Crerar v Crerar* (1956) 106 LJ 694 to the effect that the court should:

> "consider all the relevant evidence available and then, drawing such inferences as it can from the totality of that material, it has to come to a conclusion whether or not those propounding the will have discharged the burden of establishing that the testatrix knew and approved the contents of the document which is put forward as a valid testamentary disposition".

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171. This forms the basis for Lewison LJ's formulation of the correct approach in *Simon v Byford* at [47] as "a holistic exercise based on the evaluation of all the evidence both factual and expert".

Chronological Narrative and Findings of Fact

172. I now turn to consider the chronological narrative with my main focus being on (i) evidence of Jack's mental state in the period prior to, and shortly after, the signing of the 2015 Will and (ii) his instructions in respect of that will together with his interactions with Ms Wells over the period October 2013 to October 2015, as evidenced by the Will File. In carrying out the necessary fact-finding exercise I shall look not only at the available documents but also at the evidence from the witnesses and experts to determine what, if any, inferences it is appropriate for me to draw from those documents.

September 2011-June 2013

173. On 11 September 2011, Jack and Margaret attended a Dolly Parton concert with Megan and Geoff as an 80th birthday present for Jack. Megan recalls (and I accept) that Jack confided in her that he was not seeing things in his mind "the right way around". It was Megan's evidence that although she did not really understand at the time what Jack meant by this, looking back he was trying to describe what may have been an early symptom of dementia. Whilst I do not doubt that Megan believed this evidence to be true, I note that in his Addendum report, Dr Warner (who had summarised this evidence earlier in the report) did not include it as an example of the common symptoms of frontal dysexecutive syndrome. For that reason I am not inclined to view it as evidence that Jack was suffering from dysexecutive syndrome (or dementia) at this time. There is no evidence whatever that Jack ever mentioned this particular cognitive difficulty again.

174. In September 2012, Jack engaged in email correspondence with Corinne Fournier of Triplet & Associates on the subject of a possible new French will. This is the earliest date at which there is documentary evidence of Jack indicating a desire to change his 2007 Will. In an email of 16 September 2012, Jack records his "inheritance wishes" in the following terms:

> "1. My current UK will leaves everything to my current wife and four children equally divided, with my wife inheriting our UK house which is in joint ownership.

> 2. I am currently considering changing my UK will to leave everything to my wife (i.e. not taxable in the UK) and she will, in turn, leave the residue of my wealth to my children equally divided".

175. The motivation for Jack's desire to change the 2007 Will appears from this email to have been tax efficiency. In a reply dated 21 September 2012, Ms Fournier strongly advised that Jack should draft a new French will, advice which Jack never followed up. He did not respond to Ms Fournier's email.

176. Jack revisited his desire to change his 2007 Will at a meeting at Barclays on 26 September 2012 with (amongst others) Mr Mutsuddi and Ms Vokes of Withers. During the course of the meeting, whose primary purpose appears to have been to discuss estate planning, Jack said that he had received confirmation from Invensys Pension Trustees that Margaret would be eligible to receive the entirety (i.e. 100%) of the pension he had accrued whilst working for Eurotherm after his death, although he plainly found this difficult to believe ("he still doesn't believe it to be true"). This was worth approximately £110,000 per annum. He also explained that he wished to change his current will. The meeting note records that:

> "Jack wants to change his current will which states that he would like to split his wealth 5 ways between his 4 children and his wife Margaret. He noted it is logical that he will go first and would like Margaret to continue to live at their current standard of life should he pass away before her. … One thing that Jack was sure about was that he would like to give the house that his son Andrew is living in, in Virginia to Andrew. Andrew has psychiatric trouble and is looked after by his partner and Jack owns the house in which he is currently residing and doesn't want Andrew to have to move out."

177. The notes of this meeting are detailed and there was a comprehensive and lengthy discussion about all aspects of Jack and Margaret's financial planning. Amongst other things, Jack informed Barclays that he expected the proceeds of sale of the Tally Ho! to be around £390,000, observing that he thought he would make a significant capital loss from the sale. Mr Mutsuddi advised that Jack would be able to "utilise this loss against potential gains that he will make by divesting and re-allocating a portion of his discretionary portfolio".

178. Mr Mutsuddi's evidence is that when he first met Jack in 2012 (prior to the meeting in September) he formed the view that he was active, clearly intelligent and experienced. His evidence as to Jack's capabilities at the meeting is that he was capable of understanding the concepts that were being discussed, although he would not have expected Jack to understand every aspect of the structure or elements of the investments that he was recommending. Given the wide range of topics that are recorded as having been discussed at the meeting on 26 September 2012, including Jack's assets, his testamentary intentions and various complex financial products, including trusts, proposed by Barclays with a view to mitigating tax, I have no reason to doubt Mr Mutsuddi's general recollection about this, which appears to me to be consistent with other evidence from around this time. I also accept his oral evidence that it was

principally Jack (rather than Margaret) to whom he was speaking throughout the course of the meeting.

179. It is clear from the section of the meeting note that deals with the advice given by Ms Vokes, that she explained what she would need from Jack if she was to draft a US will and that she also made clear that the 2007 Will would need to be "redone". Although Mr Mutsuddi appears to have provided Ms Vokes with relevant information, Jack did not pursue these proposals any further. In an email following the meeting from Jack to Mr Mutsuddi, Jack noted that "[t]oday's meeting was much appreciated; it was interesting and informative".

180. Following the meeting, Barclays proceeded with the underwriting and calculation to put in place the 2013 Transfer to Margaret, as Mr Mutsuddi confirmed in an email dated 4 October 2012. On 16 October 2012, Mr Mutsuddi arranged for Jack to attend a meeting with the chairman of Calculus, an investment provider recommended by Barclays.

181. At this time, Jack was still flying, although it seems that he was certified temporarily unfit by reason of macular degeneration in his right eye in February 2013.

182. On 11 February 2013, Jack and Margaret had a meeting with Linda Hayward, an assistant vice president in Wealth Advisory at Barclays, primarily designed to discuss the trusts that Barclays had recommended, i.e. (i) the 2013 Transfer by Jack of £500,000 into a DGT for Margaret, a vehicle that would enable the capital sum to pass to her beneficiaries tax free if she survived for seven years, whilst also generating monthly income (subsequently confirmed at a meeting on 30 April 2013 to amount to £20,000 per annum); and (ii) the transfer of £1m by Jack into a Discretionary Gift and Loan Trust ("**DGLT**"), a vehicle that would enable Jack to continue to have access to his capital sum (which would be liable to Inheritance Tax on his death) whilst ensuring that any growth in that sum would be outside his estate and thus not subject to tax. Pursuant to the DGLT, which was ultimately set up in September 2013, Jack was able to nominate beneficiaries.

183. Although Mr Mutsuddi said in his statement that he was not present at the 11 February meeting, it is clear from the meeting note that he was in fact in attendance and must have forgotten. The meeting note records that Mr Mutsuddi raised the bank's policy of recommending that clients over 70 years of age bring an independent third party to meetings, but Jack and Margaret confirmed this was not required. The note records that they were "in good health" and "actively retired". Jack and Margaret discussed the importance to them of maintaining a good, active lifestyle, stating that they generally spent their income (i.e. Jack's pension together with a small annuity received by Margaret) and "any planning would need to take into account their ongoing requirement for income particularly on Jack's death". The note records that there is a 100% spouse's pension.

184. There was then a discussion of assets, a discussion of sources of funding and Jack's existing portfolio, together with a brief discussion of Jack's existing will:

> "Jack wrote his will in 2006. On his death his assets will be equally split 5 ways – Margaret and his four children. He now wants to re-write his will to give Margaret the majority of his assets".

It was Mr Mutsuddi's evidence in cross-examination that he assumed that this meant that it would be for Margaret to decide what to do with those assets, which, given the terms of the 16 September 2012 email, I consider to have been a correct assumption.

185. In the context of the trusts that were being discussed, Mr Mutsuddi advised that there were potential tax implications in the US if Andrew and Jonathan were to receive proceeds from trusts. He recommended that Jack and/or his sons obtain specialist US tax advice.

186. On 12 February 2013, Ms Linda Hayward of Barclays emailed to Jack and Margaret a list of decisions that needed to be made in relation to the trusts that Barclays were recommending: who would act as trustee alongside Barclays; who would be the beneficiaries under the respective trusts (subject to advice on US tax); what provisions were required in the letters of wishes; what level of payment was required for Margaret's trust and confirmation that the investments in the trusts were to be managed on a discretionary basis with moderate risk profile 3. Jack responded on 13 February 2013 saying that he had "fewer questions than I thought" but that he and Margaret would welcome a meeting so as to clear their thoughts prior to making a decision. Jack attached a brief list of concerns raising four questions including the amount to be invested initially, the specific advantages, whether the cost would be greater than the savings and what Barclays' charges would be as Trustees.

187. In his evidence, which I accept, Mr Mutsuddi confirmed that the "list of concerns" were in fact questions about the advice and recommendations and that they were going over old ground in that Barclays had already explained the cost. There was no attempt by Jack to engage with the advice given or to respond to the queries. On balance, I am inclined to accept the Claimants' submission that it would appear that Jack and Margaret had not really grasped exactly how the trusts recommended by Barclays would work at this point. However, I also note the experts' agreement, with which I concur, that Jack's email of 13 February 2013, whilst short, is both coherent and relevant. I agree with Dr Series' view that the questions raised by Jack "demonstrate a clear and intelligent interest in what was being proposed, a wish to understand it fully, and a proper concern for costs", all of which are matters which weigh in favour of Jack having a good level of cognitive function at this point in time.

188. There is no evidence in the documents that a further meeting took place with Barclays, although there appears to have been an intention (recorded in the 11 February 2013 meeting note) for such a meeting to be convened to "discuss the detail". On balance, and having regard to the terms of Mr Mutsuddi's email of 11 March 2013 which sought confirmation in respect of various of the queries raised by Ms Hayward in the 12 February 2013 email, I think it unlikely that there was a further meeting. Nevertheless, on 8 March 2013, Jack emailed Mr Mutsuddi saying that:

> "Margaret & I are agreeable to the two investments proposed and will appoint Barclays as Trustees. It remains to get definitive advice on the US situation".

189. The Claimants suggest that the reference to "investments" here suggests a continuing lack of understanding of the trusts, although, given that Mr Mutsuddi refers to both the transfer to a DGT for Margaret and the recommended payment by Jack of £1m into a DGLT as "investments" in his subsequent email of 11 March 2013, I disagree. What is clear is that Jack appreciated that before he could go ahead with the proposed DGLT he needed advice as to its implications for Andrew and Jonathan.

190. Although at this time, Jack had advisers in the form of Deloitte providing assistance with US tax advice, he did not seek their help on the question of US taxation in the event of Andrew and Jonathan benefitting from the proceeds of trusts. Instead, by way of an email of 11 March 2013 (referred to above), Mr Mutsuddi confirmed that Barclays was arranging for legal/tax advice in relation to Jonathan and Andrew. Later that same day, he recommended the accountants, Buzzacott, to advise specifically on the implications of gifting the US Property to Andrew (apparently a reference back to the clear instructions Jack had given on 26 September 2012) and the implications of naming Andrew and Jonathan as beneficiaries of Jack's DGLT. Also on 11 March 2013, Jack instructed the transfer of £500,000 from his and Margaret's joint account to Margaret's separate account (the details of which he provided), saying in an email to Mr Mutsuddi that he was not sure what was in the joint account but "assume you will sort it out". It appears likely that Jack and Mr Mutsuddi spoke on the telephone about the content of Mr Mutsuddi's email of 11 March 2013 which expressly records that Mr Mutsuddi would "give you a call to discuss these points".

191. Pausing here, this transfer was the subject of the claim that has since been abandoned by the Claimants. Nevertheless, it is important that I address the evidence as to Jack's mental state at this time.

192. As I have said, from his own experience of spending time with his father, Jonathan did not express concern about Jack's mental state in his oral evidence prior to 2015, while his siblings say in their statements that they first really noticed a decline in his cognition at Sara's wedding in July 2013, an event to which I shall return in more detail in a moment. In so far as Sara's evidence indicates that she began voicing a concern over her father's condition in 2012, that would appear from her statement to have been in connection with falls he had experienced rather than any cognitive decline. Sara recounts an occasion in her statement in December 2011 when she says that Jack began to show an inability to "filter some of his comments", apparently making an upsetting and insensitive remark about Julie's illness. However, the significance that Sara appears to have attached to this with hindsight does not seem to me to be borne out by his cheery follow up email briefly apologising for his "gaffe" and I rather suspect that she has fixed on this incident as a means of trying to pinpoint the start of her father's mental decline. On balance I consider that she is mistaken.

193. In her oral evidence, Sara referred to an occasion in February 2013 when she said her father was more physically frail and more vague and difficult to communicate with than normal, but in circumstances where this evidence has never previously been mentioned and where it appears to me to be inconsistent with the documentary evidence of his

interactions with Barclays and other contemporaneous email evidence of Jack's general state (to which I shall return in a moment), I am unable to accept it as reliable evidence of cognitive impairment. However, I accept that, in general terms, Jack was becoming more physically frail at this time, as Jonathan also attests.

194. On balance, I do not consider the witness evidence to support any real mental decline on Jack's part in early 2013. Whilst there are grounds for thinking that at the time of his email of 13 February 2013 he may not have had a particularly good grasp of the detailed trust structures that Barclays was recommending, he was asking sensible questions. There is no evidence to suggest that Jack was unable to understand the essential nature of the trusts recommended by Barclays (including that he was making an outright transfer of £500k to Margaret) or their intended tax benefits and I do not consider that there is any real evidence at this time of cognitive deterioration or executive dysfunction.

195. In their second joint statement, the experts agree that Jack "probably had the requisite mental capacity to make a lifetime gift of 500k to [Margaret] in March 2013". Notwithstanding his initial view (to which I have referred), Dr Warner now expresses the view based on new emails that had come to light that Jack "demonstrated some initiative, ability to plan, and showed problem solving which would indicate reasonable executive function". It was his view that although there was some "evidence of impaired cognition" at the time, that evidence was "not sufficient to cause him to have real doubt about capacity to make a gift". It is clear from Dr Warner's reports that the "evidence of impaired cognition" to which he is referring was based on evidence in the claimant's witness statements of behaviours that were "consistent with executive impairment", however, as I have said, I regard that evidence (insubstantial as it is) to be unreliable.

196. Furthermore the new emails to which Dr Warner refers plainly support an inference (absent evidence to the contrary) that Jack's cognitive abilities were not materially impaired at this time. They include emails of

    a. 13 February 2012 (to which I have referred above);

    b. 2 October 2012 (evidencing forward planning on Jack's part in respect of the use of his debit card whilst on holiday together with a request for the transfer of US$1,300 to Andrew's account);

    c. 28 February-1 March 2013 (evidencing flexibility and problem solving on Jack's part in liaising with Deloitte over a request from the US Tax authorities for an additional payment); and

    d. 12 March 2013 (evidencing forward planning by Jack in respect of funds needed to pay bills).

197. I do not consider Jack's decision to instruct Buzzacott, instead of Deloitte, to provide US Tax advice, on Barclay's recommendation, to undermine this conclusion, notwithstanding the Claimants' attempts to suggest it was evidence of "apathy" or a "lack of engagement with the process". I also do not consider the fact that Jack was

generally happy to delegate to advisers (as the evidence confirms) to take matters any further. Many people would (sensibly) prefer to delegate their financial affairs and estate planning to advisers; I cannot infer merely from such delegation the presence of cognitive decline.

198. On 11 April 2013, Buzzacott provided its report on estate planning and the US implications. It is clear from the report that a planning meeting was held with Buzzacott on 19 March 2013 at which instructions were provided, including that Jack had four children, five grandchildren, that Jonathan and Andrew were resident in the US and that Margaret was "likely to be the main initial beneficiary of the residue of his estate" (an instruction which appears to me to accord with Jack's previously stated intention to leave his estate to Margaret on the understanding that she would divide it between his children). There is no evidence as to whether Jack attended such a meeting. It is clear that the context of the report is the intended creation of the DGLT from which Jack's children might benefit in the future. In summary, the report concluded that, owing to complications in the US it might be better to make a cash gift from the sale of the US Property, regular gifts of income to Andrew and Jonathan or to leave to them different assets in Jack's estate (i.e. not to make them beneficiaries under the DGLT). Ultimately, the report concluded that:

> "The main motivation in the planning is not driven by US tax and so should not necessarily deter you, particularly as either or both children may not always be US based. However there will be costs and complications for them in the longer term [under the DGLT] if they remain in the US".

199. The report was discussed at a meeting between Jack and Margaret, Mr Mutsuddi, Ms Bultitude and Ms Hayward on 30 April 2013 at which Jack confirmed that he had £1.5m of cash available for investment. Jack's instructions were that he understood the tax implications identified in the report in respect of Andrew and Jonathan but that he wished to "proceed with UK Estate Planning" and wanted to "retain equitable settlement – i.e. equally across all four children". He also expressly confirmed that Jonathan and Andrew should be "retained as beneficiaries", thereby apparently rejecting Buzzacott's suggested alternative courses of action and confirming that he wished the proposed DGLT to benefit his four children equally. That these were his instructions is confirmed by a Barclays Wealth Planning Report dated 4 June 2013:

> "Whilst you understood that including your sons as beneficiaries will result in tax charges by the US authorities it was more important that you retained an equitable settlement between all four of your children and did not wish to omit any of them from this. You wanted to proceed despite these tax implications because you wanted to achieve your wider estate planning objectives".

200. Later, the report confirms that Jack was "adamant" (a word Mr Mutsuddi said he would have used to capture Jack's own words) that Andrew and Jonathan remain equal beneficiaries with their siblings. In the circumstances, I reject the Claimants' case that Jack prevaricated in the face of the Buzzacott report; on the contrary he made a positive decision to proceed with the DGLT with a view to all of his children being equal beneficiaries, notwithstanding the potential complications of the US tax regime.

201. A further meeting between Jack and Margaret, Mr Mutsuddi, Ms Bultitude, and Ms Hayward took place on or about 14 June 2013 with a view to progressing the ongoing financial planning discussion. It was suggested during the trial that this meeting may have taken place in May 2013 but, given that one of the notes of the meeting records that Mr Mutsuddi, Jack and Margaret all signed a copy of a Barclays Wealth Planning Report (itself dated 4 June 2013) at this meeting and given that their signatures on the report are all dated 14 June 2013 and that one of the two existing meeting notes is dated 14 June 2013, it is clear that the meeting must have taken place on this day. Neither Ms Bultitude, nor Mr Mutsuddi was really able to give evidence about the meeting that went beyond what was recorded in the comprehensive notes.

202. At the meeting, Jack and Margaret were introduced to Julia Tyrrell who was to oversee their investments and, following what appears from the note to have been a detailed recap by Mr Mutsuddi of the couples' financial position, objectives and investment profile, Jack and Margaret each signed the documents for their respective DGLT and DGT, together with an expression of wishes (copies of which do not appear to be available). They also completed individual risk profiles referred to by Barclays as Financial Personality Assessments without conferring with each other, as Mr Mutsuddi confirmed in evidence. There was a detailed discussion about their investment portfolio and attitude to risk and they were taken through the Wealth Planning Report by Mr Mutsuddi, which makes clear Jack and Margaret's key objectives of using lump sum investments to mitigate the effects of IHT whilst retaining access to income to maintain their lifestyle. The Wealth Planning Report identifies Jack and Margaret's current net worth as being approximately £6.6 million.

203. Insofar as the Wealth Planning Report records that Jack and Margaret already have wills in place that are "up to date", any inaccurate impression on the part of individuals at Barclays was quite obviously dispelled by a discussion about wills, during which the notes of the meeting record that Jack expressed the view that he wanted "a simple will in that when he dies, all will pass to [Margaret]. When [Margaret] dies they think that they want assets to be split amongst the children…". It appears from the context that this is a reference to both Jack's children and Margaret's children, the first time a possible intention to split all of their assets between both sets of children had been articulated, albeit that no proportions are identified and it is unclear how they intended it to operate. A little later in the meeting note, Mr Mutsuddi is recorded identifying Jack and Margaret's main concerns as being "around tax liability and ensuring that both sets of beneficiaries from each marriage are looked after in the event of their deaths". The French Property and the US Property were discussed and Barclays appears to have advised that Jack may need to consider wills for these jurisdictions. Having been given a quote for Barclays' will service of £90 for a simple will and £18,000 for Barclays to provide an executorship service, Jack first queried the fee but then confirmed he would likely proceed with "a simple will with Barclays" but would also likely use their executor services. Both Jack and Margaret were provided with a "will pack" but neither completed it. In light of these discussions, I reject the Claimant's suggestion that Jack "failed to correct" an important mistake (i.e. a statement that he and Margaret already had wills in the Wealth Planning Report) in a professionally drafted document. Although he signed the Wealth Planning Report, no one can have been misled as to the fact that he and Margaret both required new wills.

204. Pausing here for a moment, as at 14 June 2013, Jack had provided clear instructions to Barclays that he wished his four children to benefit equally from the DGLT and he had also indicated that it was his intention that, upon his death, his assets would pass to Margaret and that thereafter his and Margaret's assets would be split between their children, albeit the split between Jack's family and Margaret's family was unclear.

205. Jack did not meet with Barclays again until September 2013, but in the meantime, Sara's wedding took place and it is to that event that I must now turn.

Summer 2013 and Sara's wedding

206. On 22 April 2013, Jack had an email exchange with Sara about her wedding, including confirming that he had booked rooms for himself and Margaret and for his niece, Lynne, for the Friday and Saturday night. I agree with the experts whose joint statement records their agreement that this evidences planning and initiative on Jack's part together with an obvious wish to attend Sara's wedding.

207. A couple of months later, on 20 July 2013, Jack booked British Airways flights for Andrew to fly over from the US for Sara's wedding, together with a room at the Travelodge and room cancellation insurance. In circumstances where his message to Andrew did not initially send correctly, he took steps to ensure that it was delivered (as is clear from an email of 28 July 2013). Upon Andrew receiving the ticket and raising an issue with Jack about needing to show the credit card that was used to book the flight before getting on the plane, Jack contacted British Airways and resolved the issue. On 3 August 2013, Jack sent Andrew a detailed email about arrangements for his stay in the UK. Again, I agree with the experts that these emails evidence an ability to plan, to make detailed and complex arrangements, to problem solve and to take the initiative.

208. Sara's wedding took place on 17 August 2013. Andrew, Sara, Megan, Alicia, Robert (who sat next to Jack at the wedding dinner), Ms Pride and Pamela all give evidence to the effect that Jack was "not himself" at the wedding. Andrew says in his statement that Jack's cognition had visibly deteriorated although he gives no detail beyond relying on hearsay to the effect that his cousin commented that Jack may have had a stroke. Whilst I am unable to attach much weight to this evidence owing to his absence from the trial, I note that Andrew wrote an email to Jack some two years later on 4 August 2015 (to which I do attach weight as a contemporaneous document) expressly referring to the fact that he had noticed "a slow delivery in speech from you before [Sara's] wedding". I also note that Pamela herself says that she asked Jonathan if Jack "had been ill at all". On balance, I accept that the Claimants' evidence does clearly indicate what Megan describes as "a noticeable change" in Jack. Whether that is reflected by reference to him being more withdrawn than usual, reticent, struggling for words and dependent upon Margaret (as Sara, Robert and Pamela variously attest) or by reference to his being "frail and confused" (as described by Ms Pride) or by reference to his being quiet and rarely venturing from the table (as described by Alicia) or by reference to the fact that Megan observed him spilling coffee down his front when he missed his mouth and having difficulty with his food, perhaps does not matter. I accept that in general terms there was a change in the erstwhile confident and assured Jack which immediately struck those who knew him best.

209. I do not consider, given the evidence to which I have referred, that this is a change that could be explained by Jack's hearing loss, although I accept Dr Series' evidence that Jack's hearing loss may (particularly if he had not been wearing his hearing aids) have exacerbated the impact of the change. Overall I do not consider Jack's hearing loss to be a significant feature in my consideration of the evidence in this case – the continuing changes in his behaviour and deterioration in his cognitive abilities which I shall go on to describe cannot be explained by his hearing loss

210. None of the Defendants attended Sara's wedding and so they are unable to give evidence about what took place, although Liz said in her statement that she could not reconcile the behaviour described by the Claimants with the man that she saw in 2013, saying that if Jack was acting "peculiarly" it was "unusual". Regrettably, perhaps with a view to discrediting (or at least providing an alternative explanation for) the Claimants' evidence, Liz said in her statement that Margaret had told her that Jack did not want to attend the wedding because he was "uncomfortable with the idea". Liz also said that Jack himself told her that he did not "see the point" in Sara and Julie marrying, speculating that "perhaps he did not consider it a marriage in the 'traditional sense'", a statement that I can only view as a rather insidious means of suggesting distaste at a same sex relationship. If and in so far as this evidence was intended to invite the inference that any atypical conduct on Jack's part at the wedding could be explained by his discomfort at attending a same sex ceremony, I decline to draw such inference.

211. I have seen nothing in the documents to support the proposition that Jack was in any way discomfited by Sara's same-sex relationship or that he did not want to attend her wedding (the 22 April 2013 email to which I have already referred suggests otherwise). Ms Wells says in her statement that she got "the impression" during a meeting that Jack was embarrassed by Sara's sexuality, but I consider this likely to be mistaken and Ms Wells did not suggest orally that it was anything other than a personal impression. Given Jack's generous and open nature, neither Liz's nor Ms Wells' evidence fits with the inherent probabilities. Perhaps appreciating this, it was apparent that Liz sought to row back on her evidence under cross-examination, emphasising her "impression" that there was something about the "formality of the event that [Jack] did not feel comfortable with", expressly disavowing any disapproval on Jack's part of Sara's relationship with Julie and speculating that Jack's statement that he "did not see the point" was really about the "formality" of the occasion, speculation which to my mind rang hollow.

212. I accept Jonathan's evidence that Jack was looking forward to Sara's wedding and that he never heard him express any reservations about Sara's relationship with Julie, which seems to me to fit much better with Jack's character, as I have described it. Indeed, this evidence is also consistent with Charlotte's statement to the effect that Jack was "never openly negative about his children". Megan's evidence, which I also accept, is to the effect that the suggestion that Jack would be uncomfortable with a same sex relationship would be out of character. I note in this context Megan's evidence that Sara's previous long term partner, Ms Pride, had been a bridesmaid at Megan's wedding but that Megan had witnessed nothing untoward from her father.

213. Jack informed Professor Hawkes in July 2015 that "about two years ago", i.e. in the summer of 2013, he "first noted a problem with his speech…when he may have become confused when taking instructions from the local control tower [whilst flying his helicopter]". I accept Dr Series' evidence that the most likely explanation for this event is that:

> "at that point there was some kind of very small stroke in the brain, a blockage of some artery somewhere which caused a period of confusion and from which [Jack] may have later improved.[…]That would be very typical of a person in the course of vascular dementia and Alzheimer's disease".

This ties in with Ms Pride's evidence about Jack's confusion at Sara's wedding and may well explain why Jack appeared to others to be withdrawn, reticent and dependent upon Margaret on that day – he may have been experiencing a period of confusion and problems with his speech following "some kind of very small stroke". I also note and accept Dr Warner's evidence that a lack of engagement with family, as appears to have occurred at Sara's wedding, may itself be a sign of dysexecutive syndrome.

214. On balance I find that Jack's altered behaviour at Sara's wedding together with the confusion he experienced whilst flying in the Summer of 2013 were early signs of cognitive decline caused by vascular dementia and Alzheimer's Disease. These signs also appear to me to be evident in his reference in an email to Deloitte of 26 August 2013 to the fact that he was "hazy about details" in relation to certain tax information and "puzzled" by his bank statements. That such signs were not evident to Liz during holidays and social occasions in 2013 (as she says in her statement) does not mean that Jack was not experiencing cognitive decline. As Dr Series confirmed, and I accept, whilst all patients are different, an individual developing dementia and Alzheimer's may suffer periods of confusion, or "periodic changes" before stabilising and making a substantial recovery (albeit not returning fully to his original state). I also accept Dr Series' evidence that a person with vascular dementia, or an element of vascular dementia, is unlikely to have a linear decline – the progression of their disease is "likely to be punctuated with ups and downs", although, as Dr Series also confirmed, dementia is a disease that "gets worse".

The instruction of Ms Wells and the First Draft of the 2015 Will

215. On 5 September 2013, Jack created a document on his laptop which he saved as "Will". It was evidently drafted on the assumption that Margaret would outlive him and it was in the following terms:

> "I wish to change the will drawn up by Wortley Byers.
>
> I now wish to leave everything to my wife…to whom I will leave a list of wishes on my decease.
>
> My present list of wishes:
>
> My residual estate will be split five ways with four fifths going to my children of my first marriage.

> The provisions of the will drawn up by Wortley Byers will apply to my children's inheritance.
>
> The remaining fifth of my estate will go to my wife's estate"

216. This document, which never appears to have been sent to anyone, may have been an aide memoire for Jack in advance of his meeting on the following day with Barclays. At that meeting (recorded in a meeting minute) attended by Ms Tyrrell and (remotely) by Mr Mutsuddi, Jack and Margaret declined the suggestion that they may wish to have a third party present due to their age. Jack raised the issue of his will at the outset, confirming that he had not yet completed the will pack but explaining his wishes in essentially the same terms as they appear in his note. Margaret also confirmed that she needed "to cancel" her existing will. Jack made reference to the Findon Property observing that he would not be asking Marjorie "to move any time soon". There was discussion of the loss that Jack would make in respect of the Tally Ho! but again Barclays advised that he would be able to offset this against approximately £350,000 of gains that would be made in the event of putting into place the DGLT and converting his remaining portfolio to moderate risk. Although Jack confirmed that he had a home in France, he did not mention the US Property and nor did he (or Barclays) mention the potential need (as previously advised) for Jack to obtain advice on making wills in those countries. Ms Tyrrell returned to the subject of the will writing service, explaining that she would let Jack and Margaret know who they needed to contact to draft their new wills (it is clear that Margaret also wished to make a new will). Ms Tyrrell did this on 12 September 2013 in an email identifying Ms Wells and indicating that the cost of preparing the wills including taking instructions over the phone would be £500 plus VAT.

217. Pausing for a moment, it is clear that at this point, Jack's desire for a simple will translated into instructions that everything would be left to Margaret. I have no doubt that Jack trusted Margaret to carry out his stated wish that 4/5 of his estate should go to his children and saw no need to overcomplicate matters further. Jack does not appear to have focussed on the need for advice about his foreign properties.

218. On 10 October 2013, Jack sent an email to Ms Wells stating that he and Margaret wished to appoint her to prepare their wills and, amongst other things, explaining that "It seems appropriate to leave my estate to Margaret…should I die first. The residue on her death would be distributed to my four children with her money and some of mine to go to her children according to her wishes. I am 82 next birthday and my wife 76". Jack spoke to Ms Wells on 14 October, as evidenced by her hand written attendance note on the Will File. Amongst other things, Jack told Ms Wells during this call that Audrey had "died intestate" and that her estate was worth "virtually nothing". This information was plainly incorrect and I can only infer that Jack had forgotten that Audrey died testate leaving an estate worth approximately £1.7 million to Jack, who proved that will as her executor. Given his role as executor, I reject the Defendants' submission that this memory lapse is "perhaps unsurprising" – on the contrary, I agree with the Claimants that a widower might normally be expected to remember undertaking the responsibilities connected with being an executor. I note that the error was repeated by Jack in an email of 18 October 2013 following a specific request from Ms Wells for confirmation. Although Ms Wells gave evidence to the effect that she had become aware of this inaccuracy and had dismissed it on the basis that Jack

"probably thought that was his money anyway", I do not consider that to explain the error.

219. On 14 October 2013, Jack emailed Ms Wells attaching a summary of his and Margaret's wishes. His email referred to 2 Hutton Place being a "slight complication" because, "being in joint names is probably best split evenly between the two estates when we are both deceased". Jack noted that he would forward a copy of his 2007 Will "shortly". Margaret's list of wishes (drafted by Margaret on 10 October 2013) states:

> "I would like my possessions divided by three, i.e. 1/3 to each of my two surviving children and 1/3 to the three children of my late daughter".

220. Jack's list of wishes begins by providing some personal details, which, on close analysis contain a number of errors and oddities: (i) the date on which he changed his name by Deed Poll is inaccurate (although this is perhaps explained by a later email of 18 October confirming the correct date by reference to the Deed Poll); (ii) Andrew's date of birth is wrong; (iii) Megan's date of birth is missing; (iv) the relationship status of Jonathan, Andrew and Megan is identified but no partner is recorded in respect of Sara, despite her wedding having taken place only a couple of months previously. For reasons I have already given, I reject the Defendants' submission that Sara's partner was omitted because of a discomfort on Jack's part with Sara's same sex relationship. Under the heading "Wishes", Jack says this:

> "Should I die before my wife I would like all my possessions to pass to her without restriction.
>
> Should my wife die before me I would like the provisions of my last Will to stand (A copy is with Rana Mutsuddi) with the addition of a provision leaving an extra £30,000 to my wife's family in accordance with her wishes and in addition my estate is to be divided by five with 4/5 going to my children and 1/5 going to my wife's family, again according to her wishes".

221. Under cross-examination, Ms Wells accepted that the repeated reference in this document to "according to her wishes" would have prompted her to think that she needed to make sure that Jack's wishes were his own and that, for this purpose, a meeting would be required. She also acknowledged that Jack's statement that he wanted to leave everything to Margaret was ambiguous. When questioned generally about her approach to inconsistencies and errors in her instructions, including as to biographical details, Ms Wells confirmed that incorrect biographical details would be "a red flag" and that if she had identified an inaccuracy then, absent a reasonable explanation, she would have taken steps to assess capacity. Given that Ms Wells took no such steps in relation to Jack, I can only infer that she did not identify the errors I have referred to above. I cannot see that there could be any reasonable explanation for Jack apparently forgetting Andrew's date of birth or the fact that Sara had just got married. I accept the Claimants' submission that those errors (including the error in relation to Audrey having died intestate) appear consistent with Jack suffering from memory lapse, probably related to cognitive decline.

222. In this context I also bear in mind Dr Series' evidence that the more evidence there is of errors in Jack's thinking and deficiencies in his understanding, the more weight that adds to the proposition that his capacity must be in doubt. I must go on to examine the evidence in detail to see whether Jack continues to make similar (or more serious) errors in the lead up to the making of the 2015 Will and what, if anything, I can properly infer from those errors in the context of the *Banks* test for capacity.

223. On 16 October 2013, Jack sent Ms Wells a copy of his existing 2007 Will under cover of an email in the following terms:

> "…I now wish to leave everything to my wife…until she dies then I wish the existing Will to apply. There are some complications as my boys live in the US and I will check the tax laws there with a visit early next year. However, I wish to be covered with my wife inheriting everything and the existing Will applying as much as possible".

Ms Wells interpreted this email as probably an instruction for Jack's assets to pass to Margaret on his death (rather than for a life interest trust), but she thought it was ambiguous.

224. Ms Wells replied to Jack's email on the same day confirming that she had had a conversation with Margaret about nil rate bands and recommending to Jack that in light of his instructions his will should be structured so as (i) to give 2 Hutton Place outright to Margaret so that it would then pass in accordance with her will; (ii) set up a discretionary trust for £650,000 in order to maximise tax efficiency by using two nil rate bands; and then (iii) set up a life interest trust for Margaret in respect of the remaining funds to be divided on her death "as per your instructions". This recommendation was not consistent with Jack's earlier instruction that 2 Hutton Place be split evenly between his and Margaret's estates.

225. On 17 October 2013, Jack sent Margaret's existing will to Ms Wells under cover of an email saying that her will would be "complemented by my wish to repay her for the house we jointly bought when we married and by my wish to divide my estate by five to spread one fifth to her beneficiaries". Ms Wells accepted again in cross-examination that these instructions were ambiguous and that they needed to be discussed and clarified. Certainly the reference to "repaying" Margaret for 2 Hutton Place does not seem consistent with Jack's previously expressed wish for the house to be split equally – Margaret's financial contribution to 2 Hutton Place was considerably less than 50%.

226. On 17 October 2013, Ms Wells sent a formal letter enclosing Terms of Business letters (signed by Jack and Margaret on the following day) together with a Will Questionnaire form, which Jack and Margaret never returned. The covering letter sought formal instructions together with information to enable Ms Wells to provide Inheritance Tax advice, something she considered to be a "key aspect" of her role. Notwithstanding her evidence at trial that there should have been a meeting with Jack and Margaret, the Terms of Business Letter records Ms Wells' estimate that 3-4 hours work would be required and that "this matter will be completed on a postal basis".

227. The Terms of Business Letter identifies that Ms Wells (who describes herself as a Chartered Tax Adviser) reports to Gillian Coverley. Ms Coverley is a partner at Irwin Mitchell who now heads up the Wills Trust and Probate Team in the Sheffield Office. There is no evidence that she was ever involved in any aspects of Ms Wells' work on Jack's 2015 Will and I find that, on balance, Ms Wells did not consult her.

228. The Claimants submit that I should infer from the available evidence (namely Ms Wells' lack of legal qualifications and the absence of any detail in her evidence as to the training she received at Irwin Mitchell on the question of assessing capacity) that Ms Wells did not receive adequate training. Given (i) Ms Wells' failure to hold the meeting with Jack and Margaret that she now accepts was necessary; (ii) her somewhat inadequate description in cross examination of the Golden Rule; and (iii) her failure to insist on a meeting with Jack in the year before he signed the 2015 Will (to which I shall return later), it does appear to me that Ms Wells did not have an adequate grasp of the cautious approach she was required to take to questions of capacity, including the proper application of the Golden Rule. However, these are not negligence proceedings involving Ms Wells or Irwin Mitchell and I do not need to go as far as to infer a lack of training, although it is necessary for me to consider the impact of any failures on the part of Ms Wells on the credibility of her evidence. I shall return in due course to the question of whether I can attach any weight to Ms Wells' evidence that she was completely satisfied that at all times Jack had testamentary capacity.

229. Ms Wells emailed Jack twice on 21 October 2013 asking various questions arising from his 2007 Will, including in relation to the US Property, the gift of £100,000 to Sara and Jack's interest in LTH. Jack responded coherently to this request on the following day, responding to the questions, including confirming that he still owned the US Property, that LTH had been sold but not yet wound up and noting the advisability of a US will and confirming his intention to obtain further advice. Jack also observed that "the gift of £100,000 still applies" in relation to Sara.

230. On 18 December 2013 Jack chased Ms Wells, asking whether she had made progress on the Wills. This prompted Ms Wells to send draft wills ("**the First Draft Wills**"; "**Jack's First Draft Will**" and "**Margaret's First Draft Will**") under cover of a letter dated 20 December 2013, providing a detailed summary of the drafts (including an explanation of the life interest trust) by reference to the numbered paragraphs in the drafts. As she admitted in cross-examination, there had been no meeting with Jack and Margaret despite the admitted "red flag" and the ambiguous nature of her instructions.

231. Jack's First Draft Will appears to be generally consistent with Jack's instructions and aims, although it is not "simple" in that it seeks to set up a discretionary trust for tax mitigation purposes together with a trust fund with a life interest to Margaret. Furthermore, as Ms Wells admitted in cross-examination, it does not ensure that 2 Hutton Place is to be split evenly between the two estates. However, Ms Wells explained in the covering letter that for half shares to pass under the terms of the wills it would be necessary for 2 Hutton Place to be held as tenants in common and she suggested that Jack and Margaret sign forms to sever the existing joint tenancy. In fact this was never done.

232. In summary, Jack's First Draft Will provided that:

a. It would affect Jack's property worldwide save in the US and would revoke previous wills to the extent they affect property other than in the US;

b. It was not mutual with Margaret's will and there was a reservation of right to revoke or amend their wills;

c. Sara and Robert were appointed executors and trustees,

d. Robert was to receive £5000 free of tax if he proved the will,

e. Margaret was to receive Jack's personal chattels;

f. Jack's interest in LTH was to pass to Jack's children in equal shares. In her covering letter Ms Wells noted that if the company were to be wound up this provision would cease to apply and the proceeds would fall into residue. She expressly queried how Jack wanted this to be dealt with;

g. The Findon Property was to be held on trust for Marjorie rent free for life, remainder to Sara (consistent with the 2007 Will);

h. A discretionary trust was established to make use of two unused nil rate bands. The beneficiaries were to be Margaret, Jack's children, Margaret's children, Jack's grandchildren and Jack's "step grandchildren" including Melanie's children.

i. The residue was to be held:

    i. For Margaret for life, with a power to appoint capital in her favour;

    ii. On Margaret's death, as to £10,000 to each of Mark and Liz, and £10,000 for Melanie's children in equal shares;

    iii. Subject to (i) and (ii) four fifths of the remainder was to go to Jack's children in equal shares and one fifth was to go to Margaret's children and Melanie's children (presumably to be split equally between them, although this was not specified)

    iv. Sara was to bring £100,000 into hotchpot on the division of the residuary estate (consistent with the 2007 Will).

233. As is clear from my summary above, Ms Wells included in Jack's First Draft Will:

a. what she described as a "broad" provision for capital to be paid to Margaret in order to meet any shortfall in her provision, which she mentioned in her covering letter and made detailed provision for in Jack's draft letter of wishes, but did not recall in cross examination whether this had been discussed with Jack and Margaret.

b. a revocation clause in respect of all former wills which was expressly said to exclude the US Property. Ms Wells also did not recall discussing this revocation clause with Jack (albeit it is mentioned in the covering letter) and nor did she recall any discussion with him when it was later expanded so as also to exclude from revocation the provisions of the 2007 Will in relation to the French Property (about which it was Ms Wells' evidence that she had no information at the time of the First Draft Wills).

234. There is no note of any discussions in relation to the detailed ramifications of these two provisions and I can only infer that, on balance, they were not discussed and that their ramifications were not explained to Jack, either during discussions about the First Draft Wills or at any date thereafter. I agree with the Claimants that this was a significant failure. The power to appoint capital could conceivably have been exercised to exhaust the trust fund, while the revocation clause in its final form in the 2015 Will (as I shall return to in a moment) ensured that the US Property continued to be subject to the terms of the 2007 Will but that now Andrew was unlikely to be able to exercise the option to purchase.

235. In summary, Margaret's First Draft Will (which was expressed not to be mutual with Jack's) revoked all previous wills, appointed Mark and Liz as executors and trustees, giving them a direction to appoint her chattels in accordance with any memorandum of wishes and gave her interest in 2 Hutton Place to her trustees to hold for Jack's occupation for life and thereafter on the trusts of the residue. The residue was to be split in three equal shares between Mark, Liz and Melanie's children.

The February 2014 Meeting with Ms Wells

236. Jack was cleared as fit to fly by the FAA on 24 January 2014.

237. By an exchange of emails on 10 January 2014, Jack arranged to meet with Ms Wells on 3 February 2014 to discuss the First Draft Wills ("**the February 2014 Meeting**"). It was Ms Wells' recollection, which I accept, that Jack wanted to go through the trust provisions which were complicated and caused him "the most difficulty". It was also her recollection, borne out by the documents, that Jack and Margaret regarded the will making process as "a joint enterprise".

238. The February 2014 Meeting (the first of only two face-to-face meetings with Ms Wells) duly took place at Irwin Mitchell's offices in Holborn and Ms Wells made a detailed typed attendance note (which it appears she prepared based on her own handwritten notes). I accept that Ms Wells is able independently to remember certain details about this meeting including her general impression of Jack and Margaret and the fact that Jack spoke in warm terms about Margaret's family of whom he was plainly fond. I do not need to recite in detail the lengthy discussion at the meeting but it is clear from the typed note that:

a. the subject of the French Property came up for the first time (with Ms Wells) albeit there was no discussion around the need for a French will and nor

does the note record any discussion around whether the French Property should be excluded from the revocation clause in the First Draft Will;

b. Ms Wells again advised Jack of the need to make a US will;

c. Jack discussed the Findon Property at some length, including expressing the desire that it should be sold on Marjorie's death and that where he was not in receipt of any rent on the property he felt "no obligation whatsoever" to provide accommodation for Susan's use (an abdication of moral obligation that Ms Wells confirmed in cross examination). He instructed Ms Wells to include mention of Susan's occupation and to give her a right of occupation of three months following the date of Marjorie's death. These instructions are contrary to the provisions of the 2007 Will which left the Findon Property to Sara after Marjorie's death on the unwritten expectation that she would "do the right thing" by Susan. They are also contrary to Susan's unchallenged oral evidence to the effect that both Audrey and Jack had reassured her that the Findon Property would remain her home as long as she needed it (consistent with the provisions of Audrey's will). Indeed Susan recalled one occasion when she was having difficulties with her neighbour and Jack had reassured her that the property was "her home".

d. Jack instructed Ms Wells that his will needed to include provision for an annuity for Andrew, equal to Jack's current annual payment of approximately £18,000-£20,000 per annum and ideally index-linked. Ms Wells confirmed in her oral evidence that she thought Jack "felt he had got a moral obligation" to support Andrew.

e. As LTH was being wound up, the gift of Jack's interest in this company (i.e. clause 6 of Jack's First Draft Will) was to be removed from the draft.

f. Jack and Margaret informed Ms Wells that they intended to gift £150,000 to Charlotte. There was then a discussion as to whether this needed to be "evened up in Margaret's will" although it was concluded that this was not necessary. There appears to have been no discussion around "evening it up" for the purposes of Jack's will and, notwithstanding his desire to include hotchpot provisions to try to ensure equity between his own children, Jack never appears to have considered making a hotchpot provision in respect of this gift.

g. Barclays would be appointed as executors of both wills, together with thesurviving spouse.

h. Ms Wells explained the reasons for the trusts in the Wills, namely to maximise the use of nil rate bands available to both Jack and Margaret owing to the fact that they had both been widowed.

i. A discussion about joint assets appears to have given Ms Wells the (incorrect) impression that a majority of Jack and Margaret's assets were held in joint names (albeit this is reflected only in the typewritten note and

not her handwritten note). This is perhaps because Jack and Margaret appear to have been in the habit, as confirmed by Ms Bultitude, of regarding their assets as "our wealth". Jack and Margaret are described as being "very casual" about this, saying that Barclays, as executors, would sort it out. This led to Ms Wells explaining the problems that could be caused by the fact that joint assets would pass by survivorship on first death thereby undermining the testamentary intentions as identified in the wills and giving rise to the risk of a claim. I infer from the note that up to this point, neither Jack nor Margaret really understood the operation or significance of survivorship or the potential risks of a claim, although the note suggests that this was made very clear to them at the meeting.

239. Ms Wells says in her statement that at no stage at this meeting did she think either Jack or Margaret lacked capacity, an assessment with which, on balance, and based on my assessment of all of the evidence, I agree. However, in my judgment there were a number of errors made by Jack at this meeting which tend to support the proposition that he was suffering from memory lapses. Key amongst these are:

a. the information he provided to Ms Wells (directly contrary to his email of 22 October 2013) that a gift of approximately £400,000 made to Sara at around the same time he had married Margaret, needed "to be adjusted for in the distribution of his estate in his will". His recollection of giving a total amount approximating to this sum was broadly correct, but omitted the fact that he had received the value of the Brighton Property by way of offset against this sum. Jack appears not to have looked back at the 2007 Will to check what he did at that time. Jack sent an email to Deloitte on the same day as this meeting with Ms Wells seeking to check the amount of the gift given to Sara and subsequently received a reply dated 19 February 2014 referring to a gift of £100,000 rather than £400,000. Ms Wells confirmed that, surprisingly, she did not question this obvious error during the meeting, notwithstanding that she had a copy of the 2007 Will which referred to a £100,000 hotchpot in relation to Sara; and

b. his explanation that Megan had "gone off the idea of running a pub and simply left and moved to Bolton". This is not consistent with Megan's evidence as to the circumstances in which she left the pub, which include that she was the subject of emotional and physical abuse by her husband, evidence which was not challenged by the Defendants and which I accept. Such traumatic events for his youngest daughter seem to me to be a peculiar thing to forget, although it is also possible that Jack simply did not feel the need to explain the real reasons in circumstances where he also informed Ms Wells that the pub had been sold, LTH wound up and that he would "effectively get his money back". Unlike the error in Jack's information about the gift to Sara, Ms Wells would not have been in a position to identify the factual inaccuracy in what she was being told about Megan.

240. Following the February 2014 Meeting, Jack immediately sent an email to Barclays asking whether his understanding that he and Margaret only had one "joint" account was correct. Mr Hamid of Barclays confirmed his understanding.

241. Ms Wells sent a letter to Jack and Margaret on 7 February 2014, following the meeting, asking for a schedule of assets to address her concern that the "majority" of their assets may be in joint names and expressly advising on the risks of Inheritance Act claims by Jack's children in the event of a failure to address this issue. Ms Wells advised that "Jack's Will also needs to make some provision for Andrew otherwise he could well have a claim against the estate". She erroneously asked whether any consideration had been given to transferring the US Property "to Jack" now, albeit it is clear from the context that she meant Andrew, a mistake that Jack appears to have identified as is clear from his reply. Finally she noted that the matter had become more complex and that her fees would have to increase.

242. On 18 February 2014, Jack wrote to Ms Wells emphasising that in the event he was the first to die, he was "most anxious that Margaret will not have an impaired lifestyle, hence my earlier expressed wish that I change my Will to leave her everything". He observed that he appreciated the need to obtain advice from American lawyers in relation to Andrew and he said that he did not want Andrew to be worried about repairs. He accepted the fee position.

243. Jack attached the requested list of assets, identifying the couple's joint bank account at Barclays and their joint ownership of 2 Hutton Place, which Jack says Margaret will "assume possession of" in the event of his death and that he will leave "to Margaret's family in my will should Margaret die first". He also identified that Margaret had a trust fund of £500,000 (i.e. the DGT) which would accumulate tax free funds together with a private bank account of £1,897,233. This latter information as to Margaret's bank account was wrong and may have been a typo, but may equally have been the product of Jack copying a sum in respect of his own wealth into this paragraph. Jack gave a valuation of his assets at £2,906,799 (a figure which appears to include his £1 million debt from the DGLT, although that is not made express in the document) and identified his ownership of the French Property, the Findon Property and the US Property.

244. On 6 March 2014, Ms Wells wrote to Jack and Margaret setting out her recommendations as to the structure of their wills and observing that she had sought to "find an equitable way of structuring your wills, which balances the desire to mitigate inheritance tax, with the need to protect each other and your respective children". Amongst other things, the letter

a. recommended that 2 Hutton Place be left to Margaret in Jack's will if he died first and to Margaret's children if Margaret predeceased Jack. Ms Wells says that Margaret's will can "mirror" this and she notes that "[t]his does not require a trust to be involved".

b. sought instructions on the £1.8m that Ms Wells now (wrongly) believed was in Margaret's bank account;

c. suggested leaving an annuity in Jack's will to Andrew of £20,000 and asked whether Jack would wish this to be taken into account in hotchpot;

d. continued to recommend the inclusion of a discretionary trust in the wills to maximise the tax benefits;

e. recommended in paragraph 4 that the remainder of Jack's estate be held in trust for Margaret for her lifetime "with the Trustee having power to appoint capital to her if required". She also expressed the view in this paragraph that, given Margaret's own fund of £1.8m, this was unlikely to prove necessary;

f. made some additional suggestions for Margaret's will, including asking how much of the £1.8m was to go to Margaret's children and how much was to go to Jack's children.

g. asked Jack for confirmation as to the amount of the gift to Sara in light of there being "some uncertainty" over that.

245. Jack replied on 10 March 2014, apologising that he had omitted reference to his DGLT in his List of Assets (the first time he had drawn Ms Wells' attention to the existence of his DGLT), and correctly referring to the fact that as Margaret was the joint owner of 2 Hutton Place "I assume she inherits it anyway". He also correctly referred to his understanding that Margaret would receive his entire pension in excess of £100,000 per annum, but noted that owing to Eurotherm having been taken over by a German firm "there may be changes in store", which I infer indicates a concern that Margaret may not be able to rely on his pension, at least in full. Jack again expressed his overriding concern that Margaret would not have to change her lifestyle in the event of his decease and that "she should inherit the maximum amount possible, my children can wait". He said that he and Margaret agreed with the remainder of the letter, including the annuity for Andrew (which was to be taken into hotchpot), save that "we don't understand paragraph 4".

246. On balance, I infer that this lack of understanding encompassed the whole of paragraph 4, which concerned the operation of the life interest trust and the power to appoint capital. This broad interpretation is consistent with the words used and with the difficulty that Jack had previously identified with his understanding of the trust provisions. I do not accept the Defendants' suggestion that this phrase was merely intended to express confusion over the reference in paragraph 4 to Margaret's fund of £1.8m. In so far as Ms Wells had that "impression" as she said in cross examination, I consider her impression to have been mistaken.

247. On 28 March 2014, Jack emailed Ms Wells following up on a promise he had made in his 10 March 2014 letter to check the amount he had given to Sara. In his email he said he had failed to find a cheque stub for the amount he had given Sara in 1980 and Barclays had been unable to help but he had found an amount in his Barclays statements of £211,000 "which I am nearly certain relates to this transaction", although there was no payee name or reference given. It is unclear how an entry in his statement in around 1980 for the sum of £211,000 could possibly relate to the purchase of the Brighton

Property. No money exchanged hands when the property passed from Jack to Sara some 16 years later and the agreed value of the property at that time was less than half that amount. Even if Jack confused the 1996 conveyance with his purchase of the Brighton Property in the 1980s, Sara was still at school in 1980. Jack nevertheless instructed Ms Wells that "[i]f we make it £200k it will suffice". Given the absence of any reference to the email of 19 February 2014 from Deloitte (suggesting that the correct figure was £100,000) and given the lack of any reference to a conversation with Sara (which would potentially have resolved the point), I infer that Jack had forgotten that he had asked Deloitte for their assistance (which he had received) and that he had also not checked the position with Sara, despite an email he sent to Deloitte on 24 February 2014 indicating that he would do so.

248. As at this point, Jack had provided Ms Wells with his 2007 Will identifying a figure of £100,000, an estimate of £400,000 and then a rounded down figure of £200,000 from an apparently uncertain figure in a bank statement apparently dating back to 1980. That he appears to have been trying to go back as far as 1980 also suggests that he had forgotten the circumstances of the purchase of the Teddington Property in 2000, when he had required Sara to repay him the proceeds of sale of the Brighton property. In that context, I do not attach any weight to the Defendants' submissions that the final hotchpot figure Jack settled on for Sara of £200,000 was "pretty accurate". It appears to have been pure coincidence that he got to a roughly correct amount and I consider that his attempts to get to a correct figure clearly evidence (at least) significant memory lapse, including as to whether he could obtain the relevant information.

The 2014 Gift to Charlotte and evidence of Jack's domestic interactions between December 2013 and July 2014

249. On 23 December 2013, Jack sent an email to Barclays saying that he and Margaret wished to give "my step-granddaughter" (i.e. Charlotte) £150,000 for a deposit on a house. Jack said that "at the moment we plan half to come from my wife…and half from me" but he indicated that it might be convenient to tell the estate agent that all of the money was coming from him. Jack asked Barclays to send to the estate agent a letter confirming that he was good for this amount, adding that the money would not be needed until mid-January, by which time he should have received £390,000 from the sale of the Tally Ho! so that his investments would be unaffected. It is clear from the documents that the £150,000 was intended as a non-refundable gift and that Jack did not intend to hold any interest in, or charge over, the new house. This is entirely consistent with what Jack told Ms Wells at the 3 February 2014 meeting to which I have already referred.

250. It appears that Jack may have forgotten to send details to enable the necessary transfer of funds to be made, because on 5 February 2014, Charlotte emailed Margaret telling her that the funds for her deposit had not been received. This prompted Jack to send the necessary details on to Barclays who completed the transfer of the £30,000 deposit on the same day. Thereafter, on 20 February 2014, Jack had an email exchange with Barclays in which he requested a further transfer of £120,000, which Barclays confirmed would happen the following day. Completion on the property took place on 11 March 2014.

251. The 2014 Gift is no longer the subject of a claim, but as it is another staging post in the period prior to the 2015 Will, I should address it briefly. Dr Warner now agrees with Dr Series in the second expert joint statement that Jack "probably had the requisite mental capacity" to make this gift in light of additional evidence that he had seen. I would go rather further. I consider it to be clear from the evidence that, notwithstanding the memory lapses that Jack was plainly suffering from at this time, he did have the capacity to make the 2014 Gift.

252. Not only did I find Charlotte's detailed evidence on the 2014 Gift compelling, but I also consider it to be clear from the contemporaneous documents that Jack knew exactly what he was doing. The experts agree that the email of 23 December 2013 shows both coherence and forward planning. It appears from Charlotte's evidence that Jack originally wished to retain an interest in the property as an investment but, upon resistance from Charlotte's partner, Howard, he and Margaret eventually decided that they wished to gift the money. I do not find this in any way surprising and I agree with Charlotte that there is no evidence that Jack misunderstood, or was not aware of, the nature of this gift. Although Charlotte was (rather surprisingly perhaps) cross-examined at some length about her statement, I did not detect that there was any real resistance to her evidence. At most it was put to her that Jack might have been prepared to make the gift because he viewed it as essentially a gift to Margaret, but beyond explaining why Jonathan was, in my judgment, mistaken in his oral evidence when he described this gift as "highly unusual" and "out of character", I do not consider this to take matters further. I find that Jack's preparedness to make the gift was entirely consistent with his generosity of spirit and love for both Margaret and Charlotte.

253. That Jack's cognitive abilities appeared to be functioning reasonably well at around this time is also supported by:

    a. the evidence to which I have referred surrounding the February 2014 Meeting with Ms Wells, including the correspondence;

    b. Mark's evidence about a trip to Madrid with Jack and Margaret in February 2014, which clearly shows that Jack was functioning well on a social level.

    c. the documentary evidence of arrangements Jack made in March 2014 to obtain last minute tickets to a football match for himself, Jonathan and Sara;

    d. Jack's response to a detailed email from Jonathan of 10 March 2014 asking for information he required in connection with his immigration status form to which Jack responded on the same day in coherent terms, providing the information sought and illustrating flexibility of thought (warning that his own Green Card number should only be revealed "if you must", as he ought to have returned the Card).

254. There is clear evidence of memory lapses both in his dealings with Ms Wells (to which I have already referred) and in his domestic relationships (for example Jonathan's evidence that Jack had difficulty remembering names and locations in a family tree "going way back" at a dinner in March 2014 and an email from Jonathan to Sara of 9

May 2014 implying forgetfulness on Jack's part). Nevertheless I accept Jonathan's evidence that at around this time "in transactional conversations he seems to understand and be normal".

255. During his visit to the UK in March 2014 to attend the football match, Jonathan's evidence, which I accept, is that Jack informed him that he was thinking about changing his will to further provide for Margaret, which Jonathan considered to be at odds with previous discussions during which Jack had said that "everyone would be treated equally" (i.e. under the 2007 Will). Jonathan now considers Jack's change of heart to be "vastly out of character". Sara sent Jonathan an email on 22 March 2014, discussing the same topic. Sara reports in the email that Jack had told her that he "just wants to be fair and doesn't want to see Margaret penniless" but that "he wouldn't give [the money left by Audrey] to Margaret's kids". She also reports that Jack had told her that he would show his children his will before he did anything, although Sara told him there was no need.

256. On balance, I reject the suggestion that Jack's desire to change his will was out of character. Jack was of course free to change his will, if he wanted to, as Jonathan and Sara both realistically accepted in cross-examination. It is clear from Jack's communications with Barclays and Ms Wells that his overriding concern at this stage in his life was to ensure that, in the event of his death, his wife was properly provided for and, to my mind, given his character, this is entirely unsurprising. As I have said, he appears to have had grounds for being concerned that Margaret might not benefit from his full pension. However, running alongside his wish to ensure that Margaret was properly provided for, Jack plainly continued to have a strong desire to provide equitably for his children, a desire that I accept he considered to be a moral obligation. His attempts at this time to balance making appropriate provision for Margaret with his children's claims on his estate seem to me to be the natural response of an affectionate and caring man.

257. By May 2014, there is contemporaneous evidence that, although Jack "seemed OK", conversation with him had become "difficult" (referred to in an email from Sara to Jonathan of 6 May 2014) and that his stated intentions were not always consistent with his actions (referred to in an email from Sara to Robert of 20 July 2014 "What he says and what he does, however, are two different things").

258. As I shall now address, although he continued to engage with the arrangements necessary in connection with his will (and was able to identify a spam email purporting to have been sent from lawyer Jonathan Ginsburg on 30 June 2014, to engage in detail with Deloitte over his tax return in August 2014 and to enjoy a holiday with Mark and Diana in September 2014) Jack continued to exhibit signs of memory loss.

Interactions with Deloitte and Ms Wells – July 2014-August 2014

259. In July 2014, Jack instructed Christopher Horton of Deloitte to advise him on US estate law in connection with the US Property, albeit apparently giving Mr Horton an incorrect valuation of that property (US$250,000). Mr Horton provided his advice to Jack in an email of 15 July 2014 in which he noted Jack's plan to transfer the US Property to Andrew on his death and advised that Jack would be subject to a combined US estate

tax and UK inheritance tax charge of US$100,000 based on a US$250,000 valuation. The alternative suggested by Mr Horton was to transfer the US Property to Andrew for fair market value prior to Jack's death, albeit that given Andrew's circumstances (about which Mr Horton had no information) this was not a realistic possibility.

260. Jack appears to have read and understood this advice, because on 24 July 2014 he sent an email to Mr Horton identifying that the valuation of the US Property was a "mistake", noting that he had paid US$415,000 for that property in 2001 and saying that in the circumstances he assumed that the tax charge would be higher. He observed that "…it is unlikely that [Andrew] will be able to pay this". Mr Horton responded that if Jack could let him know the current value of the US Property he could recalculate the estimated tax liability. Jack responded saying that he needed to make some enquiries and would get back to Mr Horton.

261. On 23 July 2014, Jack sent an email to Ms Wells forwarding Mr Horton's email of 15 July 2014 and instructing her that given the substantial tax that would be payable on the US Property on his death it would be best to give Andrew a choice as to whether to inherit it "as in my previous will". Ms Wells accepted in cross examination that this was a testamentary instruction and that she had not actioned it because she was "still working under the impression that he was going to deal with it via a US will". She also accepted that this instruction meant that there was no longer any need for a US will.

262. Also in the email of 23 July 2014, Jack provided a new figure for Margaret's individual assets (£160,000 rather than £1.89m together with joint ownership of 2 Hutton Place) and informed Ms Wells (i) that his assets were about £3m (which appears to include the sum he was owed under the DGLT) together with the French Property and his helicopter worth about £350,000 (this had not been mentioned in the list of assets provided on 18 February 2014); (ii) that he had just sold the Tally Ho! for £390,000 and was awaiting liquidation of LTH; (iii) that he owned the Findon Property for which he had paid £80,000. Jack observed, in common with his earlier instructions, that "I don't wish to leave it to [Susan] but I don't wish to worry [Marjorie] at this stage of her life – she is 86"; and (iv) that he had given $10,000 to Jonathan "some years ago" (this was inaccurate as the figure was US$60,000 in July 1997), that he had reported his gift to Sara and that Andrew had received US$15,000 a year for the past 15 years (there is no explanation for this period, which is inaccurate). Jack instructed Ms Wells that he wished "to take these gifts into account when writing my will". Jack ended the email by saying that he hoped Ms Wells could now proceed to write a will. Although Ms Wells accepted in cross-examination that this email amounted to testamentary instructions, she did not in fact take these instructions fully into account in the next draft of the will.

263. A handwritten note on the copy of Jack's 23 July 2014 email on the Will File confirms that Ms Wells spoke to Jack over the phone shortly after receipt of the email. She provided him with costs information and her note records that he "[a]ccepts that things have developed and need to be finalised".

Interactions with Ms Wells in September and October 2014 and the provision of the Second Draft Wills

264. Under cover of a letter dated 19 September 2014, Ms Wells sent to Jack and Margaret further drafts of their wills ("**the Second Draft Wills**", "**Jack's Second Draft Will**" and "**Margaret's Second Draft Will**") for their review and comment. In the letter, Ms Wells noted the inconsistent information that she had been given as to the ownership of Jack and Margaret's savings and again explained the operation of survivorship in respect of joint assets, noting the potential for a claim by Jack's children if joint assets passed by survivorship to Margaret. Ms Wells "urged" Jack and Margaret to discuss this with Barclays, explaining in her oral evidence that "they needed some assistance with explaining all the assets and the trusts which are relatively complex structures".

265. Ms Wells explained that the intention behind Margaret's Second Draft Will was that she would leave her estate direct to her children and Melanie's children, but that to achieve Jack's intentions (of making provision for Andrew and Marjorie but for Margaret to benefit from the estate with Jack's children benefitting following Margaret's death) it was necessary to create trusts in the will.

266. Ms Wells summarised the effect of Jack's Second Draft Will in her covering letter, explaining that

a. personal chattels would go to Margaret, including the helicopter;

b..the Findon Property would go into trust for Marjorie's occupation during her lifetime and would then go to Sara on her death (this was inconsistent with Jack's instructions given at the February 2014 Meeting for a three month grace period);

c. Andrew would have an annuity (set at £20,000 per annum, but not limited to 15 years contrary to Jack's instructions);

d. she had included a further gift to Jack's children of up to £650,000 to take account of inheritance tax allowances, albeit that, given the annuity, the gift of the US Property to Andrew and the provisions relating to the Findon property, this was unlikely to arise;

e. 2 Hutton Place would pass outright to Margaret if she survived Jack as joint tenant;

f. remainder of the estate would be on trust for Margaret;

g. on Margaret's death, 2 Hutton Place would go to Margaret's family, with the remainder of the estate going on trust for Margaret with the trustees having the power to pay capital to her;

h. upon Margaret's death the estate would pass as follows:

i. £30,000 would go to Margaret's family;

ii. 4/5 of the remainder would go to Jack's children in equal shares (subject to a £200,000 hotchpot in Sara's case); and

iii. 1/5 would go to Margaret's family.

267. It is common ground that Ms Wells omitted to address Jack's instructions that gifts to Jonathan and Andrew should be brought into hotchpot. Ms Wells made reference in Jack's Second Draft Will to a US will, despite her evidence that she now thought that Jack would not need a US Will and that he wanted Andrew to be given a choice as to whether to purchase the US Property. Again, the Second Draft Will included a revocation clause in respect of the 2007 Will, albeit that it was now drafted so as to exclude both the US and the French Properties. Again the will was expressed not to be mutual. Barclays and Margaret were to act as executors and trustees.

268. On 20 September 2014, Ms Wells sent to Jack a summary of assets that should have been included with the Second Draft Wills, which Jack said he would take with him on holiday "to study". In this summary the US Property is valued (incorrectly) at US$250,000.

269. On 3 October 2014, Jack created a document on his laptop saved under the name "Jack and Margaret's Wills" which appears to have been used to gather together information as to his and Margaret's assets which he then reproduced in an email sent to Ms Wells on the same day. The assets identified are roughly in line with his 23 July 2014 email, albeit that some of the figures have now changed; the US Property is now valued at US$600,000. There is no dispute that the figures Jack gave at this time, which were not formal market valuations, were roughly correct. Jack now appears to express the view (contrary to information he had received over a year before) that Margaret would only receive half his pension "minimum" (albeit there is an internal inconsistency in the email in this regard). Jack says that he does not want to leave Andrew homeless and that he would rather pay the inheritance tax, by which I infer he meant that he wanted to ensure that Andrew inherited the US Property and would not have to pay inheritance tax in the US, something he said he was "researching". Jack finished the email by reiterating that he wanted Margaret to be able to continue with her lifestyle and posing the question:

> "[I]s it possible to leave everything to Margaret and specify, when she dies, the distribution of our respective wealth to our respective children? As two of my children live in the US, I am not concerned about tax".

270. Pausing there, this email appears to me to confirm that Jack remained of the view at this time, consistent with the document he had prepared for his meeting with Barclays in September 2013 and his instructions in October 2013, that he wanted a simple will and that his ultimate ambition was to ensure that he left everything to Margaret and that, on her death, their separate estates would pass to their respective families. I infer that he continued to feel uncomfortable with the trust structure that Ms Wells was recommending. His instructions in relation to Andrew appear to have changed from his previous instruction that he wanted to ensure that Andrew had an option to purchase the US Property in accordance with the 2007 Will.

271. In an exchange of emails at the end of September 2014, Andrew informed Jack that he was looking at alternative properties, to which Jack replied:

> "I am presently researching how to get you a house when I am gone!
>
> At present you will have to pay a minimum estate duty of 40 per cent of value which is not on. I'm researching forming a trust and am awaiting a report – it looks hopeful!"

272. Jack's reference to a report appears to be a reference to a further report from Mr Horton. At some stage Jack informed Mr Horton that the US Property was worth between US$415,000 and US$450,000 (not US$600,000) because Mr Horton emailed Jack on 9 October 2014 referring to this valuation and noting that Jack had told him that he planned "on transferring the property [to Andrew] at death". Mr Horton advised that given this valuation, the combined UK and US tax charge would be up to US$180,000 (including US tax liability of US$120,000). Mr Horton again suggested some alternatives including selling the US Property to Andrew, gifting cash to Andrew to enable him to purchase the US Property and transferring the US Property to Andrew in the near future. Finally, Mr Horton advised that he was not sure that there would be much to be gained from transferring the US Property into a trust, but that it would probably make sense "to build the US analysis into the wider inheritance tax planning project" and that he would be happy to discuss this further. There is no evidence that Jack forwarded this advice on to Ms Wells.

273. Ms Wells responded to Jack's email of 3 October 2014 on 23 October 2014, proposing again that, so as to utilise all available tax allowances, 2 Hutton Place should be held by Jack and Margaret as tenants in common and that Margaret should have a discretionary trust for two nil rate bands if she died first. Alternatively, Ms Wells informed Jack that if he wanted a simpler will he would need to transfer "around £500,000 to Margaret" in case she died first. She reiterated her view, however, that the trust arrangement (including a discretionary trust arrangement for Margaret) was the "most practical option", concentrating on the available inheritance tax saving (something that Jack had said the previous month that he was not concerned about). Ms Wells asked for instructions as to how to proceed. It seems that Ms Wells also made some internal amendments to the Second Draft Wills in anticipation of Jack and Margaret accepting her proposals in the 23 October 2014 email ("**the Internal Drafts**"). These were not, however, sent to Jack and Margaret at this time, so they had no opportunity to consider the specific drafting changes made by Ms Wells in the Internal Drafts designed to implement her suggestions.

274. About an hour after receipt of this email, Jack forwarded it to Ms Bultitude at Barclays observing that "[t]hings are not as bad as I thought and may be workable". Although it is unclear from the evidence what prompted this observation, and although Ms Bultitude said in evidence that it was unclear what Jack was referring to, I infer that, given Jack's anxiety to ensure a "simple will", the optimism he expresses in this email refers to the fact that Ms Wells has finally identified an "alternative" to the trust structures.

275. That this is the case is borne out by instructions Jack then provided on the Second Draft Wills in an email to Ms Wells dated 24 October 2014. He said this:

> "Margaret and I have reviewed the draft wills and they don't take account of 'who dies first'.

> I would not want Margaret's lifestyle to be affected in any way should I die first – which is likely because I am five years older. In these circumstances I want Margaret to inherit everything. Margaret inherits half my pension.
>
> Should Margaret die first she has agreed to a Will which splits everything seven ways (among my and her children from our first marriages with the exception of Melanie, Margaret's daughter who is deceased, in which case Melanie's three children inherit).
>
> Tax is not a concern.
>
> I'm afraid this means redrafting both Wills".

276. Although it is clear from this email that Jack continued to want a simple will leaving everything to Margaret outright and dispensing with the trusts, that tax was not a concern and that he and Margaret therefore thought that a redrafting exercise was required, the remainder of the email is ambiguous (as Ms Wells accepted in cross-examination) and, to my mind shows a lack of understanding of the detailed terms of the Second Draft Wills, together with the advice provided to date by Ms Wells. The purpose of the trust structure set forth in the Second Draft Wills was to take account of "who dies first", something I can only infer that Jack did not understand. He appears to have had a more simplistic view that his will should simply provide that Margaret received everything if he died first, albeit it is unclear from this what he intended to do in relation to, for example, the Findon Property.

277. This email appears to be the genesis of the idea that there should be a seven-way split of the residuary estate, but it is unclear whether Jack intended this to apply only to Margaret's will, or whether the seven-way split was also to apply to his will. The reference to Margaret inheriting half of Jack's pension was inaccurate and appears to involve no nuanced thinking (of the sort Jack had exhibited in earlier documents) around the fact that he had been told she would inherit his full pension, albeit that there were reasons to be sceptical about this – points which Jack appears to have forgotten.

278. This email is, to my mind, an important piece of evidence which suggests that Jack was, by now, having increasing difficulty understanding the proposals that were being made in respect of his will and that he was also having difficulty recollecting instructions he had previously given. Ms Wells accepted in cross examination that the wills were "not necessarily easy documents to follow" and that the content of the email left her "clearly concerned enough that they needed to have a further discussion about the mechanics of the wills", from which I infer that she understood Jack to be having difficulties understanding aspects of the Second Draft Wills. She understood Jack's instructions to involve a big change which would require her to go "back to the drawing board".

279. On 27 October 2014, Jack emailed Ms Wells again, informing her that he had been talking to Ms Bultitude about the draft will "which she thinks is fine" and asking if Ms Wells would be agreeable to a three way conversation, a proposal to which Ms Wells subsequently agreed. Ms Bultitude's evidence was that she would have wanted a meeting to resolve "confusion" around the nature of the trusts set up by Barclays and

Jack's longer term tax planning. Given that Jack had obviously also discussed the Second Draft Wills with Ms Bultitude and given that Jack apparently had difficulties understanding those wills, I also infer that Ms Bultitude considered that a meeting was necessary to clarify the content of the wills.

280. On 28 October 2014, Ms Bultitude emailed Jack and Margaret about the proposed meeting (copying in Ms Wells and Mr Mutsuddi). The purpose of the meeting (which was to take place as a conference call) was said to be "to discuss your Wills" with a view to providing "an opportunity for us all to address your questions and ensure we have resolved any outstanding issues preventing you from getting the documents formally executed". Ms Bultitude noted that she, Ms Wells and Mr Mutsuddi would dial in slightly ahead of the meeting time to ensure they were "on the same page" and able to address Jack's concerns about the Second Draft Wills.

281. The telephone conference call took place on 29 October 2014 and is evidenced by an attendance note taken by Ms Wells, which expressly records its purpose as being to discuss the wills to "allay concerns" that Jack and Margaret may have. Neither Ms Bultitude nor Mr Mutsuddi sought to challenge the content of this note. The note records that there was discussion of Jack's DGLT and Margaret's DGT, described by Mr Mutsuddi in his evidence as "complex structures". Ms Wells said (wrongly) that she had not been made aware of these trusts and referred to the conflicting information she had received as to Jack and Margaret's assets (information which by this stage had been clarified). Ms Wells appears then to have explained her proposed tax saving mechanisms (probably including reference to proposals in the internal draft that she had prepared but not sent to Jack). Ms Wells reiterated concerns around leaving the entire estate to Margaret, which Barclays agreed with, pointing out that the existing arrangements made adequate provision for Margaret and reiterating her concerns that Margaret could change her will after Jack's death and leave everything to her children, thereby creating the potential for a claim (under the Inheritance Act 1975) by Jack's children. Ms Wells advised that the life interest trust arrangements in the Second Draft Wills were therefore "the only viable solution". The note does not record any instructions from Jack and Margaret on this point.

282. Ms Wells then took Jack through his draft will "in broad outline" and the note of the call records that "he was struggling to understand some of the provisions notwithstanding that they have been explained to him previously". Ms Wells accepted in cross examination that he was "particularly" struggling to understand the trust structures. This caused Ms Wells, Ms Bultitude and Mr Mutsuddi to have a further discussion after Jack and Margaret had left the call during which the note records that it was accepted that "it is a difficult situation to go through with Jack because he doesn't seem to understand the situation or the potential threats of litigation if everything is left to Margaret". The note ends with the words "It was agreed that [Ms Wells] would send [Ms Bultitude and Mr Mutsuddi] copies of the current draft wills and keep them updated following the meeting in November".

283. It is the Defendants' case that it was unsurprising that Jack, as a layperson, was struggling with (what they accept were) complex trust mechanisms over the telephone in circumstances where he had not yet seen the Internal Draft and that this note raises no issues around Jack's capacity. I disagree. It is clear from the note that the purpose

of the meeting was to consider the "latest draft Wills", which, on balance, was a reference to the Second Draft Wills that had in fact been sent to Jack and Margaret and also seen by Barclays. Although during the course of the meeting Ms Wells appears to have raised some new suggestions which had not been included in the Second Draft Wills (and may well have confused Jack further), I find that when Ms Wells took Jack through his "Will in broad outline", she did so by reference to the terms of Jack's Second Draft Will, which he had a copy of (and not by reference to the Internal Draft). The reference in the note to "provisions" which had been explained previously makes this abundantly clear.

284. Accordingly, it is plain that Jack was struggling to understand "some of the provisions" of Jack's Second Draft Will and in particular the trust structures. However, it seems that he was also having a more general difficulty in "understanding the situation", which I infer to be the advantages of the trust structure as drafted by Ms Wells by comparison with the simple will he wanted. He was not simply having difficulty understanding the risks of litigation (although that was certainly something that he could not comprehend). To my mind, although this lack of understanding on Jack's part may very well have been exacerbated by the fact that this meeting was taking place over the telephone, this note is nevertheless evidence of Jack's continuing and progressive cognitive decline. Ms Wells had discussed her proposals for tax saving trusts with Jack before but had never previously formed the impression (or recorded) that he was "struggling to understand" her advice. Mr Mutsuddi had no recollection of this aspect of the conversation but said he had no reason to doubt what was written in Ms Wells' attendance note. His evidence in his statement went no further than to say that "if" he had had concerns about Jack's capacity, he thinks he "would have remembered that". However, to my mind, the fact that the note records Jack "struggling" to understand ought immediately to have given rise to such concerns. In so far as Ms Bultitude appeared to suggest during her evidence (apparently based on "interpretation" of the note) that there was no issue with Jack's understanding of the provisions of the Second Draft Will, I reject that evidence, which in my judgment is inconsistent with the terms of the note.

285. Jack's difficulties appear to have prompted Ms Wells to recognise the need for a face-to-face meeting ("I thought it would be beneficial to go through it in more detail") because, as is clear from the final sentence of the note, it was agreed that this should take place in November 2014. She did not, however, think it necessary to apply the Golden Rule and obtain medical assistance, as I consider would have been the prudent course of action at this time.

286. On 29 October 2014, Ms Wells sent to Ms Bultitude and Mr Mutsuddi the Internal Draft of Jack's will, which was not in fact a draft that had yet been provided to Jack. Indeed there is no evidence that this draft was ever provided to Jack. On 30 October 2014, Ms Wells wrote to Jack and Margaret confirming the next meeting at her office on 18 November 2014 and saying that "[h]opefully in advance of that meeting you will be able to provide me with a list of your current concerns so that we can hopefully try to finalise the Wills to your mutual satisfaction".

The November 2014 Meeting with Ms Wells and provision of the Third Draft Wills

287. On 30 October 2014, seemingly in anticipation of the 18 November meeting, Jack prepared a document on the iMac entitled "Jack Leonard Wishes". This document (which was never sent to Ms Wells) reads as follows:

> "Margaret to inherit everything, including the House (2 Hutton Place)
>
> My wealth to pass to my wife, Margaret.
>
> She will abide by wishes.
>
> Should Margaret die before me, the Estate reverts to me. This to include the House in Hutton Place. After my death, the Estate is to be divided into seven My (four children and the three children of Margaret) [*sic*]
>
> I will address the problem of the House in France and America
>
> Monies already given to my children
>
> Sara Leonard: £152,080 in 2000, £34,000
>
> Jonathan Leonard, $10,000. Towards a house
>
> Andrew Leonard. House £400,000. Income paid $12,000 per month for 14 years plus Expenses.
>
> Megan Leonard: (memory jogger) £100,000".

288. It is clear from this that Jack was continuing to think along the lines of a simple will – leaving everything to Margaret on the understanding that she would abide by his wishes, but that if Margaret died first then on Jack's death there would be a seven-way split. This does not appear to be compatible with Ms Wells' proposed trust structure and I infer that Jack intended this to be an alternative to the trust structure proposed by Ms Wells. The hotchpot figure for Sara is remarkably accurate in the sense that it provides a correct net figure for the transaction involving the purchase of the Teddington Property in 2000, albeit where the additional figure of £34,000 comes from is unclear. The Defendants suggest that it is not quite half of the agreed value of the Brighton Property but there is no evidence one way or the other as to how any of these figures was arrived at. As I shall return to in a moment, Jack does not appear to have regarded the £34,000 as referable to the Brighton Property and its inclusion is therefore a mystery.

289. For the first time, Jack appears to make a mistake about Margaret's children (referring to her **three** children, rather than recognising Melanie's death). Given that Jack had not made a similar mistake in his email of 24 October 2014, only a few days earlier, and did not make a similar mistake at the meeting on 18 November 2014, I infer that (as the Defendants suggest) this was likely just a slip or intended as shorthand for Liz, Mark and the children of Melanie.

290. The note repeats an earlier error in relation to the gift to Jonathan (US$10,000 rather than US$60,000) and makes an entirely new error in respect of the amount of money paid to Andrew on a monthly basis, which I accept could have been a typo, Jack's intention being perhaps to refer to US$1,200 or US$2,000 per month (figures which sit more comfortably with the sort of monthly figures he was in fact paying to Andrew) and not US$12,000. However, notwithstanding that Jack appears to have advised Mr Horton earlier in October that the US Property was worth between US$415,000 and US$450,000, Jack mistakenly refers to £400,000. The reference to 14 years is the length of time Jack has been married to Margaret but does not begin to reflect the period of time during which Jack had in fact been supporting Andrew, perhaps an indicator that Margaret was providing Jack with assistance in the preparation of this note.

291. For the first time, the note also suggests that £100,000 has been given to Megan, albeit that, if this figure refers to a hotchpot provision to be made in respect of the sale of the Tally Ho! pub, there appears to be scope for this to be extremely unfair to Megan who had left the pub in circumstances involving the breakdown of her marriage. Furthermore, Jack had made a cashflow profit on the pub over many years (which he seems to have forgotten) and it is not clear why any capital losses made on selling the pub would not be borne by Jack as the majority shareholder. In any event, he also appears to have forgotten that he had been advised by Barclays on at least two previous occasions that any losses he had made on the pub could be set off against gains made on his portfolio for capital gains tax purposes. The Defendants disputed that this was accurate as a matter of fact in closing, but this is what Jack had been told by Barclays. It is notable that Jack himself considered that he required a "memory jogger" in relation to this figure, suggesting that he thought it was something he might not recall.

292. In early November Jack and Margaret holidayed in the Maldives.

293. The meeting of 18 November 2014 ("**the November 2014 Meeting**") was attended by Jack, Margaret and Ms Wells. This meeting was only the second face-to-face meeting that Ms Wells had had with Jack and Margaret and it was also the last. Ms Wells took handwritten notes during the meeting and subsequently prepared a detailed typed attendance note which records in its second paragraph:

> "Although on the telephone Jack seems very slow and unsure of things face to face it is clear that he does understand things and I had no concerns either in respect of his mental capacity to make decisions or him being under any undue influence of Margaret."

294. Ms Wells accepted that she had recorded this in the note because Jack's mental capacity had "obviously" crossed her mind. Nevertheless, Ms Wells does not appear to have consulted her supervisor or to have attempted to speak to Jack and Margaret individually to try to assess whether they were each individually capable of understanding what was going on. No third party was invited to observe. Although her evidence was that at the meeting "it was clear that [Jack] did understand things", in my judgment that evidence can carry no weight in light of these obvious failures.

295. It is unclear from the attendance note whether Jack had access to his aide memoire document created on 30 October 2014, although it seems likely that he did, because he

instructed Ms Wells at the outset that he wanted to leave everything to Margaret and (later) that "he would want to leave his estate in seven shares" (this time apparently without repetition of the error in his own document). He also instructed Ms Wells:

a. that Sara had received approximately £180,000 (the sum of the figures in his own note) albeit he said this was "plus" the gift of the Brighton Property – in other words the £34,000 cannot (in Jack's mind) have related to the gift of the Brighton Property;

b. that he had lost approximately £100,000 on the Tally Ho! venture which would need to be taken into account in respect of Megan – Ms Wells had no way of knowing whether this figure was right or wrong although the information that Jack had made a loss was not consistent with information he had given her at the February 2014 Meeting to the effect that he was expecting to get his money back; and

c. that Jonathan had been given US$10,000 (as is clear from the handwritten note but does not appear in the typed note).

296. Ms Wells accepted in evidence that the figure of £180,000 for Sara was an entirely new figure and that, given Jack's decision that the current figure of £200,000 in Jack's Second Draft Will "should be adequate" as recorded in the note of the meeting, the process of calculating Sara's hotchpot provision was "unscientific" and "could create unfairness". However, she appears not to have been concerned about it at the time, notwithstanding that it is now her evidence that her own assessment of testamentary capacity would have involved "looking for contradictions [and] irregularities" or "unexplained departures from previous testamentary wishes".

297. As for the value of the US Property, Jack appears to have told Ms Wells, despite the figure in his aide memoire document, that it was worth US$600,000 – considerably more than the sum he had given to Mr Horton only a few weeks previously.

298. The typed note of the meeting records that there ensued a "very forthright conversation" about using trusts to avoid the risk of litigation, with which Jack ultimately agreed "provided that Margaret was in agreement", and it was the Defendants' submission in closing that this was evidence of the provisions of the draft will and its effect being "drummed into" Jack at this meeting. I disagree. Neither the handwritten note nor the typed note provides any detail about this conversation from which it could be inferred that Jack's difficulty in understanding the nature of the trust structures and their effect, evident during the previous telephone meeting, had been overcome (as opposed to, for example, his having made a decision to rely upon Margaret's understanding and agreement). It is clear that Ms Wells treated Jack's instructions as to the division of his estate into seven shares (provided at this meeting for the first time) as being made in the context of the trust structures that she was proposing, albeit that Jack's own aide memoire had assumed this division in the absence of a trust structure and appeared to be his attempt to find an alternative solution to the trust structure. To my mind this raises a significant concern over whether Jack and Ms Wells really understood each other's intentions and approach at this meeting.

299. That concern is not dispelled by the way in which Ms Wells' note summarises various aspects of the draft wills which were discussed, including that "the residue of the estate is to be left on an immediate post death interest Trust for Margaret's benefit and on her death to be divided in the seven shares". This is neither a simple nor user-friendly description of what Ms Wells was seeking to achieve, as the Defendants appeared to recognise in closing when Mr Dumont suggested that Ms Wells probably did not in fact use these terms, a submission which finds no support in the evidence.

300. Aside from his instructions about the gifts to Sara and Megan, and aside from pointing out that there should be no adjustment in respect of gifts that had been made to Andrew and instructing that (as her own handwritten note records) Andrew's annuity should be "remove[d]" (an instruction that Ms Wells apparently did not query), the note records the following "discussion":

a. Findon Place was now to form part of the pot on Margaret's death and was to be divided into seven shares rather than going to Sara;
b. Jack's children would receive the benefit of a single nil rate band in equal shares on his death;
c. the Will would leave 2 Hutton Place to Margaret "and will sever the joint tenancy on that", a measure that was described as "important";
d. the residue of the estate was to be left in trust for Margaret's benefit during her life and thereafter divided in seven shares (it appears from Ms Wells' handwritten note that this was to include 2 Hutton Place);
e. the will would include a power of appointment to Margaret "so that if she does have a need for capital that can be made available to her". Again, there is no evidence that the possible consequences of this last point were explained to Jack.

301. Furthermore, Jack instructed Ms Wells that he would take advice in the US about the US Property, albeit he did not mention that he had already consulted Mr Horton of Deloitte. Margaret agreed that her estate would also be split seven ways.

302. During the course of the meeting, Ms Wells advised that the gifts to Jack's children could be dealt with "by dividing the residue so that a total of £300,000 is given to each of Jack's children taking into account the prior gifts and then any remaining residue and the property would then be divided into seven shares as discussed". Ms Wells accepted in cross examination that this proposal was approved by Jack and Margaret, but it never found its way into any draft will.

303. The November 2014 Meeting ended with Jack confirming that "as long as Margaret was happy that she was going to be OK following his death" then he would agree to the trust arrangements being included in his will. Ms Wells confirmed that she would prepare amended wills so that the matter could be concluded.

304. On 19 November 2014, Jack sent an email to Ms Bultitude referring to the November Meeting and saying "I think I now understand wha't [*sic*] she is doing and we sorted out details". I do not read this as a clear and unequivocal statement that Jack now understood, or was comfortable with, the proposals discussed at the November 2014 Meeting. Subsequent events suggest that he did not understand those proposals.

305. Under cover of a letter dated 21 November 2014, Ms Wells sent to Jack and Margaret further drafts of their wills ("**the Third Draft Wills**", "**Jack's Third Draft Will**" and "**Margaret's Third Draft Will**") "for your consideration and if approved signature" together with draft letters to the Executors and Trustees and a draft Notice of Severance of their joint tenancy in respect of 2 Hutton Place. Ms Wells advised that the Notice of Severance needed to be signed and returned.

306. Jack's Third Draft Will provided in summary that:

a. the will would affect Jack's property worldwide save in the US and France and would revoke previous wills to the extent they affect property other than in the US and France;
c. the will was not to be mutual with Margaret's will, as before;
d. Barclays and Margaret were to be executors and trustees;
e. Margaret was to receive Jack's personal chattels;
f. Margaret was to receive Jack's interest in 2 Hutton Place but subject to that it was to be held on the trusts of the residue (i.e. seven ways);
g. the Findon Property was to be held on trust for Marjorie to occupy for life, the remainder to Jack's children in equal shares;
h. a gift of any unused nil rate sum was given to Jack's children in equal shares; and
i. the residue was to be held
    i. to pay the income to Margaret for life with a power of appointment of capital in her favour;
    ii. subject to that, on Margaret's death, the residue was to be divided seven ways;

Sara and Megan were to bring £200,000 and £100,000 respectively into hotchpot

307. The Third Draft Wills omitted accurately to put in place the instructions discussed at the November 2014 Meeting. In particular, (i) the provision in relation to the Findon Property did not leave it in sevenths on Marjorie's death, as instructed, a mistake Ms Wells accepted in cross-examination; (ii) there was no hotchpot relating to the gift to Jonathan; and (iii) Ms Wells' own suggestion that there should be a £300,000 provision for each of Jack's children out of residue before division of the balance into seven shares (which was approved) was omitted, as Ms Wells also accepted in cross-examination. Furthermore, although the covering letter stated that the remainder of Margaret's estate was to be divided into seven shares (in accordance with Margaret's instructions at the November 2014 Meeting), Margaret's Third Draft Will continued to identify a three way split between Margaret's family. These omissions are important because, if Jack had fully understood all that had been discussed and agreed at the November 2014 Meeting, it is difficult to see why he would not have identified these errors and queried them with Ms Wells. However, at no stage did Jack get back to Ms Wells to point out that she had failed to implement his and Margaret's instructions. The Notice of Severance was never returned to Ms Wells and she never mentioned it again.

308. At some point in November or early December, it appears that Jack had a meeting with Mr Horton of Deloitte. There is no note of this meeting but I infer that Jack was seeking further advice in respect of the US Property. He mentioned obtaining this advice in an

email to Ms Wells of 28 November 2014 in which he also confirmed receipt of the Third Draft Wills (albeit making no comment on their content). The email confirmed that "I am seeking advice on Andrew…as the [*sic*] is a danger of him having too much". Given that the proposed annuity to Andrew had now been removed from the draft will, on Jack's instructions, it is unclear what Jack meant by this.

November 2014 to February 2015 – Jack's interactions with his family

309. By late 2014, early 2015, it is clear from the witness evidence (and I accept) that outward signs of Jack's cognitive decline were becoming more obvious. In her witness statement, Sara refers to a family event to celebrate her uncle's birthday in November 2014 at which she describes Jack as appearing "vague and disorientated" and "slurring his words". She also says that she was so concerned about him that she left the dinner to walk him and Margaret back to their hotel to make sure they arrived safely. Sara's evidence is corroborated by (i) Pamela (who says that at this same event she found it hard to get Jack to engage with her, that Margaret did most of the talking and that Jack was "more distant in conversation again"); (ii) Paula (who says that Jack "didn't really seem with it and wasn't speaking clearly" and records in her statement that she asked Sara if Jack had suffered a stroke); and (iii) Keith who says that his father told him that he found Jack "at the hotel the following morning, confused and trying to find a bus towards Reading".

310. In similar vein, Jonathan recalls that by early 2015, Jack's speech had "noticeably deteriorated", that he was struggling to speak and that, when he did, his voice was "raspy and slurred". Jonathan describes a visit he made to the UK in February 2015 to attend a football match in Newcastle during which he met Jack, Margaret and Sara at the Renaissance Hotel Heathrow for dinner. He says that Jack seemed easily confused, that he was struggling to remember his room number and that Jonathan paid for dinner because he did not think that Jack "could manage" the bill – evidence which went unchallenged. Jonathan says that "[t]his for me was notable as Dad would always insist on paying at restaurants. This time, he didn't even notice I'd paid". Jonathan also describes how, the following day, Jack did not understand how to purchase a train ticket, observing that "[t]his is a vivid memory for me as [Jack] was hugely intelligent, very technical and could fly through any device".

311. I accept this evidence which appears to me to be consistent with Jack "struggling" to understand the complexities of his will during his telephone conversation in October 2014 with Ms Wells, Ms Bultitude and Mr Mutsuddi and also the evidence of his condition at the birthday celebration in November 2014. Jonathan's evidence about Jack's difficulty coping with technology is reflected in Susan's evidence that he had difficulty understanding a keyless system for a car, albeit that Susan is unable to date that incident with any specificity beyond saying that it took place "around 2013 or 2014". Given my analysis of the evidence to date, I am inclined to think that, on balance, this is likely to have occurred late in 2014.

312. It is clear that Jack was becoming more physically frail at this time, but the evidence to which I have referred is also consistent with ongoing progression of his mental illness. Given the expert evidence as to the fluctuating nature of cognitive decline, I do not regard this ongoing progression as inconsistent with evidence of (apparently coherent)

emails that Jack was able to write at around this time (for example in relation to his holiday in the Maldives on 17 November 2014) or evidence that in December 2014 Sara had a "nice lunch" with him (as was suggested in cross examination) or that he and Margaret were able to check themselves in online for flights to Cancun over New Year, or indeed that in March/April 2015 he purchased a car in France with Andy's assistance. Although it is true that Jack was able to obtain tickets for Jonathan to go to the football match in February 2014, I accept Jonathan's additional evidence in cross examination that the process of obtaining the tickets was difficult and that Jack had originally obtained two hotel rooms only, rather than tickets for the match. Jonathan said, and I accept, that Jack's "thought process was very slow". The emails from that time between Jonathan and Sara (on which Sara was not cross examined) discuss Jack's physical decline (his difficulty travelling) together with confusion and difficulty in communicating. An email from Sara to Jonathan on 11 February 2015 referring to the planned dinner with Jack records that "Dad just rang me and thought dinner was for tomorrow – honestly communication is soooo difficult". No doubt with these communication difficulties in mind, Sara sent Jack an email on the same day using red text, underlining and bold font to highlight key information about the location, time and date of the dinner.

313. It is common ground between the experts that slow or slurred speech is not necessarily caused by cognitive impairment. However, Dr Warner regarded it as "a red flag". Dr Series said that one of its causes is dementia "and so that could be a relevant thing to consider as part of the assessment of the degree of dementia", although he said he did not consider that it was directly related to capacity. In this case, I find that given my determination as to Jack's sudden confusion in the summer of 2013, his continual memory lapses and his later diagnosis of mild to moderate dementia, Jack's slurred and slow speech at the end of 2014/early 2015 is likely to have been an outward manifestation of the ongoing progression of his illness. I infer (particularly from the evidence of confusion on Jack's part) that Jack was also suffering from progressing cognitive impairment. It is possible that Jack himself understood the potential significance of what was happening to him. In an email to Andy in March 2015, responding to a query about a holiday in Jamaica the following December, Jack said "Don't know if I'll make it". Andy's response "Of course you will" no doubt expresses the optimistic response of many members of Margaret's family to his state of health at this time – perhaps not really wanting to see or acknowledge Jack's slow decline.

314. In so far as the evidence of Margaret's family suggested that Jack was showing no signs of any cognitive impairment (including confusion or memory lapses) in this period, I consider them to have been mistaken. As I have already said, the fact that many members of Margaret's family were seeing Jack very frequently may have made it a great deal more difficult for them to pinpoint the start of Jack's decline or, indeed, to remember specific incidents and dates. The Defendants rely on evidence of a Well Man Medical on 4 March 2015 which described Jack as "overall" in very good health, but I have no evidence whatever as to the tests to which Jack was subject during this medical. From the letter to him of the 5 March 2015, it is clear that the medical involved blood tests and that it "looked at" four medical issues, none of which concerned cognitive deterioration. In the circumstances I can attach no weight to this in the context of my consideration of Jack's cognitive decline. In this context I note the admission in the

Defence that by 2015 Jack's cognitive facilities had declined "such that he was no longer as sharp as he had previously been".

Meetings and interactions with professional advisers – January 2015-May 2015

315. There is no evidence of Jack getting back to Ms Wells as to the substance of the Third Draft Wills in December 2014 or early 2015. Indeed there is no evidence of them being mentioned in any material way again. That he did not do so is confirmed by an email from Ms Wells' secretary to him on 24 February 2015 referring to his exchange of emails with Ms Wells in November 2014 and asking whether he is yet in a position to finalise the wills. Jack's response to this query explains that he is "awaiting a response from Deloitte regarding the USA" and that once he has received that response he is hopeful of being able to proceed.

316. In the meantime, however, Ms Bultitude contacted Jack by phone on 5 January 2015 to obtain his instructions on an investment that he had purchased in 2008. The attendance note evidences Ms Bultitude giving detailed advice about the investment and records the fact that Jack's "speech can be a little impaired from time to time" when speaking over the phone. Ms Bultitude raised with Jack the Barclays "elderly and vulnerable" policy but the note records that he was "adamant and clear" that he did not require a third party present when receiving investment advice and making investment decisions. Although the note describes Jack as still very much engaged when it came to his investments, Ms Bultitude accepted in cross-examination that "Jack's interaction with her would have been brief" and may have been limited to single word responses. On balance, I do not consider the note of this meeting to evidence engagement on Jack's part in the particular conversation; there is no suggestion that he questioned any aspect of the advice he was being given. That Jack himself was not prepared to accept that he needed the assistance of a third party does not, to my mind, carry any real weight for obvious reasons.

317. On 30 January 2015, Deloitte sent Jack his 2013/14 tax return together with an amended 2012/2013 return which he was asked to approve by the following day. Jack sent a brief email on 31 January 2015 confirming that there were "no major (or minor) omissions" and asking for the return to be submitted. These exchanges do not evidence anything other than Jack following the instructions he had been given by Deloitte. On 23 February 2015, Deloitte submitted their invoice to Jack for the period to 31 January 2015, which, amongst other things, mentioned (and charged for) their review of his files "to confirm details of a gift you made to your daughter, Sara, for the purposes of reviewing your will". This reference does not appear to have prompted Jack to reconsider the latest instructions provided to Ms Wells.

318. On 2 March 2015, Mr Horton provided Jack with a report in relation to the US Property, noting in his covering email "the level of complexity involved". The report confirms Jack and Margaret's agreement to divide their assets seven ways, identifies the value of the US Property as "between $450,000 and $500,000" and records Jack's wish that, on his death, Andrew would be able to continue to reside in the US Property. The report also records Jack's instructions that "due to Andrew's health issues", he did not want to make an outright transfer to him of the US Property and nor did he want to transfer a significant amount of money to him which might enable him to acquire his own

property. Instead, Jack now wanted advice on whether a trust might be appropriate to hold the US property for Andrew's benefit during his life, notwithstanding that this might not be the most optimal result from a tax perspective. The possibility of a trust had been raised by Mr Horton in his email of 14 October 2014.

319. Under the heading "The Importance of Wills", the report advised that "it is important to ensure that you have a US will in place to ensure that this asset is directed to the correct beneficiaries on your death". It also advised that because Jack was likely therefore to have multiple wills in place "it is important to ensure that each will recognises the existence of the other" and that this was a matter that would need to be addressed with the solicitors responsible for drawing up the wills. On the subject of a trust, the report advised that it would be possible to transfer the US Property into trust on Jack's death and to provide Andrew with a life interest in the trust but recommended that if this approach were to be taken there would need to be provision in Jack's UK will that the US tax charges associated with the transfer of property at his death be settled out of his wider estate before any other distributions to the beneficiaries of the UK will.

320. Jack met with Mr Horton on 18 March 2015, although there is no note of that meeting. An email of the following day from Oliver Burton of Deloitte followed up on a request made to him at the meeting to send information which would enable Deloitte to prepare his 2014 tax return. Jack did this under cover of an email on 20 March 2015.

321. In an email of 26 March 2015 to Mr Horton, Jack explained that he had decided "it will be too expensive to set up a trust" in respect of the US Property and that he had abandoned the idea – presumably the costs had been explained to him at the meeting on 18 March 2015. In a departure from his earlier thinking about tax, he observed that "I will, instead, leave the property to Andrew and, if he keeps it, he will have to pay the 40% tax". Jack says he will tell Andrew this "in due course". This prompted two emails from Mr Horton providing advice as to how this should be dealt with in Jack's will ("it would be prudent to outline how you wish the UK/US tax in relation to the property to be funded") and reminding him of the possibility of selling the US Property and then gifting the proceeds to Andrew, together with calculations as to the "economics" associated with this possibility. Jack responded on 28 March 2015 thanking Mr Horton for "spelling it out so clearly" and saying that he would "give it some thought and let you know".

322. There is no evidence that Jack told Ms Wells of this decision, told Andrew of his intentions, or passed Mr Horton's emails on to any of his other advisers. In an email to Mr Horton of 1 April 2015, Jack wrote "[i]n fairness to my other children I will leave the house to Andrew and no [*sic*] give him anything. He can then borrow against house to pay the tax or downsize – I can't go on living his life for him! I will however start researching a US Will!". This is suggestive of a change in Jack's approach to Andrew, perhaps suggestive of a growing lack of empathy. However, it is clear that Jack was still keen to leave the US Property to Andrew. There is again no evidence that this was communicated to Ms Wells.

323. On 8 April 2015, Jack emailed Fettmann Ginsburg PC seeking to follow up on his decision to research obtaining a US will and asking for a contact that he could use. He

did not attach Mr Horton's latest report or their email exchanges but said that his sons now reside in the US. Patricia Fettmann, an American attorney, replied indicating that she might be able to help and that she could also provide a referral to a lawyer specialising in estate planning. Jack replied in an email that was full of typos (described by Ms Fettmann's law partner and husband, Jonathan Ginsburg, in an email of 8 April 2015 as "cryptic") as follows (errors in the original):

> "I have plenty of advice on Estate planning, but I'm Told I need aUS will or those that live in the US. I remaares when my dirst wife died and for many years was a US resident with my Company, Eurotherm, thanks to Jonathan (who was with Ginsberg, Feldman & Bress at the time".

324. Pausing there, Jack's email appears to me to evidence a substantial degree of confusion. He does not mention the US Property, Andrew's financial position or the advice he has received from Deloitte (or, much earlier, from Buzzacott). Later that same day he sent a further one line email saying simply "I am resident in England", again not addressing the central issue.

325. On 9 April 2015, Jack appears to have organised his thoughts more clearly, because he sent another email to Ms Fettmann explaining that he needed a US will because:

> "I have given up my Green Card and my sons (2) are resident in the USA…I am having a UK will drawn up...I should mention that I own the house where Andrew lives but I intend to leave it to him. He will have to downsize to pay the tax, which he hasn't realised".

Ms Fettmann responded on the same day saying that the charge for any work by her would be dependent on the complexity of the document and that some items could be addressed without the need for a will. She asked to discuss with Jack "the specifics of your estate and your intentions" saying that would give her a "better idea" of his needs and the corresponding charge.

326. On 10 April 2015, Jack provided Ms Fettmann with what he described as a "summary of requirements", an apparently more coherent document albeit containing information of no relevance to Ms Fettmann (about his assets outside the US). Notably in this context Jack identifies the general position as being "[m]y wife inherits if I am the first to die", without any reference to the trust structure he has been advised to put in place. Jack set out his understanding in this document that "there is a tax complication at the moment involving the English Wills which are being rewritten". This was incorrect – there was no tax complication in relation to the English wills. The information he provides in relation to the US Property did not make clear his specific instructions for his US will. He said only this:

> "I own the house my son, Andrew, lives in and he is due to inherit it. I gather he will have to pay some $200k (the house is worth $500k) and will probably have to downsize. Alternatively he may borrow money on the house".

327. Jack's final paragraph said that he needed to prepare English and US wills and that he was looking for someone to prepare the US will. He asked "Are you appropriate", by which I infer that he wished to know whether the preparation of the US will was a task that Ms Fettmann was able to undertake on his behalf.

328. Jack and Margaret attended another meeting with Barclays (this time at Barclays' offices) on 29 April 2015. There are at least two notes of this meeting but neither records any attempt on the part of Barclays to check whether Jack and Margaret required a third person present and Ms Bultitude's evidence in chief was that (as is evident from the notes) Jack was involved in the discussions. During the course of the meeting Jack said that "[h]e would be adding [Margaret's] children to his will" and that he was "not entirely happy with Andrew inheriting the US property, he has thoughts in place to have Andrew downsize". He informed Barclays that he was considering writing an American will and that he may also consider writing a new French will. He does not appear to have provided any information as to his advice from Deloitte or his recent contact with Ms Fettmann. The note records that there was also a discussion about Jack's investments.

329. Following the meeting, there is evidence that Ms Bultitude was concerned about a change in Jack. In a note of a second meeting signed by Ms Glimond (who had also attended the meeting on 29 April 2015) on 5 May 2015, the following conversation between Ms Glimond and Ms Bultitude is recorded:

> "SB also advised that [Jack] has macular degeneration and appears to have 'slowed down' since she last met him. His understanding is still evident but he struggles a little to make himself understood. DG had noted that his speech is a little slurred".

The note goes on to record that a substantial investment decision had been made by Jack but that his instruction "was not taken immediately as SB wanted him and [Margaret] to be able to go away and discuss this".

330. When asked about this note during examination-in-chief, Ms Bultitude did not attempt to suggest that it was incorrect. She confirmed that it had also been signed by another of her colleagues at Barclays. Upon it being put to her in cross-examination that there had been some kind of cognitive deterioration since she last met Jack she responded that she "could not remember". However, she accepted that "to an extent" the reason she had refused to take immediate instructions from Jack, instead asking him to go away and discuss his decision with Margaret, was because "there were concerns about capacity", albeit she subsequently appeared to row back from this concession.

331. I find that this note is important evidence from Jack's professional advisers that it was obvious to them that he was slowing down, that his speech was slurred, he was having difficulty making himself understood and that this gave rise to concerns around his capacity. Dr Series expressed the view in the second joint statement that this note was evidence of "reduced flow of speech in line with [Jack's] dementia". In so far as the note expresses the view that Jack's "understanding" was still evident, it is entirely unclear what this view was based on or how it was arrived at, and, in the circumstances, I am unable to place any real weight on it. On balance I consider it to be much more

likely that Jack was engaging with Ms Bultitude only on a relatively superficial level at this stage, perhaps appearing to understand the advice he was being given, but in fact not able to engage with it on a detailed or complex level.

332. Ms Bultitude followed up on Jack's instructions in an email dated 13 May 2015, asking about his intentions in relation to the transfer of excess cash into his DGLT and requesting information about the intended beneficiaries under both his and Margaret's trusts. Jack did not reply to the former question, leading Ms Bultitude to send him a chasing email on 30 July 2015.

333. At the beginning of May 2015, Jack emailed Ms Fettmann apologising for being "vague" and asking if she wanted "the job of writing my will". Ms Fettmann replied suggesting a call (at no charge) and it seems that Jack tried to call her on 4 May 2015, but she was not available. There is no direct evidence of a conversation between Jack and Ms Fettmann.

334. On 6 May 2015, Jack sent to Ms Fettmann a document entitled "Carol Wells". His covering email was blank. The document, which was presumably intended to assist in the preparation of a US will, said this (typing errors included):

> "My UK lawyer is Carol Wells.
>
> \Carol works for Irwin Mitchell…There are existing wills which will be superseded.
>
> I should explain my first wife died of breast cancer in 1998. I remarried a lady I met on the Web whose husband had died some five years earlier. Margaret is five years younger than me. I am eighty three.
>
> I want to save Tax, if possible, because neither my wife nor I paid any tax on the death of our first respected spouses, and believe it possible.
>
> Any further questions, please ask".

The email contained no relevant information in relation to Jack's US Property and irrelevant information about his wife's death and his subsequent remarriage. No email address for Ms Wells (who was wrongly referred to as a lawyer) was provided and Ms Fettmann chased Jack for this information in an email later that same day. Jack replied "Will do by Morning" and sent Ms Wells' email address to Ms Fettmann the following day.

335. On 7 May 2015, several months after his last contact with her, Jack emailed Ms Wells saying that he had "appointed" Ms Fettmann "to work on an American will" and that she would be in contact. This appears to be entirely inaccurate in that (as Ms Fettmann points out in an email to Ms Wells later the same day) Ms Fettmann had been neither formally retained nor instructed (certainly not in any clear terms) to do anything. Indeed Ms Fettmann's email of 7 May 2015 (also copied to Jack) evidences her confusion around Jack's requirements; amongst other things she says that she has been "unable to determine whether he wants the US will for only the US property or for his entire estate

(which made no sense to me)" and she also says that she understands Jack to want the US Property to be sold "so that the proceeds can be equally divided between all his children", something which appears consistent with what Jack had said to Barclays on 29 April 2015, and which might suggest that Jack and Ms Fettmann had managed to speak (albeit it is inconsistent with Jack's written instructions to Ms Fettmann). Curiously Ms Wells appears never to have responded to this email, notwithstanding that, in my judgment, this episode should have served as another warning flag as to Jack's capacity.

336. In an email sent to Ms Fettmann the following day, Jack identified that she had made "errors" in her email to Ms Wells but he described these as follows:

> "I the house where we live in England is jointly owned with there is a property in Plan-de-la-Tour in the South of France which I also own about 1,0m Euros. My apologies".

I agree with the Claimants that it is clear from this email that Jack simply did not appreciate why Ms Fettmann could not understand his instructions and did not begin to address her difficulties or to appreciate that he may have given inconsistent or unclear instructions. He also failed to address her very clear statement that "Mr Leonard has not yet retained this office".

337. Ms Fettmann replied to Jack on 8 May 2015 saying that she was waiting to hear from Ms Wells before responding and that "[t]hose items [which I infer to be the assets identified in Jack's email] should not affect the basic question or her response". Jack had no further contact with Ms Fettmann and took no further steps to try to pursue the preparation of a US will.

338. Ms Bultitude's request of 13 May 2015 for details of the beneficiaries of the trust appeared to prompt Jack into creating documents on his laptop designed to set out this information. Altogether he appears to have created five documents (saved as "Children D"; "Children &"; "Children&Grndchildren"; "Children & Grnadchildren" [*sic*] and "Jack Leonard's Children") between 17 and 18 May 2015. The final version (entitled "Jack Leonard's Children") was sent to Ms Bultitude under cover of an email from Jack dated 18 May 2015. This was an important document for obvious reasons, but it is littered with errors. Jonathan and Andrew's dates of birth are both incorrect, Jonathan and Andrew's zip codes are both incorrect, Sara's house number is incorrect and his youngest grandson Henry is omitted entirely from the list. Under cross-examination, when this document was drawn to his attention, Dr Series confirmed that Henry's omission gave him "a little more cause for thought that that could be a memory error" and said that the other errors would "possibly" exacerbate those concerns albeit that it would depend on why Jack prepared the document and how important it was that it was absolutely accurate. I accept the Claimants' submission that Dr Series' testimony supports the conclusion that this document is further evidence of a progressive cognitive decline, particularly in relation to Jack's memory. It seems to me to corroborate the evidence given by Robert that at a family dinner for Passover in April 2015, "Jack's mental health and speech capacity had markedly deteriorated".

339. Between 23 and 29 June 2015, Jack was involved in correspondence concerning the renewal of his private healthcare cover with BUPA, which Schneider Electric (the successor company to Eurotherm) were responsible for paying. It is the Defendants' case that this shows Jack using initiative and demonstrating good cognitive skills, but on close analysis I disagree. In fact detailed analysis of these documents (which I need not set out at length here) shows that Jack persisted in sending emails to the wrong address and that having received confirmation that Ms Chang at Schneider Electric would pay the renewal sum, he nevertheless paid it himself around 20 July 2015. To my mind this appears consistent with deteriorating cognitive abilities.

Further Instructions to Ms Wells and Ms Fettmann – June to July 2015

340. On 25 June 2015, Jack created a document on his laptop saved as "letter to carol carr" (presumably an incorrect reference to Ms Wells). The court was shown four versions of this document. Version 1 (last modified on 26 June), which reverts back to the need for simplicity in his will, reads as follows:

> "I now wish the Wills to be written.
>
> The first thing to define is that, if Margaret survives me she inherits everything. I suppose Tax to be a consideration. The Will is to be written to minimise Taxation.
>
> Everything except the house we live in is to be divided seven ways with a seventh going to each of my four children and a seventh to Margaret's **three surviving children and their offspring**.
>
> The reason for this is my wife who doesn't want my children to inherit any part of the place where she has been living.
>
> The value of the property in France is to be similarly split seven ways.
>
> The residence at Findon Valley…is for the life time use of my first Wife's sister, Marjories, and is not to be sold until her death. Then the proceeds of the sale can be split seven ways.
>
> The house currently occupied by my Son Andrew is to be inherited by him alone. He will probably have to downsize after paying the inheritance tax" (**emphasis added**).

341. This document was the subject of a considerable amount of scrutiny at trial, in particular as to the error in Jack's reference to Margaret's "three surviving children"; an error which repeats the similar error made in his aide memoire document of 30 October 2014. On this occasion however, this phraseology (together with other evidence from around this time) does not suggest to me a mere slip or "shorthand" for Mark and Liz and Melanie's children. I infer from the reference to "three **surviving children**" that Jack understood that there had been a death but it is not clear that he was able to identify

who had died. His identification of three surviving children was plainly wrong. Margaret only has two surviving children. Furthermore, the suggestion that one seventh was to go to the offspring of all of Margaret's children was wrong.

342. At this remove of time it is impossible for me to say with any certainty why Jack made such an error – Melanie's death had plainly been extremely traumatic for everyone. There would appear to be three possible explanations: (i) that when drafting the document he made serious and fundamental typographical errors which entirely changed the intended meaning of the sentence without noticing them; (ii) that he believed what he had written to reflect the true position (i.e. he believed it to be accurate) without appreciating that what he had written in fact meant something entirely different – in other words he was very confused; or (iii) he had forgotten or was unable fully to understand who the members of Margaret's family were and their relationships to each other.

343. I consider the first possibility, effectively that this is simply an example of poor draftsmanship, as the Defendants contend, to be unlikely. This document was of considerable importance to Jack; it was setting out his testamentary intentions. In that context it is difficult to believe that he would not have taken care in drafting it, including reading it over to check for errors. I reject the suggestion that this is simply an example of "loose terms". In my judgment it is, on balance, more likely that when he wrote this document he was either extremely confused and finding it difficult to articulate in writing his thoughts, or he had actually forgotten the identity of the member of Margaret's family who had died. Dr Series accepted in cross examination that if Jack had forgotten Melanie's death "that raises quite a question about his memory". He also explained that following strokes or various kinds of brain injury the "ability to express in words what you are thinking is damaged". In either event, I consider that this casts serious doubt over Jack's cognitive powers.

344. On 2 July 2015, Jack sent an email to Ms Wells with no content but an attachment entitled "I now wish the Wills to be written". This was Version 4 of his "letter to carol carr" document, albeit found on the iMac. The document was created on the iMac on 2 July at 11:19 and last saved/modified at 11:49 on the same day. It was then sent from the iMac to Jack's email address by Margaret at 11:53 (Version 3) and 17 minutes later a very slightly amended version of it (Version 4) was sent to Ms Wells under cover of Jack's email. I do not need to decide that anyone other than Jack was responsible for this document (he may have had his own reasons for working on this document on the iMac); however, I infer (based on the inherent probabilities) that Margaret read it on her iMac and suggested that he correct the error he had previously made because the reference to "Margaret's three surviving children" in the third paragraph is now amended to "Margaret's two surviving children and Melanie's (deceased) three children", thereby reflecting the true position. The other more minor amendments do not change the intention expressed in Version 1 but clarify that the French Property will be put on the market.

345. Pausing here, these instructions to Ms Wells clearly revert to the desire for a will leaving everything to Margaret – a rejection of the trust structure that Ms Wells had included in the Third Draft Will and a reiteration of instructions that Jack had been giving all along: he literally wanted everything to be left to Margaret should he die first, with the

exception of the Findon Property and the US Property which were to be provided for separately. This was accepted by Ms Wells in evidence who acknowledged that these instructions were a "reversion by Jack to the quite simple structure that he and Margaret had come up with, that everything [apart from 2 Hutton Place] that belonged to both of them goes seven ways". Furthermore, these instructions:

a. change Jack's instructions in relation to 2 Hutton Place, which is now to go only to Margaret's family (something he had said he wanted to do at the February 2014 Meeting, but had subsequently changed his mind about);
b. do not provide instructions as to how Andrew is to inherit the US Property, pay the tax burden or maintain the property (or any other property he might purchase) notwithstanding Jack's attempts to engage with Ms Fettmann;

c. do not make clear which, if any, of his previous instructions, included in the Third Draft Will (for example in relation to the hotchpot provisions or the gift of an amount up to the nil rate band to Jack's children) are to be taken into account and certainly do not identify the errors in Jack's Third Draft Will in relation to the hotchpot provisions and other missing provisions on which he had agreed;

d. do not deal with whether Jack still wishes the sum of £300,000 to each of his children to be taken "off the top" of the residue, as he had instructed at the November 2014 Meeting. The Defendants submit that it is clear that Jack did not want a provision of this sort, because it had not been mentioned and this may be so, but on that basis, these instructions also do not refer to hotchpot provisions, the inference being (on the Defendants' argument) that Jack no longer wanted those either;

e. do not comment on, or even mention, the provisions of the Third Draft Will. Indeed there is no acknowledgement in Jack's instruction document asking for "the Wills to be written" of the existence of the Third Draft Will. As Ms Wells accepted in cross examination, Jack's will "had already been written", but I can only infer that either he did not remember that, or did not appreciate the need to review his instructions in the context of that earlier draft.

346. I reject the Defendants' submissions that these instructions were plainly referring to a life interest trust as discussed at the November 2014 Meeting and further that it was "clear" from these instructions that Andrew would have to give credit against his interest in the residue under the UK will should he receive the US Property as intended via a US Will.

347. On 3 July 2015, the day after sending his instructions to Ms Wells, Jack sent an email to Ms Fettmann attaching another very similar version of the document he had sent to Ms Wells the previous day, this time saved as "leonards will". The metadata shows that this document was created on 1 July 2015 on Jack's laptop (i.e. this was Version 2, created before the document saved as "I now wish the Wills to be written" was created). It was last saved/modified at 11:54 on 2 July 2015 – in other words, Jack appears to have worked on it within a few minutes of finalising Version 3. Given its similarities to Version 1, also created on his laptop, it seems likely that Version 2 was created either

by re-saving Version 1 under a different name or by copying the text into a new document. In either case, it is clear that the third main paragraph has now been amended to read:

> "Everything except the house we live in is to be divided seven ways with a seventh going to each of my four children and a seventh to Margaret's surviving children and **to be split equally between Margaret's three surviving grandchildren**" (**emphasis added**).

Albeit a different mistake from the mistake made in Version 1, this is a serious mistake nonetheless, now inaccurately suggesting that one seventh is to be split between Margaret's "three surviving grandchildren", when in fact the intention was that it be split between Melanie's three children (i.e. some, but not all, of Margaret's seven grandchildren).

348. It is impossible to say whether this amendment was made to Version 2 before or after Version 3 was created on the iMac, although it seems from the metadata to be more likely that it was made before. However, what is clear is that Jack made a serious error on 25 June 2015 and that although he subsequently appears to have appreciated a need to amend his drafting, he was totally incapable of properly correcting that error when he worked on Version 2. Inexplicably (and as the Defendants accepted in closing "somewhat bizarrely") , he then chose to send Version 2 to Ms Fettmann rather than sending Version 4 which he had provided by way of instructions on the previous day to Ms Wells (which did not contain the error), without apparently appreciating the continuing inaccuracy in the information he had provided. To my mind this again evidences a considerable degree of memory loss and confusion on Jack's part and cannot simply be explained away, as the Defendants suggest, as a "simple mistake".

349. Jack's covering email to Ms Fettmann said this:

> "I would now like you to proceed with our Wills, if you are willing.
>
> The subjects are all those living in VA, my two sons. Further explanation is carried in the attached letter".

It is very difficult not to conclude from this email that, by this stage, Jack did not fully understand or was extremely confused as to identity of the person to whom he was writing, what that person could do for him and why he needed a US will. He does not appear to appreciate that Ms Fettmann has not been formally retained and he certainly does not attempt to address that situation. Margaret did not need a US will and so the reference to "our Wills" was quite obviously incorrect. Furthermore, his reference to the "subjects" being his two sons who were living in the US (presumably what he meant by "VA"), suggests that he had lost sight of the fact that the need for a US will primarily arose out of his plans for the US Property, i.e. Andrew's home. There is no evidence of Jack ever chasing up this email and no evidence of any further contact from Ms Fettmann.

350. That Jack was, on balance, suffering from confusion when he prepared the various instruction documents to which I have referred is borne out by his GP's notes from 6

July 2015. On that day Jack attended at his local surgery to obtain a prescription from his GP, Dr Patrick Ward, who records in the notes that "*of most concern*" was his "*apparent confused state, really quite vacant*". Jack was recorded as "*extremely hesitant with speech*", unable "*to follow simple instructions during cranial nerve exam for example*" and forgetful in that, having left Dr Ward's room for a short time, when called back in he appeared "*to have forgotten the previous conversation*". Margaret told Dr Ward that there had been a "*sudden change*" in Jack which had happened "*about six weeks ago*", that it had maybe worsened since then but that she "*thought it was just age*".

351. Dr Ward asked Margaret to take Jack to Basildon University Hospital, where he was admitted and spent three nights under observation.

352. Jack's inpatient letter from the hospital records that he was admitted with "*expressive dysphasia, dysarthria and slurred speech*", which the experts explained as difficulty in producing and understanding language (including written language) (dysphasia), difficulty in expressing the right word (expressive dysphasia) and difficulty in the mechanical production of speech resulting in slurring or lack of proper articulation of speech (dysarthria). The letter describes these symptoms as "longstanding" and I reject the Defendants' attempts to suggest otherwise by reference to a letter to Jack's GP from Dr Khorshid, a consultant dermatologist, dated 6 July 2015 which refers to his attendance at a clinic on 3 July 2015 and says that aside from a severe itch he is "otherwise well". Dr Khorshid was plainly focussed on a skin condition from which Jack was suffering and I infer that he would have had no reason to focus on or explore entirely different symptoms which were unrelated to that condition and fell well outside his area of expertise.

353. During his time in hospital, Jack had CT and MRI Scans, which showed, in summary, abnormalities involving generalised cerebral involutional changes (described by Dr Series as shrinkage of the whole brain which tends to be a feature of ageing rather than an indicator of dementia). There were signs of chronic small vessel ischaemic disease, but no sign of a substantial haemorrhage or stroke. The CT scan reported a "moderate burden of chronic small vessel disease", which Dr Series explained as the "furring up, narrowing" of the small blood vessels in the brain, effectively resulting in poor blood supply to the brain. The description of this condition as "moderate" was in his view "getting to a level where it is likely to be having some impact on cognitive function".

354. An imaging report (and an Addendum) by Dr Chawda described Jack's MRI scan as showing "a moderate to severe degree of generalised cerebral and hippocampal atrophy as well as a moderate degree of cerebellar atrophy". Dr Series explained that Alzheimer's disease pathology usually starts in the hippocampus (a particular part of the brain) and that "hippocampal atrophy" was an indicator of Alzheimer's pathology in Jack's brain (with which Dr Warner agreed), while "cerebellar atrophy" together with the identification in the imaging report of "hypertensities scattered in white matter of both cerebral hemispheres and at the basal ganglia" were indicators of vascular dementia. Dr Warner explained in his report that the problems with blood supply to Jack's brain were both in the cortex (outer surfaces) and in the deeper structures (basal ganglia). Dr Series said that hypertensities could indicate small bleeds, alternatively small areas where the blood flow has diminished. Dr Warner's evidence was that this

presentation was compatible with an acute vascular event (stroke) which was not so severe as to cause any problems with motor function. I did not understand there to be any significant disagreement between the experts on any of these points.

355. At around this time, Margaret told Isabelle that Jack had suffered a "funny turn" whilst on holiday in France. In an email to Helen Smith, sent on 15 July 2015, Margaret explained that Jack "was very confused and unsteady on his feet. It started when we were in France". I infer that it is very likely that once again Jack had suffered from a small bleed (in layman's terms, a small "stroke"), possibly in France. I note, however, that Margaret's description of his being "very confused" across the six week period tends to indicate that if there was such an episode in France, it was not something that Jack immediately recovered from. It appears equally likely that Jack suffered a similar episode on or around 6 July 2015. As Dr Series said in his evidence, such episodes are "very typical of a person in the course of vascular dementia" and vascular problems will cause "periodic changes".

356. Jack was discharged on 9 July 2015 and appears to have seen or spoken to Dr Ward again upon discharge. Dr Ward's notes record his view that Jack "will need a neurology follow up no matter what". On 12 July 2015, Sara sent Margaret an email asking Margaret to keep her posted on Jack's condition and observing that she had "been worried about his speech for a while now", an email on which Sara was not challenged.

357. On 15 July 2015, it appears that Jack left a voicemail message for Ms Wells chasing up his draft will, because she sent him an email apologising for the delay in getting back to him and saying "I will proceed with the drafting of your Wills and get back to you as soon as possible". Although Ms Wells gave no evidence about what Jack said to her in his voicemail, I can only infer that he made no mention of his illness or admission to hospital because Ms Wells herself does not mention it, either in her email or in her statement. Notwithstanding Jack's failure to engage with the Third Draft Wills, to mention any advice about a US Will (which had originally been his explanation for the delay in getting back to Ms Wells) and his reversion to a "simple will" structure, Ms Wells apparently did not see any need to arrange a meeting with him before preparing the next drafts.

358. Also on 15 July 2015, Margaret wrote an email to Helen Smith to which I have already referred. She expressed the view that since Jack had been home from hospital "he is much better and back to his normal self". Whilst Jack may have improved somewhat since his discharge from hospital, on balance I do not consider he was back to "his normal self", which appears unlikely given his medical condition, his six weeks of confusion, and the agreement between the experts that dementia is a disease that gets worse. It is also inconsistent with the evidence of his behaviour on a trip to London on 18 July 2015 and the evidence of Mr Marks and Dr Zach to which I shall return in a moment. In any event, Margaret's assessment is somewhat relative – it is difficult to know what she might have meant by "his normal self".

359. I also consider the contemporaneous evidence (in particular an email from Margaret to Andy on 12 July 2015 and an email from Sara to Jonathan of the same date reporting a conversation she had had with Margaret) to suggest that Margaret was not keen to tell members of her own, or Jack's family, about his condition because she "did not want

to worry" them – during her discussion with Sara she said that Jack's GP had been concerned about his speech but did not mention his confusion. Furthermore I consider it likely that her view that there was "nothing wrong" was based on her personal feeling that Jack was merely suffering from "old age". Sara records in her email to Jonathan that "clearly Margaret thinks there's nothing wrong and…Mark came round to see [Jack] this morning and thinks its old age". Sara observes that in her view "there's definitely an issue that needs looking into". In an email to Helen Smith on 22 September 2015, Margaret expressly says that what she describes as Jack having "slowed down considerably" could be "down to old age". There is some (unchallenged) evidence from Sara that Margaret was in the habit of dismissing Jack's falls and concerns about his health and on balance I find that she was generally keen to "play down" the events surrounding 6 July 2015.

360. On 18 July 2015, Jack and Margaret met up with Sara, Julie and their son Henry, Jonathan and his sons and Keith and his daughters. During the course of a visit to HMS Belfast, Keith noticed that Jack spent most of the time sitting with Margaret on a bench and, although he was frail, expressed surprise that he had not wanted to explore the ship. The group went to a pub for lunch and Keith remembers that Jack's communication was very vague, that he appeared "a little distant" and that Margaret would tend to answer for him. This is consistent with Sara's evidence of this occasion. She also describes him as "very gaunt and frail", looking "terrible" and as "unusually quiet" and apparently "disorientated", needing help in the pub in choosing a drink and something to eat. Jonathan remembers his speech as very poor, limiting him to the occasional sentence and describes Jack as failing to say hello to his grandson, Gareth, which he says would have been normal. I accept this evidence which appears entirely consistent with the medical episode that Jack had just experienced.

361. Following a review of Jack at an outpatient appointment, Professor Christopher Hawkes, a consultant neurologist, wrote a letter dated 28 July 2015 commenting on Jack's CT and MRI scan results and recording the results of his own examination of Jack, including observing, amongst other things, that Jack had a "*scanning dysarthria*" (i.e. as Dr Series explained, that his flow of speech was interrupted and jerky) that his speech was "*not actually slurred, more jerky*" and that *"[t]here was a clear impairment of cognitive function*", although he said that this had not been tested. Dr Series explained that he read this observation as indicating that Professor Hawkes had observed impairment of cognitive function in the way that Jack had dealt with his questions and answers. Professor Hawkes diagnosed *"[d]iffuse cerebrovascular disease with maximum impact on the cerebellum and frontal lobes*", opining that this was "*probably secondary in part to hypertension*". The cerebellum is a lobe at the back of the brain that controls fine motor movements. Professor Hawkes identified a prominent pout reflex which Dr Warner described as indicative of frontal lobe damage. Professor Hawkes referred Jack to Dr Charlotte Fuller, a consultant neuropsychologist, for a neuropsychological assessment.

362. On 30 July 2015, Ms Bultitude wrote to Jack with a view to chasing up a decision on the question of whether he wished to transfer additional funds into his DGLT, something that had been raised with him at the meeting on 29 April 2015. Jack never replied to this email and Ms Bultitude eventually telephoned him on 28 August 2015 apparently obtaining then his confirmation that he wished to invest approximately

£600,000 of liquid funds (a combination of maturing investments, the proceeds of sale of the Tally Ho! pub and the sale of his helicopter) into his investment portfolio with Barclays rather than transferring them into his DGLT. There is no note of this call and no evidence that Ms Bultitude was aware of Jack's illness at this stage. Ms Bultitude had no recollection of it. Ms Bultitude sent an email on 16 September 2015 to her line manager entitled "Elderly and Vulnerable Approval" referring to Jack's decision to invest in his discretionary portfolio, rather than to transfer money into his DGLT, but I do not regard this as evidence that Barclays took any appropriate steps to determine whether Jack understood the advice he was being given about these funds and nor do I accept that Ms Bultitude could have been satisfied from her conversation with Jack that he fully understood the ramifications of his decision. On balance I doubt that he did understand the advice he was being given about this considerable sum of money. The inherent probability seems to me to be that if Jack had understood the alternatives, he would have chosen to transfer the sum into his DGLT, thereby ensuring maximum efficiency from an inheritance tax perspective. I note that Jack never drew the existence of these substantial additional funds to Ms Wells' attention.

363. On 1 August 2015, Jack and Margaret had lunch at their home with Mr Marks and Dr Zach who were visiting the UK from Philadelphia. Although two emails from Jack to Mr Marks of 30 July 2015 liaising with Mr Marks over the arrangements for the lunch and providing detailed (Dr Warner described them as "meticulous") travel instructions appear to show good cognitive function on Jack's part (including flexible thinking and problem solving, as Dr Warner accepted), their evidence (which I have already said I accept in full) leads to a very different conclusion. They both referred to their shock at Jack's altered appearance. Dr Zach said he was almost "unrecognisable", saying he "looked terrible" and describing his uncharacteristically "sloppy" clothes. They remember that his speech was slurred and that he had little sense of balance. Mr Marks says that at some point "it was not completely clear that he knew who we were", while Dr Zach remembered that Jack "did not seem to know who [Mr Marks] was" saying that "he kept sort of looking aside and I had the impression it was like 'who are these people, what are they doing in my house?'". Dr Zach's evidence was that she and Margaret had been forced to keep up conversation. They both gave evidence to the effect that Jack was clearly not the Jack Leonard they had known in the past. Dr Zach said that while driving back to Arundel, she distinctly remembered that she and her husband had discussed their feelings that Jack "looked and acted like someone who had had a stroke". In his witness statement, Mr Marks expressed the opinion that on the day of their lunch, Jack would not have been in any condition to make important legal decisions. An email to Jack of 2 November 2015 from Mr Marks clearly shows the anxiety that this visit caused, whilst a second email of 2 July 2016 confirms Mr Marks' views at the time of his visit that "there had been some trauma, perhaps a stroke".

364. Dr Fuller saw Jack at an appointment on 5 August 2015. She carried out various tests designed to indicate the level of Jack's intellectual, attention and speed processing, executive and language function, together with other tests of memory and visual perception. In summary, Jack performed reasonably well in some tests and less well in others.

365. Dr Fuller recorded her conclusions in her subsequent report as follows:

> "*Dr Leonard currently performs within the average to superior range on measures of general intellectual ability. Compared to his estimated optimal level, these findings suggest a mild degree of inefficiency in his verbal skills, due to relatively weak verbal abstract reasoning. His auditory immediate attention/working memory is patchy and overall a little weaker than expected. He presents with very mild word retrieval*
> *difficulties on naming. There is a verbal-visual memory discrepancy, with relatively weak visual memory apparently reflecting organisational difficulties but no indication of rapid forgetting. Overall he performed unevenly and weaker than expected on measures of executive function and there is evidence of marked cognitive and motor slowing.*
> *The predominant pattern in Dr Leonard's neuropsychological profile is one of subcortical/frontal cerebral dysfunction, which would be in keeping with the indication of a vascular process. His cognitive impairment can be best described within the mild to moderate range at this juncture*".

366. Dr Fuller observed that Jack was aware that this assessment would provide a baseline for future comparison, if required. I have already said that, together with the results of the scans conducted on Jack in July 2015, it also serves as a useful evidential anchor prior to the signing of the 2015 Will.

367. Dr Series observed in his evidence that it was fair to concede from the outcome of the tests conducted by Dr Fuller that Jack's executive function (i.e. his ability to bring knowledge of the world and memory of events to bear in planning outcomes and in decision making) was impaired – this condition was referred to by Dr Warner as "dysexecutive function". This was something upon which the experts agreed in the second joint statement. In his report, Dr Series opined that an impairment of executive function could be relevant to testamentary capacity because it affects decision-making, albeit during his oral evidence he cautioned that it was not in itself an indicator of testamentary capacity. Dr Warner opined that Dr Fuller's tests evidenced an impaired working memory compared with his premorbid expectation, weak verbal abstract reasoning, organisational difficulties and "impaired executive function with marked cognitive slowing". I did not understand Dr Series to disagree.

368. On 8 August 2015, Jack and Margaret attended the wedding of Carolyn, who is Mark and Diana's youngest daughter. Mark, Diana and Liz's evidence is that at this event, Jack was effectively "back to his usual self" and "in fine form" chatting to people, but, given the evidence from Mr Marks and Dr Zach of only eight days earlier, and the evidence of Mr and Mrs Roberts of a meeting on 24 August 2015, a couple of weeks later, I consider that to be highly unlikely. It would appear that Jack may have been feeling physically stronger on this day, and that, in so far as he may have been experiencing good days and bad days, this was a relatively "good day", but I attach no weight to the suggestion that he was his "usual self".

369. On 11 August 2015, Jack sent an email to Haywards Aviation Ltd, insurers, informing them that he had sold his helicopter on 10th July and providing details of the purchaser and sale price.

370. On 12 August 2015, Jack saw Dr Ward at his local surgery. Dr Ward reviewed his history, noted that he was now being seen by Professor Hawkes and prescribed some medication

371. On 13 August 2015, Margaret sent an email seeking to change a medical appointment for Jack, from which I infer that he was not sufficiently well to organise his own diary.

372. On 14 August 2015, for the first time, Margaret sent an email to Ms Wells saying that Jack had passed on her last message, that time was dragging on and that "we would like to reach a finality of the wills". Margaret said that she and Jack "would like to discuss the present situation with you and complete as soon as possible". She then stated incorrectly that "it is almost twelve months since we first approached you". Margaret made no mention of Jack's admission to hospital or the fact that he had been undergoing neurological tests. There is no evidence that Jack sent Ms Wells' email of 15 July 2015 to Margaret and I infer that by this stage Margaret was probably reading Jack's emails. There is no evidence that Jack was aware that Margaret had chased Ms Wells in these terms.

373. Ms Wells replied to Margaret's email address on 17 August 2015 apologising for the delay caused by her own husband's illness and saying that she would "progress" the wills "this week" and would be in touch shortly. Ms Wells made no mention of setting up any meeting or telephone call as requested. Margaret responded the following day, again from her own email address, expressing regret at Ms Wells' husband's illness but saying that she and Jack looked forward to hearing from her. Margaret signed the email "yours sincerely Margaret and Jack", but it was not copied to Jack.

374. On 24 August 2015, Jack and Margaret had lunch in Edinburgh with Gordon and Tessa Roberts, whilst visiting the Fringe. Gordon remembers in his statement that he was surprised that they appeared to have "lost their bearings" in a taxi on the way to the house as Jack knew the area intimately. He also recalls that Margaret was focused on looking after Jack who was slurring his words a lot and was hard to follow, evidence which is corroborated by an email sent by his wife Tessa to their daughter Christa the following day. Given this (and the other evidence to which I have already referred), I have no difficulty in accepting Robert Behrens' evidence that he saw Jack and Margaret twice on their visit to Edinburgh, that Jack's decline in speech, conversation and intellectual skills were marked on each occasion and that when Jack went to pay the bill after dinner, he was "unable to manage the transaction and Margaret had to do it for him", which fits with Jonathan's evidence about a similar incident earlier in the year. That Gordon Roberts sent an email to Jack on 26 August 2015 describing Jack and Margaret's visit as "just like old times", seems likely to me to be the product of a fondness and sensitivity towards Jack rather than an accurate statement of his observations on Jack's state of health.

375. On 26 August 2015, Ms Wells sent to Jack and Margaret updated wills "for their approval" ("**the Fourth Draft Wills**", "**Jack's Fourth Draft Will**" and "**Margaret's Fourth Draft Will**"). In the covering letter, which continued to emphasise the importance of putting Jack's estate into trust, Ms Wells summarised Jack's Fourth Draft Will as follows:

> "1. Jack's half share of the house is left to Margaret, but if Margaret predeceases you then it goes in 7 shares as discussed.
> 2. Marjorie's house is left in trust for Marjorie's benefit until she either dies or leaves the property. At that point the property passes to the seven children/step-children in equal shares.
>
> 3. All personal belongings pass to Margaret.
>
> 4. The remainder of the estate is then held in trust for Margaret's benefit for her lifetime. Margaret is entitled to the income arising on the estate and the Trustees have power to appoint capital to Margaret should she need it to ensure that all her living costs and if appropriate care costs are met. Margaret would therefore have full access to income and capital to the extent that it is required.
>
> 5. On Margaret's death the trust fund after the payment of any inheritance tax due is then divided into 7 shares as discussed, but with Sara and Megan being deemed to have received £200,000 and £100,000 respectively during Jack's lifetime, and Andrew's US property being taken into account as part of his share".

376. Jack's Fourth Draft Will is in the same terms as the Third Draft Will save that:

a. the gift of an amount up to the nil-rate band to each of Jack's children is omitted;

b. the interest in the remainder of the Findon Property is to pass seven ways rather than just to Jack's children and

c. the US Property ("which he shall have inherited in the United States of America net of any United States Federal or State inheritance tax paid") was now to be brought into hotchpot in Andrew's share, apparently in circumstances where (as Ms Wells explains in the covering letter) "you will still need to take further action in the US with regard to Andrew's property. The advice there seems to be that you should transfer the US property to a revocable trust which will specify what will happen to the property on your death". Ms Wells asked in the letter for confirmation as to Jack's instructions on this, which she never received.

377. Margaret's Fourth Draft Will removed the discretionary trust provision and now provided for the residue of Margaret's estate to be split seven ways.

378. On 1 September 2015, Margaret responded to Ms Wells by email saying: "[a]ll looks acceptable except we would like it to be made clear that the family house be left to my children after our demise". She made no reference to the US Property and did not attempt to address the query as to Jack's instructions in relation to that property. Ms Wells replied the same day, copying Jack in, and seeking clarification in relation to the instructions for 2 Hutton Place, which she said had changed. She did not try to follow up on her query as to the US Property.

379. On 3 September 2015, Margaret responded to Ms Wells' query (again not copying Jack in) saying "Yes I would wish for the family house, 2 Hutton Place, to be left to my children. Jack has agreed to this, also upon his demise this house will be left to my children". Margaret said that Jack would send a confirmatory email. Later that same day, Jack sent an email from his iPad saying: "I must support my wife in that my instructions specified that the house we live in will pass to Margaret's family because she doesn't want my family involved in any way with that house". I accept the Claimants' submission that it seems likely given the evidence and the inherent probabilities that Margaret assisted Jack with this email, although there is no doubt that Jack's intentions were consistent with the terms of his document of 2 July 2015. Despite the evidence of this email (to the effect that Jack was potentially being passive in his intentions for 2 Hutton Place) and despite the fact that Ms Wells had been corresponding primarily with Margaret, she did not seek a meeting or a phone call with Jack to confirm his instructions. Her evidence was that she took Jack's email at face value in the context of conversations she had been having with Jack and Margaret over a long period of time. In my judgment, this was very far from being a prudent approach. I note however, that Ms Wells' husband was, at this stage, in the final weeks of his life.

380. On 7 September 2015, Ms Wells sent finalised Wills to Jack and Margaret for their signature, correcting the position in relation to 2 Hutton Place in accordance with their instructions ("**the Fifth Draft Wills**"). She also enclosed Letters of Wishes for them to sign. Ms Wells advised in her covering letter that:

> "You will need to take further action in the US with regard to Andrew's property. The advice there seems to be that you should transfer the US property to a revocable trust which will specify what will happen to the property on your death. This apparently avoids the need to file for probate in the US and is a faster and less expensive process. I will email Patricia Fettmann to confirm that you wish to proceed with this if you would like me to do so. **Jack please confirm your instructions on this**" (**emphasis in original**).

381. At the beginning of September 2015 Jack and Margaret were away on holiday in Italy, returning on 12 September. On 13 September 2015, Francesca recalls meeting Margaret and Jack at the Langham Hotel for tea to celebrate her 21st birthday. She remembers little about this occasion, but in her statement she said that she recalled Jack being involved in the conversation albeit that she needed to repeat herself "when there

was background noise" and his replies were "fairly short". Under cross examination she maintained that Jack's only difficulty was with background noise (i.e. a hearing issue), but that is not consistent with the wealth of evidence to the effect that, by now, Jack was suffering difficulties that went beyond mere trouble with his hearing and, in so far as Francesca is genuinely able to recollect anything about Jack's state of health at this tea, I consider her to have been mistaken.

382. On 15 September 2015 a letter was sent to Dr Rangasamy apologising for Jack having missed an outpatient appointment on 7 September 2015 and asking for all further appointments to be cancelled in light of the fact that Jack was now being seen by Professor Hawkes. The circumstances in which this letter (signed "Dr J.L. Leonard") came to be written are unclear. There is a copy of it on Jack's laptop but also a copy on the iMac. On 24 September 2015, Jack paid an online bill and also signed Deloitte's engagement letter in respect of their tax compliance services. The letter identified both Ms Patricia Mock and Mr King Mills as personnel assigned to provide these services. I do not consider that these events are in any way probative of his cognitive faculties at the time.

383. On 2 October 2015, in an email sent from Margaret's email address, Jack wrote to Ms Wells on the subject of "Our Wills". He made no reference to the US Property or to Ms Wells' request for his instructions on this topic, but instead said this:

> "I am as anxious as no doubt are to have the draft Wills signed and witnessed as soon as possible. but there is one point that is obscure; is it enough to state **I give to my spouse, Margaret Rose Leonard absolutely all my personal chattels as defined in Section 55 (1) (X).of the Administration Estates Act 1925**.
>
> Perhaps you could clarify if I predecease Margaret will all the wishes stated in my Will be Margaret's responsibility" (**emphasis added**).

384. To my mind this was a most curious question to be asking at this point in the will making process. The Defendants' case is that this query (which they say shows that Jack has been carefully reading the draft wills) is properly to be understood as picking up on a sophisticated point to the effect that the chattels clause at paragraph 4 in each will was different. Furthermore, the Defendants say that it is entirely natural that Jack should be seeking to clarify the role of executor which is hedged around in the will with "legal mumbo-jumbo". On balance, I reject these explanations which do not appear to me to be consistent with the evidence and inherent probabilities.

385. The words in bold to which I have referred are the exact words which appear in paragraph 4 of Jack's Fourth Draft Will and they are words which had been repeated in every previous draft. They appear to have been pasted into this email, as the Defendants accepted in closing. To my mind, given Jack's instructions that he wished to leave everything to Margaret and given his question as to whether those words are "enough", I consider that this was a query from him as to whether paragraph 4 of his will achieved what he had in mind. This interpretation of his query finds support in his request that Ms Wells clarify whether <u>all the wishes</u> in his will are to be Margaret's responsibility,

something he had long wished to be the case. Ms Wells' response of the 6 October 2015 (sent only to Margaret's email albeit addressed to "Jack and Margaret") addressed only the issue of Margaret's role as executor: "Margaret and Barclays are appointed as the Executors of the Will so it is their joint responsibility to ensure that all the provisions of the will are carried out. No one else has any control over anything in the estate". There is no evidence as to whether Jack ever saw this email, but even if he did (and I infer that Margaret would have shown it to him), it failed to address the more fundamental premise of his query.

386. I agree with the Claimants that a request at this stage as to the role of Margaret as executor goes to the very heart of Jack's understanding of the will. As far back as February 2014, Ms Wells had stated that she was satisfied that Jack and Margaret understood the role of an executor. To my mind this is clear evidence that Jack either had not in fact understood her explanations or (perhaps more likely) had not retained any understanding he may originally have had. Certainly it suggests that while Jack likely read the draft will, or parts of it, he was unable now to understand how his testamentary wishes were to be effected. Furthermore, I consider that this request evidences Jack's continuing desire for a simple will together with an inability to understand the trust structure – his intention (which had not been implemented in the final draft) remained to leave everything to Margaret on the basis that she would thereafter distribute his assets in accordance with his wishes.

387. Margaret emailed Ms Wells from her address on 7 October 2015 to thank her for her reply to Jack's query (she did not suggest that Ms Wells had failed to answer the question posed). She noted that she and Jack would now "get the wills signed over the weekend and send them to you". The email is signed "Jack and Margaret", albeit it is plainly written by Margaret from her own email address. A subsequent email from Margaret's email address to Ms Wells on 12 October 2015 correcting an error in the letter of wishes and indicating that she and Jack hope that their neighbours would "find the time today or tomorrow to sign the wills" took the same form.

388. On 13 October 2015, Sara met with Jack for a hot chocolate, recording in her statement that the walk to the local Costa was very slow, that Jack was unsteady on his feet, that his speech was slow "so conversation wasn't easy". In cross examination Sara explained that the conversation was difficult, "superficial" and not what it had been in the past. Jack was having problems with his eyesight and dizziness was making him fall. He had fallen the previous week whilst taking the bins out. It appears that there was a conversation about what might be causing the dizziness.

389. Later that day, Sara sent Jack an email with the subject "Hi Dad – PLEASE READ THIS BEFORE YOU DELETE IT", reflecting a suspicion that Jack would not even read the email, Sara's evidence being that "he kept deleting emails". In the email, Sara records that she had mentioned the possibility of Jack having a condition known as benign paroxysmal positional vertigo, which she thought might be causing his falls, saying "[t]his could be worth looking into". She sent a link to the website of a golfer with the condition and also set out in bold her understanding of the condition. It was suggested to her that she expected Jack to be able to understand, absorb and consider her email, which she denied, saying that she thought he could potentially print it off and take it to a doctor. Whilst I accept that the evidence as a whole supports Sara's

description of Jack's condition when she met him on 13 October 2015, I do not accept her explanation of this email. Had she thought that Jack would be entirely unable to understand what she had said, I have no doubt that she would have expressly told her father to print off the email and take it to his GP. On balance I consider that although Sara was concerned at the possibility that Jack would delete her email without reading it (perhaps because he did not want to have to engage with anything complex) nevertheless she thought that he could still read what she had said, an understanding which is consistent with the fact that Jack was still apparently responding to emails at this time and engaging in administrative tasks.

390. On 16 October 2015 Jack sent an email to Andrew entitled "MONEY" indicating that he was aware that Andrew had received a quote for "the tidy up that needs doing" (which I infer is a reference to the US Property) and asking "How much?". Jack also confirms that "Medical Money sent".

391. On 19 October 2015, Margaret sent to Ms Wells an email from her address saying that she and Jack had arranged for their wills to be witnessed that day but that she had mistakenly signed Jack's will. Margaret asked for another copy of the last page. Once again, the email was signed "Margaret and Jack". Ms Wells posted further copies of both wills for signature on 21 October 2015.

392. Margaret in fact signed her own will on 19 October 2015, as I have already said. It was witnessed by Ms Julia Ebdon, a neighbour, and Christopher. Curiously given that Margaret apparently made the mistake of signing the wrong document, Christopher was unable to remember witnessing the signing of her will and was also unable to explain why he and Melissa would have visited Jack and Margaret twice in the space of 10 days so as to witness both Margaret's, and later Jack's, wills. It may be, as the Claimants suggest, that Christopher only visited Jack and Margaret on the day that Jack signed his will (i.e. 28 October 2015) and signed Margaret's will at the same time. However, I need not make any finding about this.

393. On 21 October 2015, Jack sent to Margaret a letter on Findon Air Services paper for the attention of Mr Smart. The letter appears coherent, apologising for the late reply and referring to the sale of the helicopter. The intention of the letter appears to be to send to Mr Smart "all relevant invoices". However, there is no evidence that the letter was ever sent and there is no evidence of the relevant invoices having been provided.

394. In his statement, Mark gave evidence that in late October 2015, on a date he could not recall, he and Diana visited Jack and Margaret at 2 Hutton Place and Jack suddenly announced that he had included Mark in his new will, information which Mark said was wholly unexpected. Under cross-examination Mark was apparently able, for the first time, to put a specific date on this visit of 25 October 2015, i.e. only three days before the signing of the 2015 Will. When challenged about his evidence, Mark insisted that "Diana was there", albeit that Diana's statement says nothing about this incident and she gave no oral evidence about it. On balance, while I consider that Jack may well have made an observation of this sort to Mark at some point, I think it extremely unlikely, given the totality of his evidence, that Mark has a clear recollection of the date on which it was made.

395. On 26 October 2015, Jack sent to Patricia Mock of Deloitte an email entitled "working for me" which said:

> "Please can you give the name, address and phone number of whoever will be working with me on Taxes. Jack Leonard"

Ms Mock replied the next day informing Jack that his contact is King Mills and saying that "I know he was going to contact you as we have not received your tax return information".
Jack had been informed of the name of his contact on 22 April 2015, but had apparently forgotten. Notwithstanding the clear terms of Ms Mock's email, Jack apparently forgot King Mills' name almost immediately (and presumably also forgot to look back at Ms Mock's email for information), because on 30 October 2015 he sent a copy of his tax booklet to Ms Mock for her attention, asking her to send it on to "whomever is preparing my Tax return".

396. Jack executed his 2015 Will in the presence of Mr Sisley and Mr Ward on 28 October 2015. Neither Ms Wells nor any other professional adviser was present to assist him and there is no evidence that he read the will at the time of execution, or that anyone else went through it with him. Christopher recalls that the will signing took place in the dining room at 2 Hutton Place and that Jack signed the will whilst he and Mr Sisley were in the room. However, besides a strong memory that he sat next to Jack when he placed his signature as witness on the will, he remembers little else. He believes Melissa to have been present in the house (which she corroborates) but he cannot remember if Margaret was in the room, he cannot remember how long he stayed or what time of day it was. Melissa was equally unable to recall any details, including whether she was in the room when the will was signed. She also could not remember seeing Mr Sisley at the house. There is no evidence as to whether Jack might have been experiencing a "good day" or a "bad day" and, even if the former, there is no evidence that he would have been able to understand matters which had consistently confused him previously. On balance, in my judgment, he would not.

397. By her own admission Melissa did not see much of Jack in 2015 and does not even mention in her statement that she was aware of his admission to hospital. She says that she recalls talking to Margaret and Jack about Jack "not being in good health" but she cannot recall "why or what happened". It appears from her statement that she was under the impression at the time that he had had "a couple of small falls". It may be that the true facts were kept from her by Margaret in order not to worry her and it may equally be that, in the circumstances, it is unsurprising that she had "no concerns about Jack's mental capacity". However, I cannot place any weight on this evidence in forming a view as to Jack's true mental state at the time of signing his will. Christopher was candid in confirming in cross examination that he did not know anything about Jack's health.

398. Strangely, Jack never signed the Letter of Wishes that Ms Wells had prepared for him and I can only infer that he did not appreciate the need to do so. It appears never to have been chased up by Ms Wells.

30 October 2015 to November 2016

399. There are a number of events on which the Defendants rely after the signing of Jack's will and so I shall go on to deal with them now (together with other contemporaneous evidence from around the same time) in the overall chronology for the sake of completeness.

400. On 30 October 2015, Jack sent his VAT Account to HMRC, observing that if they wished to contact him he would be away until 12 November. On the same day he spoke to a representative of Oxford Instruments plc, apparently asking for a dividend summary in respect of his shareholding (information he needed in order to send his "tax booklet" to Deloitte). A one-page document showing "Shareholding Dividends" (represented in tabular form with eight lines of data identifying in columns the date of payments made, the dividend rate, the tax and the amount paid) was then sent through to him by email. However, it appears that he had difficulty identifying the information that he required because his email response was "I may be dim but how do I access what I need?". He received a detailed email back explaining that he could find the information about his dividend "in the right hand column" on the attachment, but he continued to have difficulty. His response was "There are many pages. How do I get to the right page?". To my mind this is clear evidence that Jack was not only unable to understand a simple table which clearly set out the amounts he had received by way of dividend, but he was also having difficulty describing what he was looking at, referring to "pages" rather than "lines" in the payment summary.

401. Also on 30 October 2015, Jack provided to Ms Mock the tax booklet to which I have already referred. This included a document headed "JL Leonard.Tax Information for the year to 15 April 2015". On its face, this document appears, as the Defendants submitted and Dr Warner accepted, to show a good level of cognitive function. It includes details as to Jack's income (his pension, his dividends in relation to Oxford Instruments) and expenses (in relation to the Findon Property and various covenants). However, as was not made clear to Dr Warner when he was cross-examined about this document, it contains a number of inaccuracies in the figures themselves, the most significant perhaps being that instead of deducting tax from his gross pension figure, Jack added it (as is clear from a letter subsequently sent to him by Deloitte on 29 January 2016). I agree with the Claimants that for a man who has filled out this type of tax information schedule every year, this is a surprising mistake and I accept Dr Series' evidence (which appears to me to accord with the inherent probabilities) that such a mistake "supports what we perhaps already knew from the neuropsychological tests, that there was an impairment of cognitive function". Although Dr Series appeared to soften this view in re-examination, I do not consider this document to have the significance attached to it by the Defendants. I find that it shows a level of cognition in terms of Jack producing an organised picture of his financial position, but that his mistake in relation to the calculation of tax illustrates a lack of understanding and confusion about, something that to Jack, would ordinarily have been a familiar concept – the treatment of tax.

402. On 31 October 2015, Sara drove to Essex and walked with Margaret and Jack to the nearby pub for lunch. Sara's evidence, which appears to me to fit with other contemporaneous evidence, is that Jack said he was feeling better but that he was "still

very shuffly", he had difficulty speaking and was very tired, falling asleep after lunch. Jack made no mention of having signed a new will only three days earlier.

403. On 2 November 2015, Jack's 84th birthday, he and Margaret flew to Langkawi for a holiday. Sara emailed Jonathan reminding him that it was their father's birthday and saying: "I've seen him a couple of times in the last couple of weeks. He seems better than he was, although very unsteady on his feet and quite frail. His speech is very slow, but he knows what he is talking about, for the most part. He's happy enough and looking forward to the holiday". In cross examination, Sara explained (and I accept) that her reference to Jack understanding "for the most part" meant that "I thought that he kind of understood what he was talking about, given the conversation topics, but they would have been very superficial I think".

404. On 14 November 2015, Jack and Margaret flew back from Langkawi and Jack had a fall at Heathrow airport. He was admitted to Hillingdon Hospital with a fractured right femur. On admission, the orthopaedic consultant recorded that he had been having slow speech for 3-4 months together with "dizzy spells". Jack scored 10/10 on an Abbreviated Mental Test ("**AMTS**"), which Dr Series described as a "ten-item test very widely used in general hospitals…it is quite a crude test and it is unlikely to pick up things like the executive function problems". In their joint statement, the experts agreed that performance on simple tests of cognition "does not always reveal executive dysfunction".

405. Jack had an operation on his hip on 15 November 2015. On 16 November 2015 Jack was screened for dementia and underwent a further AMTS on which he scored 10/10 together with a Confusion Assessment Method ("**CAM**") on which he scored 0/10 (the best mark). The experts agreed that a CAM test is designed to screen for delirium, i.e. an impairment of cognitive function that arises over a short period of time. Thus it is testing for something different from dementia and, accordingly, Dr Series expressed the view, which I accept, that "the fact that [Jack] did well on it does not tell us that he did not have dementia". A Nuffield Health risk assessment document records that "[Jack] appears to have short-term memory loss, so forgets instructions. To refer to ward manager to have constant supervision especially at night".

406. Jack was discharged to Essex Nuffield Hospital on 20 November 2015 and went home on 23 November 2015. His discharge summary refers to "NEW neurology symptoms 3-4 month". It also refers to "slow speech" which it records had been investigated "but no pathology found at Basildon hospital", which I infer is shorthand for recording that Basildon University Hospital found no evidence of a stroke on Jack's admission in July 2015.

407. Sara and Megan visited their father in hospital and, in circumstances where Margaret appears to have been having difficulty coping, Sara began to communicate with Liz over a care plan. On 7 December 2015, Jack's medical records show that Dr Ward spoke to Sara over her concerns about his health, noting that Dr Ward had not seen Jack at the surgery since August and suggesting that he book in for a double appointment to allow time for "multiple issues".

408. That appointment appears to have taken place on 18 December 2015 according to Jack's medical records. Dr Ward's note reads "no significant change in symptoms" and identifies the need for Jack to be followed up by Professor Hawkes. Given that Jack had not been seen by Dr Ward since August, I infer from this that the symptoms being reported in July and August remained very much the same.

409. On 5 January 2016 Professor Hawkes wrote to Dr Ward recording that: "[t]he psychometric tests show a moderate degree of executive dysfunction along with cognitive and motor slowing, in keeping with subcortical and frontal cerebral dysfunction". He observed that "[t]his would fit in well with the MRI scan findings". Professor Hawkes wrote again on 19 January 2016, dealing primarily with blood test results and advising that Jack's blood pressure needed treating.

410. On 3 February 2016, Dr Ward recorded in Jack's notes that he was "awaiting review with Dr Hawkes re speech and confused state, which is unaltered", from which I infer (given his entry in December 2015) that he considered Jack to be presenting with the same symptoms that he had been suffering from since the summer of 2015. Dr Ward also recorded that Jack "managed to understand and make himself understood well", although I infer from this only that Jack was able to maintain some level of social norms, as opposed to any comment on his detailed cognitive abilities.

411. On 16 February 2016 Professor Hawkes, who by now appears to have been seeing Jack regularly, recorded that "overall his balance is slightly worse" and that he remained "concerned about the possibility of cerebral vasculitis". On 23 February 2016, Professor Hawkes dismissed the possibility of cranial arteritis (which he again ruled out in a letter of 22 March 2016), expressing his "final diagnosis" of "diffuse cerebrovascular disease with maximum impact of the frontal lobes and cerebellum". In a letter dated 15 March 2016, Professor Hawkes described Jack as "very much the same", now describing his "final diagnosis" as "vascular dementia". Professor Hawkes raised a question as to whether Jack should be given medication "in an attempt to improve his memory".

412. On 4 March 2016, Andrew emailed Jack noting that he had not received "Med Money" for "3 months going on 4" and that he had understood Jack would also be sending money "to refurbish basement". The evidence suggests that Jack's last payment to Andrew had been made on 29 December 2015. Andrew said "I hope you are OK, but don't know why we do not hear from you". Jack appears to have made one further payment to Andrew on 14 March 2016, but thereafter the payments appear to have ceased.

413. On 7 April 2016, Jack's GP record states that he has been diagnosed with "advanced vascular dementia" and prescribed Rivastigmine, a cholinesterase inhibitor used in the treatment of dementia.

414. On 26 April 2016, in an email to Ms Wells sent from Margaret's address and entitled "My Will", apparently somewhat out of the blue, Jack wrote this:

> "I am sorry to bother you again, I have been thinking about your suggestion and am in favour of same.

> I have just received a Bill for Council Tax regarding Andrew's house in America. I think it would be better if on my death a Trust Fund is set up to take care of the house and pay any bills. On his death the house would be sold, the proceeds to be divided among named beneficiaries.
>
> Aside from the extra work involved what do you think?
>
> I will pay expenses incurred".

415. The following day, Jack sent a yet further email to Ms Wells with the subject line "Another Will" from his own email address making materially the same points, albeit using slightly different language. It is difficult to know why Jack felt it necessary to send these two emails. If they were both intended for Ms Wells, he may finally have been responding to her request for instructions on the US Property in her email of 7 September 2015, albeit that any "suggestion" in fact came from Ms Fettmann, which he does not appear to understand or recall. Furthermore, if the emails were correctly addressed to Ms Wells then his reference to "Another Will" in the second email betrays a lack of understanding as to the scope of Ms Wells' role and as to what she had been seeking from him. If, on the other hand, as seems more likely, one or both of these emails were intended for Ms Fettmann, then they demonstrate a failure to recall or understand which professional advisor was dealing with which aspect of his estate.

416. I need not determine which of these possibilities is correct. Although the emails appear to evidence a degree of executive function, in my judgment, in either case, Jack was exhibiting clear signs of continuing significant memory loss and confusion. Importantly he appears to have forgotten entirely that he has already received extensive advice on the possibility of setting up a trust. Ms Wells' evidence (which referred only to one of these emails) asserted that it seemed clear to her that Jack could recall signing a will and that he recollected the advice she had given previously in September. In light of the detailed findings on the evidence that I have made above, I consider this view to have been mistaken. The differing subject lines for these emails suggest confusion about whether Jack is dealing with "My Will" or "Another Will" and there is nothing in the body of either email to provide comfort that Jack could recollect the details of advice he had been given previously. On the contrary, he appears to have forgotten the important fact that Ms Fettmann needed to be involved in any further action in the US.

417. On 27 April 2016, Ms Wells responded to Jack's emails observing essentially that it was not advisable to bequeath property to Andrew or to a trust via an English will and that he would need to take advice in the US. On 1 May 2016, Jack responded from his own email address, "I will make a US Will!". Thereafter, he never contacted either Ms Wells or Ms Fettmann again.

418. On 18 May 2016, Jack replied to an email from Jonathan raising questions about memories from his youth, which Jonathan's son, Gavin, needed for a history project. The questions and answers (which are in italics) were as follows:

> What year and where were you born? *1931*
> What was the blitz like? Was there anything you remember vividly?
> *Bathing with my sister*

What was life like during the war? *Pleasant, except for the air rads [sic]*
What was rationing like? *Sweets were difficult*
What was rationing like? *Sweets were difficult*

How was life after the war? *Marvellous.*
How was life after High School? *Normal.*
What was your reaction to being drafted for the Korean war? *No*
Is the standard of life different from then to now? *Yes you can buy anything*

419. On 26 May 2016 a note of a telephone call between HMRC, Mr Smart and Mr Mills of Deloitte (concerning a tax investigation into Jack's affairs) records Mr Smart telling HMRC that "Dr Leonard had major health problems over the last few years – possibly a bleed on the brain – which has left him with memory and speech problems". In an email dated 21 July 2016, Margaret informed HMRC that Jack was unable to respond to a notice requesting the provision of information: "[h]e is currently in a rehabilitation centre recovering from a serious fall and is suffering from vascular dementia". Ms Mock wrote to HMRC on 26 July 2016 recording information from Margaret that Jack was "very unwell" and that "she would not use the term lucid to describe his health". This understanding of the state of Jack's health appears to have led to Deloitte's letter to HMRC of 22 September 2016 explaining that because of health challenges "especially with his memory" Jack was not in a position to find documents or provide answers to requests made to him.

420. In his statement, Mr Smart says that he met with Jack and the tax inspector from HMRC at some time during the tax investigation and he appears to suggest that on this occasion, Jack was "as intelligent and financially astute as he always had been" and that there was no indication that Jack was incapable of managing his affairs. This evidence does not fit with the information that was being provided to HMRC at the time, or with other evidence as to Jack's condition. Mr Smart did not give evidence and I am unable to attach any weight to this assertion.

421. At the end of May 2016 Jack again suffered a fall, breaking his hip. His medical notes from his time in hospital record (amongst other things) that he was "very confused, trying to get out of the bed most of the time" that he was "at very high risk of delirium" and that he was "confused on and off". He was said now to be presenting with "decreased facial expression and blinking" together with a monotonous voice and ongoing slurred speech. It was proposed that he should be reviewed for a possible diagnosis of Parkinsons.

422. On 11 August 2016, Jack attended a meeting with Barclays together with Margaret which took place at 2 Hutton Place. Ms Bultitude and Ms Glimond attended on behalf of Barclays. Mark and Liz were also in attendance, apparently at Barclays' suggestion. No doubt this meeting went ahead because, as Ms Bultitude explained, from Barclays' perspective "until we have a power of attorney appointed to say that somebody has lost mental capacity, to an extent we have to work within the scenario [we] are in".

423. An attendance note made by Ms Glimond in advance of the meeting (on 25 July 2016) records that Ms Bultitude planned to discuss whether Jack had a Lasting Power of

Attorney in place. A note of the meeting on 11 August 2016 records that Margaret had recently advised Ms Bultitude that Jack had been diagnosed with vascular dementia. The note records, somewhat tentatively, that Jack "appeared to remember [Ms Bultitude] and managed to keep up with what was happening at the meeting" albeit that there is no indication in the note that he said anything at all. Mark's evidence, albeit he did not appear to recall much about the meeting, was that Jack had been "passive". All input appears to have come from Margaret. Ms Bultitude's evidence was that there were moments when Jack fell to sleep, and she explained in general terms that it is hard to deal with someone who has moments of lucidity and moments of "less lucidity", from which I infer that this was the view she took of Jack at the meeting. Consistent with this is Liz's evidence, which I accept, that at the end of the meeting Ms Bultitude spoke directly to Jack, indicating that Barclays would no longer be able to deal with him.

424. On 29 September 2016 Dr Ward wrote to Wortley Byers confirming that he had examined Jack the previous day and that Jack "is suffering from Vascular Dementia which is impairing his mental ability and therefore would satisfy the statement that he is mentally incapable of managing his affairs thus triggering the Enduring Power of Attorney". Jack's Enduring Power of Attorney was registered on 22 November 2016.

425. Given the evidence to which I have referred as to Jack's condition in 2016, I reject the evidence of Margaret's family to the effect that at this time, although physically frail, Jack was still "on the ball" (as Mark and Andy both suggested) and that he was "very much the same old Jack" (as Andy and Diana said or suggested). Liz appears to me to have been attempting to give accurate evidence when she said in her statement that in 2016, Jack "seemed to deteriorate", which he did, although on balance if this evidence was intended to suggest that he had no real cognitive difficulties prior to 2016, I consider it to have been inaccurate. In light of these findings, there is no need for me to consider further the evidence given by Margaret's family as to other events in 2016 and 2017.

Conclusions on testamentary capacity

426. The question for the court, as I have already identified, is whether Jack had the ability to understand the 2015 Will and its effect, always bearing in mind that this question is transaction specific. The question of Jack's testamentary capacity falls to be determined as at 28 October 2015, when he made his will, however the events leading up to the making of that will, together with the events in the following year are of relevance to that evaluation.

The Evidence of Jack's Professional Advisers

427. The Defendants rely heavily upon the evidence of Jack's professional advisers as to his capacity on dates prior to the execution of the 2015 Will, inviting me to draw the inference from that evidence that the mental impairment from which he was suffering did not affect his testamentary capacity. As I have said, Dr Series also relied on their evidence, in particular the evidence of Ms Wells, to support his view that, on balance, Jack had testamentary capacity when he signed the 2015 Will, saying in his third report

that he found the statement of Ms Wells "particularly relevant to the assessment of Jack's capacity".

428. However, I have already observed that I am unable to attach any weight to Ms Wells' evidence that she was "totally satisfied" that Jack had testamentary capacity. Ms Wells did not think to consult her supervisor, to see Jack alone or to apply the Golden Rule, even when it was clear that Jack was "struggling" to understand the provisions of the Second Draft Will. I have already dealt with many of the deficiencies in her approach, but concentrating for present purposes on the months leading up to the signing of Jack's 2015 Will (i) she neither suggested a meeting with Jack and Margaret when she received changed instructions in July 2015 out of the blue (which made no mention of the Third Draft Wills) nor when, having sent the Fourth Draft Wills to Jack and Margaret on 26 August 2015, Margaret expressly asked for a discussion; (ii) she did not apparently pick up on the fact that communications from Jack and Margaret now appeared largely to be emanating from Margaret; (iii) she did not see any warning signs in the email from Jack of 2 October 2015 and (iv) she made no suggestion that she should take Jack and Margaret through the Fifth Draft Wills in advance of their signature or that she should attend at the signing of those wills, notwithstanding that by this stage it had been nearly a year since she had last seen Jack. I accept the Claimants' submission that this total lack of awareness on her part of the obvious need for caution in dealing with an elderly testator renders her views as to Jack's capacity worthless.

429. Furthermore, I agree with the Claimants that Ms Wells' failures almost certainly had a negative impact on Jack's will-making ability and overall understanding of the complex task in which he was engaged; regrettably they have also increased the difficulties to which this dispute has given rise. As the evidence to which I have referred illustrates, Ms Wells frequently made mistakes in dealing with the draft wills, amongst other things, failing to pick up on, and address, "warning signs" that Jack was struggling with his comprehension of the more complex provisions in his will, failing to ensure consistency between her covering letters and her drafts and failing to ensure consistency between Jack and Margaret's instructions and her drafts. Jack consistently instructed Ms Wells that he wanted a simple will, something which she consistently failed to provide.

430. Turning to the Barclays advisers, I accept the Claimants' submission that the evidence from Mr Mutsuddi as to Jack's capacity (i.e. that during his involvement with Jack, he had capacity) carries no weight in connection with the assessment of Jack's capacity in October 2015. Mr Mutsuddi had no contact with Jack after 2014 in any event and it is striking that neither he, nor Ms Bultitude, appreciated the need to take any precautionary steps after the telephone meeting on 29 October 2014. Indeed Ms Bultitude appears to have forgotten or ignored the fact that Jack had struggled to understand his will during that telephone call when she conducted another meeting with Jack over the telephone on 5 January 2015 to discuss his investments. There is no evidence that either witness received formal training in identifying capacity issues in their clients, or how to manage such issues. Barclays' own policies were, as I have said, self-certifying.

431. It is of significance that when Ms Bultitude subsequently saw Jack at the face-to-face meeting on 29 April 2015, she recognised a potential problem, albeit took no real steps to address it beyond giving Jack time to consider his instructions with Margaret after

the meeting. That she had to chase up instructions from Jack on an important issue concerning the use of over £500,000 of free funds (an issue that Jack, as an experienced investor and businessman would no doubt have wanted to address quickly, had he been fully in charge of his faculties) is, to my mind a strong indication that he was no longer able to appreciate the need to take action and to carry through with an appropriate and rational decision.

The Medical Evidence

432. As I have said, the detailed neuropsychological assessment carried out by Dr Fuller on 5 August 2015 forms a particularly important evidential anchor, from which it is clear that (as the experts agree) Jack was suffering from dementia, probably due to a combination of vascular dementia and Alzheimer's Disease, at the time he made the 2015 Will. It is common ground that these conditions are processes established in the brain many years before the symptoms become apparent. Version 11 (2022) of the International Classification of Diseases issued by the World Health Organisation includes the following relevant definitions:

Dementia:

> "characterized by the presence of marked impairment in two or more cognitive domains relative to that expected given the individual's age and general premorbid level of cognitive functioning, which represents a decline from the individual's previous level of functioning. Memory impairment is present in most forms of dementia, but cognitive impairment is not restricted to memory (i.e., there is impairment in other areas such as executive functions, attention, language, social cognition and judgment, psychomotor speed, visuoperceptual or visuospatial abilities). Neurobehavioural changes may also be present and, in some forms of dementia, may be the presenting symptom. Cognitive impairment is not attributable to normal aging and is severe enough to significantly interfere with independence in an individual's performance of activities of daily living. The cognitive impairment is presumed to be attributable to an underlying acquired disease of the nervous system, a trauma, an infection or other disease process affecting the brain, or to use of specific substances or medications, nutritional deficiency or exposure to toxins, or the etiology may be undetermined. The impairment is not due to current substance intoxication or withdrawal."

Alzheimer's Disease:

> "the most common form of dementia. Onset is insidious with memory impairment typically reported as the initial presenting complaint. The characteristic course is a slow but steady decline from a previous level of cognitive functioning with impairment in additional cognitive

> domains (such as executive functions, attention, language, social cognition and judgment, psychomotor speed, visuoperceptual or visuospatial abilities) emerging with disease progression. Dementia due to Alzheimer disease may be accompanied by mental and behavioural symptoms such as depressed mood and apathy in the initial stages of the disease and may be accompanied by psychotic symptoms, irritability, aggression, confusion, abnormalities of gait and mobility, and seizures at later stages. Positive genetic testing, family history and gradual cognitive decline are suggestive of Dementia due to Alzheimer disease".

Vascular dementia:

> "Dementia due to brain parenchyma injury resulting from cerebrovascular disease (ischemic or haemorrhagic). The onset of the cognitive deficits is temporally related to one or more vascular events. Cognitive decline is typically most prominent in speed of information processing, complex attention, and frontal-executive functioning. There is evidence of the presence of cerebrovascular disease considered to be sufficient to account for the neurocognitive deficits from history, physical examination and neuroimaging".

433. The evidence establishes that Jack was suffering from "marked cognitive and motor slowing" with Jack's cognitive impairment described in August 2015 as "mild to moderate". The experts agree that Jack had a dysexecutive syndrome, in other words an impairment of executive function. The medical evidence and my factual findings are consistent with Jack having been suffering from dementia for a number of years by the time he signed the 2015 Will. He likely suffered a small stroke (sometimes called a transient ischemic attack ("**TIA**") or bleed on the brain) in the summer of 2013 and one or more in the six weeks during which he suffered a sustained period of confusion in the lead up to his admission to hospital on 6 July 2015. That his TIA was not expressly picked up by the hospital on 6 July 2015 is unsurprising in light of Dr Series' evidence that because mini-strokes are often very short lived, it quite often happens that they are not identified upon admission to hospital.

434. It appears to be common ground between the experts that dementia is a progressive condition so that as the disease progresses, cognitive function will tend to decline. I find that Jack had been experiencing this decline since (at least) the summer of 2013, when its effects became evident at Sara's wedding and during his period of confusion whilst flying (as he reported to Professor Hawkes). I also find that the progressive nature of Jack's disease (i) renders it probable that there were other occasions between the summer of 2013 and July 2015 when he suffered similar events; (ii) means that his cognitive abilities will have been deteriorating over that period and will have continued to deteriorate between July 2015 and October 2015; but (iii) does not preclude the possibility that Jack nevertheless experienced periods of improved function, as both experts acknowledged (notwithstanding, as Dr Warner said, that Jack's brain was "peppered with evidence of more diffuse cerebrovascular disease"), including that he may have had "better days" and "worse days". From July 2015 onward, there is clear

evidence of an outward manifestation of his condition in the form of (amongst other things) confusion, with his GP noting that his condition appeared very much the same in February 2016.

435. Dr Warner explained that dysexecutive syndrome can affect testamentary capacity in various ways. Individuals may lose the ability to weigh the consequences of their actions, such that they may make unreasoned or impulsive decisions. They may suffer from a cognitive inflexibility which means that ideas or decisions become fixed. They may also lose empathic reasoning, affecting the ability to gauge the relative merits of claims on the estate and they may experience apathy. I did not understand Dr Series to disagree with this assessment, as he described in his report (in more general terms) the potential for poor executive function to impact decision-making. I detected that he took a slightly different view to the question of empathic reasoning – explaining instead that dysexecutive syndrome may result in the loss of ability to consider who potential beneficiaries might be and the type of relationship the testator has had with them, including its history, and pointing out that some people do not have much empathy in any event. However, I do not consider that this difference is of significance in the context of this case.

436. It was Dr Series' evidence that the slowing of cognitive functions does not necessarily mean that the ability to understand and make judgments is reduced, but that it could be associated with other neuropsychological deficits which do affect understanding and judgment. Both experts were agreed that a diagnosis of dementia or dysexecutive syndrome does not necessarily mean that a patient does not have testamentary capacity. It is important to look at the whole pattern of cognitive impairment.

437. Against that background, the key disagreement between the experts, based (as I have said) on their differing assessment of the available contemporaneous evidence, is the impact of Jack's dysexecutive syndrome on his testamentary capacity, dysexecutive syndrome being a matter of degree, not an all or nothing change.

438. In my judgment, it is clear from my findings on the evidence as a whole that by 28 October 2015, Jack was suffering from periods of confusion, probably related to mini strokes and that his ability to make rational, reasoned decisions in respect of transactions that required "complex attention" and to understand in connection with such matters "what he was about" had deteriorated. The difficulties he quite clearly experienced in understanding the purpose of his contact with Ms Fettmann, together with the confusion evident in the documents he created on or around 2 July 2015 are testament to his declining mental capabilities and support Dr Warner's assessment of a "step-change" in Jack at this time. That Margaret appears (for the first time) to have (largely) taken over from Jack in dealing with correspondence with Ms Wells in the summer of 2015 supports an inference that he was not always capable of undertaking this correspondence for himself. Furthermore, Jack's own email of 2 October 2015 evidences an inability to understand concepts going to the heart of the will-making process. On balance, these events, when seen in context with all of the evidence to which I have referred in the chronological section of this judgment, support a finding that Jack lacked the mental flexibility to understand and apply rational thought to the exercise of finalising his will.

439. The Defendants rely heavily upon Jack's Tax Information document completed on 30 October 2015, albeit that I have already explained why I do not consider it to have the significance they seek to place on it. Indeed the fact that only two days after signing the 2015 Will Jack was unable to understand the need to deduct tax from his gross pension receipts, rather than to add it, seems to me to support the proposition that on a task requiring understanding of a concept (which would once have been very familiar to him) Jack was not exhibiting the necessary levels of executive function.

440. That Jack was also suffering from frequent and, over time, increasing degrees of memory lapse (memory being a component of executive function) is clear from the evidence, notwithstanding the Defendants' submissions in closing that memory was not an issue in this case. As Dr Series observed in his oral evidence, memory lapses are relevant to the question of testamentary capacity, albeit that they are not determinative because the question is whether Jack would have been able to understand matters about which he had forgotten if he had been reminded of them. Here it is common ground that Jack had no assistance as at the time of signing the 2015 Will in understanding its content and, even had he been taken through the draft on 28 October 2015, I consider, on balance, that he would not have been able to understand the complexities of its provisions, as I address further in a moment.

441. However, my determination in this case has not been straightforward. As the Defendants correctly point out, notwithstanding his medical condition, Jack was able to carry out tasks requiring varying degrees of executive function in the months immediately prior to and following the signing of the 2015 Will. The experts identified a number of these in their joint statement (albeit that at that stage they did not have access to all of the documents). Particularly striking examples appear to me to be Jack's email communications with Mr Marks on 30 July 2015, Jack's email to Haywards Aviation Ltd on 11 August 2015, Jack's email to Andrew on 16 October 2015 and his letter on Findon Air Services paper to Mr Smart of 21 October 2015. There is also evidence that Jack was able to make a travel booking for the trip to Langkawi, pay bills and respond to a request for information from Deloitte about his address.

442. Overall I find (having regard to my evaluation of the totality of the evidence) that even after his admission to hospital in July 2015, Jack was able (at least) from time to time, to engage in correspondence about his financial affairs and was also able to carry out administrative tasks and made domestic arrangements. This is perhaps consistent with Dr Fuller's finding (by reference to cognitive tests) that Jack was able to perform within "the average to superior range on measures of general intellectual ability". Jack was, as I have said an extremely intelligent man, and his dementia had apparently not deprived him of the ability to undertake various tasks requiring a level of executive function. This is also consistent with the fact that (as I have found) Sara plainly took the view in October 2015 that Jack was able to read an email she had sent him, albeit that he might be prone to "delete" it.

443. However, I cannot consider this evidence in a vacuum. It is to be viewed in the context of the other findings I have made and, in particular my findings about Jack's communications in relation to the making of his will – which, after all, is the transaction with which I am concerned. That he was able to provide directions to Mr Marks or information to his insurers about his helicopter or to chat with his family about day to

day things, does not appear to me to weigh heavily in the balance when one considers the complexity of the will making task with which he was concerned and the evidence of his communications with Ms Wells and Ms Fettmann in the last few months before signing the 2015 Will in connection with that specific task. As Dr Warner said, there is a difference in cognitive dexterity between these things, a difference which is a function of the level of complexity involved.

444. The 2015 Will was regarded by Ms Wells herself as complex. It contained devises of two different properties, one with default beneficiaries and one with subject to a right to occupy, each with different beneficiaries, and a life interest trust of the residue with a power to apply capital to Margaret. It also contained three hotchpot provisions (one of which presupposed the existence of a will in the US such that it would apply only in circumstances where Andrew had inherited the US Property). It included the express exclusion and non-revocation of any previous will relating to US and French assets. Furthermore, the complexity of the situation in which Jack found himself was enhanced by the number of "moral claims" from members of his own family (described by Dr Series as giving rise to a "difficult emotional task"), including his children (and in particular Andrew, who had been largely dependent upon him financially, including for the provision of a home, for many years), Margaret, his sister in law, Marjorie, and her daughter, Susan.

445. I accept Dr Warner's evidence that the more complex the transaction and the greater the nuance, the harder it will be for someone suffering from dysexecutive syndrome to achieve capacity:

> "Capacity is affected by complexity of the issue and degree of nuance. Especially in peoples with dysexecutive syndrome, impaired executive function may prevent individuals assimilating and weighing information. The more information and nuance in a decision, the harder it is to achieve capacity. As complexity rises even low levels of cognitive impairment may lead to incapacity."

I did not understand Dr Series to disagree with this general proposition. I also consider that it goes some way to explaining why Jack appears to have been performing reasonably well on some tasks which required executive function, but not on others. Although by no means conclusive, Dr Fuller took the view that the results of the cognitive testing "overall" showed that Jack performed "unevenly and weaker than expected on measures of executive function" and that there was "evidence of marked cognitive…slowing". An inability to comprehend the complexities of the 2015 Will is, in my judgement, consistent with this finding.

446. I turn then to apply the test in *Banks*, having regard to the questions that I formulated earlier in this judgment. In doing so, I observe that I have not gained any real assistance from the views of the experts as to compliance with the four limbs of *Banks* in circumstances where they (i) did not have access to all of the relevant evidence at the time of forming the views expressed in their reports; (ii) were dependent for their views on the findings of the court as to the evidence and (iii) accepted in any event that this question is a matter for the court. In opening and in reliance upon the experts' agreement that Jack satisfied limb 3 of the *Banks* test, the Claimants contended that

Jack did not satisfy limbs 1, 2 and 4. However in light of the additional evidence that came to light during the trial, the Claimants now contend that all four limbs of the *Banks* test are not satisfied as at the date of the 2015 Will.

447. **First, was Jack able to understand the nature of the act of making the 2015 Will and its effect?** In light of the evidence, I am satisfied that Jack understood the nature of the act of making a will, in the sense that he understood that he was making provision for his estate after his death; he had been engaged in providing instructions to Ms Wells for over two years by the time he signed his will and although his own correspondence in the months leading up to the signing of the will evidences, in my judgment, increasing confusion, there is no evidence from which to infer that Jack lost the ability to understand the plain fact that he was making a will.

448. However, given the findings I have made, I consider that, on balance, as at the 28 October 2015:

a. Jack was not able to comprehend the nature and effect of the 2015 Will, which was, as I have said, a complex and detailed document; and
b. Jack had lost the ability to make a rational decision in connection with complex subject matter of the type set out in the 2015 Will.

449. Although it was not necessary for Jack to be able to understand (in a lawyerly way) the detail of the provisions of the 2015 Will, or each clause in isolation from another, it was necessary for him to be able to understand what the 2015 Will was in fact doing, what its effect was – or as described in *Banks* itself "the business in which he was engaged". Thus he needed to be able to understand, for example, the role of Barclays and Margaret as Executors, that he was giving 2 Hutton Place to Margaret outright, that he was setting up a life interest trust for Marjorie in the Findon Property with the remainder left over on Marjorie's death which would be split seven ways, that he was creating a life interest trust for Margaret in the residue with a power to apply capital, that after Margaret's death the residue would be split seven ways and that his intentions in relation to the US Property would not be achieved by the 2015 Will (which effectively presupposed the making of a US will) and that the 2015 Will revoked his 2007 Will subject to a "carve out" in relation to the US Property and the French Property. He also needed to be able to understand the potential consequences of the broad provision granting power to his trustees to apply capital to Margaret.

450. I consider that, on balance, by October 2015, Jack's cognitive decline and dysexecutive syndrome caused by the combination of vascular dementia and Alzheimer's Disease had deprived him of the ability to understand the nature and effect of a number of the provisions in the 2015 Will.

451. From as early as the February 2014 Meeting, Jack was alluding to difficulties in understanding the trust provisions included in his First Draft Will, as was evident from his email of 6 March 2014. By 24 October 2014 (as is evidenced by his email of that date), Jack was having similar difficulties with his Second Draft Will. On 29 October 2014, Jack was plainly "struggling" to understand various of the more complex provisions in the draft will (as was recorded in the attendance note of the call), complexities which were never removed by Ms Wells in any subsequent draft. I reject

her evidence that her interactions with Jack thereafter (including at the November 2014 Meeting) provided confidence that he "does understand things". As I have already said, Ms Wells' evidence overall gives me no comfort that this assessment is likely to be accurate. I consider that it was Jack's lack of understanding of the complex provisions drafted by Ms Wells that led to his original proposal to split his estate seven ways, which he proposed as an alternative to the trust structures that Ms Wells was suggesting and repeated in his instructions on 2 July 2015.

452. It is of significance that following the provision to Jack of the Third Draft Wills on 21 November 2014, Jack never provided any comments on the drafts. Thus there is no evidence that his difficulties in understanding the more complex provisions contained in the drafts had genuinely been overcome and no evidence that he had been able to identify that instructions he had given at the November 2014 Meeting (as recorded in Ms Wells' attendance notes) had been omitted from the draft. Had Jack fully understood the suggestions made by Ms Wells at the November 2014 Meeting as to additions to be made to his will (suggestions with which he had apparently agreed) and, had he been able fully to understand the provisions of his Third Draft Will, he would surely have pointed out Ms Wells' omissions.

453. Importantly, the evidence concerning Jack's interactions with Ms Fettmann together with his own attempts to formulate his wishes on or around 2 July 2015 provide clear evidence of significant confusion in respect of what he was seeking to achieve. It is not even clear that Jack had any recollection of the existence of his Third Draft Will, or its detailed provisions. I agree with the Claimants that these documents alone support the proposition that by now, Jack had lost testamentary capacity.

454. Even assuming that Jack's condition may have stabilised after his six weeks of confusion in the lead up to his admission to hospital on 6 July 2015, his subsequent communication with Ms Wells in his email of 2 October 2015 asking whether clause 4 of the 2015 Will was "enough" and raising a question about Margaret's role as executor in the context of a clause that had been included in every draft of the 2015 Will from the outset (a query which was not, in the event, fully answered by Ms Wells) provides strong support for the conclusion that Jack did not have the necessary cognitive ability to understand the nature and effect of the 2015 Will.

455. I accept that Jack would probably have understood 'the big picture' in simple terms that Margaret would occupy 2 Hutton Place until her death and that his estate would then be split seven ways – this after all, is what he wanted. But there were various different ways in which this 'big picture' could be achieved and, importantly, the consequences of choosing one or other method of bringing the 'big picture' about were very different. In my judgment, Jack was unable to understand why the outcome he desired needed to be achieved by way of a trust, he was unable to understand the potential for disputes between his and Margaret's family and he was unable to understand what the direct consequences of putting in place a trust would be, including the need for administration of the trust and how that administration would be carried out, including the respective roles of Barclays and Margaret. Further, in circumstances where it had never been explained to him, he was unable to understand the effect of the broad provision granting power to apply capital, which could potentially enable Margaret to exhaust his assets before her death.

456. In the circumstances, having already rejected the Defendants' submission that Jack's instructions of 2 July 2015 to Ms Wells (the "I now wish the wills to be written" document) clearly referred to a life interest trust, I also reject their submission that limb 1 of *Banks* is satisfied in this case because the complex trust provisions were, on analysis, entirely consistent with those instructions. The use of trust provisions had implications which went beyond any understanding Jack had as to the 'big picture' and I do not consider that he was able to understand those implications.

457. In any event, to my mind, Jack's inability to understand the nature and effect of the 2015 Will as at 28 October 2015 went far beyond the trust provisions.

458. The 2007 Will made provision for Andrew (at his option) to purchase the US Property for the sterling equivalent of US$425,000 (and pay any inheritance tax) out of his share of Jack's estate, which would have been available to him almost immediately. The option was to be offered to Andrew within four weeks after the grant of probate and was to be exercised within three months, failing which, it would lapse. There was no provision for any hotchpot in relation to the US Property. The 2015 Will, as drafted by Ms Wells, excluded the US Property from the revocation provision (thereby leaving the provisions of the 2007 Will intact) but provided that Andrew was to "account for" the purported gift of the US Property "which he shall have inherited" net of any tax (something that the Defendants accepted in closing had not been explained to him). However, by the time of the 2015 Will, Jack had stopped investigating a US Will and had failed to respond to Ms Wells' request for instructions on what to do in respect of the US Property.

459. Importantly, the 2015 Will gave Margaret a life interest in Jack's estate which meant that on Jack's death, Andrew would not have access to the funds he would need to complete the purchase prior to Margaret's death, if he were to exercise the option given to him by the 2007 Will (even assuming that his share of the inheritance was now sufficient for those purposes). Although the 2007 Will also provided that Andrew w ould not be required to complete the purchase until sufficient funds had been distributed to him out of his share of the residuary estate to cover the purchase price, the reality of the seven way split in the 2015 Will meant that his ability to do this was seriously in doubt. It is entirely unclear how he would have been in a position to pay any tax levied in the US "in respect of any element of gift which the option may contain"[2] where Margaret's life interest gave him no ready access to any funds.

460. At best, the interaction between the provisions of the 2015 Will and the 2007 Will created considerable uncertainty in respect of Andrew's position (and, on balance, I consider that Jack would not have been able to understand this), at worst it meant that (absent a US Will) Andrew would not inherit the US Property because of one or more of the following (i) Margaret's life interest depleting the estate; (ii) the seven-way split potentially leaving him with insufficient funds to complete the purchase; (iii) Andrew being unable to afford the estate tax due on the US Property, particularly if the tax were to become due upon the exercise of the option rather than on completion (on which I had no submissions but note the provisions of clause 5(viii) of the 2007 Will). In the

[2] Clause 5(viii) of the 2007 Will.

circumstances I agree with the Claimants that absent a US Will, the effect of the revocation clause in the 2015 Will was capable of having a remarkably detrimental effect on Andrew which I have no doubt that Jack was incapable of understanding, certainly without a clear and simple explanation from Ms Wells. It is common ground that he never received any such explanation.

461. Jack's exchanges with Ms Wells in April 2016, quite out of the blue, support the proposition that he had not been able to understand the effect of the 2015 Will in relation to the US Property or, in particular, the requirement and urgency that he make a US Will (as his initial question appears to be concerned with the inclusion of a provision in his English Will).

462. As to the effect of Jack's condition on his decision-making, to my mind, Jack's failure to respond to Ms Wells' request for instructions in relation to the US Property in her email of 7 September 2015, supports the proposition that by the date of signing the 2015 Will, Jack had lost the ability to make a rational decision in connection with complex subject matter. Indeed he appears to have lost this ability sometime before that date because he had apparently been unable to provide instructions to Ms Bultitude in relation to the investment of his "free" capital, despite her chasing emails in the summer of 2015. The topic of the US Property had been causing Jack significant difficulty for some time, notwithstanding that he had received a considerable amount of advice from various professional advisers. By the time he contacted Ms Fettmann in the spring of 2015, he was plainly unable to understand what assistance he really required from her, or clearly to articulate a decision about the treatment of the US Property. It is, in my judgment, inconceivable that if he had been able to understand the provisions of the 2015 Will in relation to Andrew he would not have followed up on Ms Wells' request for instructions and sought to put in place a US Will as soon as possible.

463. Further, I agree with the Claimants that it is of some significance that Jack's professional advisers identified potential issues with his capacity during the telephone call with him on 29 October 2014, almost exactly one year before he signed the 2015 Will. After that date there can be no doubt that his mental capacity will have deteriorated further, a factor which militates in favour of the findings I have already made. Over that time, Jack's difficulties in understanding the nature and effect of the specific will-making task with which he was engaged will not have been ameliorated by the continued production of draft wills by Ms Wells which apparently did not reflect his instructions together with the failure on the part of Ms Wells to explain critical aspects of the 2015 Will. This included (i) the purpose and effect of the trust provisions (including the role of the executors); (ii) the potential consequences of the "power to apply capital" clause; (iii) the effect of the revocation clause; (iv) the meaning and effect of the hotchpot provision in relation to Andrew; and (v) the interaction between Andrew's hotchpot provision and the revocation clause. Without full and careful explanation, I find that, on balance, Jack was unable to understand the true nature and effect of these provisions.

465 For all the reasons I have given, I find a failure in respect of limb 1 of *Banks*. Specifically, I am not satisfied that, on balance, Jack understood the nature and effect of the 2015 Will.

466. **Second, was Jack able to understand the extent of the property of which he was disposing?** In closing, the Claimants put their submissions on this limb no higher than that Jack's lapses of memory in his dealings with Ms Wells "cause one to question" whether or not he understood the extent of the property of which he was disposing.

467. Whilst it is true that Jack was inconsistent and erratic in his provision of information to Ms Wells about his assets, making mistakes as to value and omitting to include relevant details from time to time (mistakes which add to the picture of the progression of his condition), nevertheless the touchstone under this limb is that Jack has a "general idea" of his assets. It is not that Jack was able to recall in the moment all of his assets and their values accurately. Deficiencies of memory do not equal incapacity. Jack was clearly able to understand that his estate included chattels and property in the form of 2 Hutton Place and the Findon Property, which he continued to mention in his own documents in the months leading up to the 2015 Will. I am satisfied he was also able to understand that he owned the US Property and the French Property (to which he had referred in his 2 July 2015 documents and which were mentioned in the 2015 Will itself); Andrew lived in the US Property and Jack had enjoyed many happy family holidays at the French Property. As for his financial investments, I consider that he would, at the very least, have had a "general idea" of the existence of his portfolio of investments with Barclays (with whom he was in fairly regular contact) together with the existence of the DGLT. Certainly he would have understood that he owned these assets had he been reminded of them. I am satisfied that, on balance, Jack was able to understand that 2 Hutton Place was owned jointly with Margaret.

468. On balance I consider that Jack was able to understand the extent of the property of which he was disposing.

469. **Third, was Jack able to comprehend and appreciate the claims to which he ought to give effect?** Although the Claimants submitted that Jack was not able to appreciate the claims to which he ought to give effect, I am satisfied that, despite his obvious confusion in the months before the signing of his 2015 Will, he was able to comprehend and appreciate claims to which he ought to give effect as at 28 October 2015. As with his property, I consider that it is likely that he would have remembered those claims had he been reminded of them. In any event, Jack did in fact give effect to the claims of his children, Margaret's children and grandchildren and Marjorie in his 2015 Will. I note that (albeit without having had access to all of the evidence) the experts were in agreement in their second joint statement that, on balance, Jack "probably understood who may have had a claim on his estate".

470. The Claimants rely, first, upon Jack's alleged inability to comprehend the claims of Margaret's family and, in particular, of Melanie's children. Although there is strong evidence in the documents created around 2 July 2015 that Jack was very confused about the structure of Margaret's family, he was in general terms aware of their claim. Even if he had forgotten Melanie's death, he still appreciated that members of Margaret's family had a moral claim on his estate. Melanie's death was such a traumatic event for the family that I have little doubt that Jack would have remembered it had he been reminded of it, just as he would have remembered that she had three children had he been reminded of them – the evidence is that he saw these children regularly and that their photos were on display at 2 Hutton Place. On my findings in

respect of the 2 July 2015 documents, Jack had Margaret's assistance in sending instructions on that day to Ms Wells, but there is no reason to suppose that he did not understand those instructions in the moment when the error in his original draft was identified and corrected. This is not a case in which Jack was unable to understand the moral claims of potential beneficiaries on Margaret's side of the family and, of course, he did in fact make provision for them in his will.

471. That Jack omitted to mention his youngest grandchild, Henry, in the document he created on 18 May 2015 (an important document in respect of which it is to be expected that he took considerable care), is evidence of memory lapse and confusion, certainly relevant to limb 1 of *Banks*, but not directly probative, in my judgment, in respect of limb 3. Jack was never intending to benefit his grandchildren directly in his 2015 Will and the Claimants do not suggest that those grandchildren were potential beneficiaries with claims to which Jack should have appreciated he needed to give effect.

472. Next, the Claimants rely upon Jack's failure to understand and appreciate Andrew's claim on his estate. However, I do not doubt that Jack remained able to comprehend that Andrew had a moral claim on him, although he appears to have begun to exhibit signs of reduced empathy towards him in the months leading up to the signing of the 2015 Will, perhaps consistent with his dysexecutive syndrome.

473. It is clear from the evidence that at the outset of the will-making process Jack considered himself to have a moral obligation to Andrew as his financial dependent; he had, after all, been providing him with funding for many years, paying for his medication and was the provider of the roof over Andrew's head. As I have found, Jack had acknowledged his sense of obligation to Andrew during conversations with him and in his email of 30 September 2014. As part of the will drafting process for the 2015 Will he had even considered providing Andrew with an annuity. His instructions of 2 July 2015 to Ms Wells included express provision for Andrew. Even after the signing of the 2015 Will, Jack continued to make payments to Andrew for another couple of months, including on 29 December 2015 and 14 March 2016, thereby recognising the need to provide financially for him. To my mind, the problem here was not that Jack was unable to understand that Andrew had a moral claim, but rather that he was unable to understand the provisions of the 2015 Will that were designed to give effect to that moral claim – hence my decision in relation to limb 1 of *Banks*.

474. Finally, the Claimants also rely upon Jack's failure to make provision for Susan in the 2015 Will, submitting that this failure clearly evidences an inability to appreciate a genuine moral claim to which Jack ought to have given effect. If the 2007 Will had made provision for Susan, this argument might have had more traction. However, where the 2007 Will made no provision for her (albeit that it was understood that Sara would "do the right thing") it is difficult to see that a failure to make provision for her in the 2015 Will must lead to a failure on this score in respect of limb 3. In providing instructions to Ms Wells, Jack had certainly shown a lack of empathy for Susan's position (perhaps consistent with his advancing dysexecutive syndrome) but, on balance, I am satisfied that on 28 October 2015 he was able to comprehend that Susan had a claim on him by reason of her occupation of the Findon Property. Even assuming that he had forgotten the existence of her claim as at that date and had forgotten that he had reassured her about remaining in her home, I am satisfied that he could have

understood her claim, had he been reminded of it. His 2 July 2015 instructions to Ms Wells expressly referred to the Findon Property and to Marjorie's entitlement to continue to occupy that property and the evidence suggests that Jack would readily have understood both that Susan was also occupying that property and that she therefore had a claim on his estate. There is no requirement for the purposes of this limb that he should be able to understand or remember that Susan had nowhere else to live.

475. On balance I consider that Jack was able to understand the claims to which he ought to give effect.

476. **Fourth, was Jack suffering from a disorder of the mind which poisoned his affections, perverted his sense of right or prevented the exercise of his natural faculties thereby causing him to bring about a disposal of his property which, if his mind had been sound, would not have been made?** In my judgment, Jack would not have executed a will which left Andrew's future in an uncertain state had he not been suffering from a disorder of the mind (namely dementia) which prevented the exercise of his natural faculties. To use the language of *Banks*, the provisions relating to Andrew's inheritance and the treatment of the US Property, evidence a perversion of Jack's moral sense of obligation which can only have been caused by his mental disease. The provision for Andrew in the 2015 Will was not rational for the reasons I have given, particularly bearing in mind that by the date of signing the 2015 Will, Jack had apparently given up pursuing the making of a US Will. This is enough, in itself to give rise to a failure in respect of limb 4 of *Banks*.

477. Perhaps unsurprisingly, I gained no real assistance on limb 4 from the experts, whose inevitable focus was on cognition. Dr Series was right to say in his first report that there is nothing to suggest that Jack's mind was poisoned by delusions, but that is not an accurate description of the test to be applied under limb 4. Interestingly, Dr Warner expressed the view in his second report that the phrase "disorder of mind" as used in *Banks* "is taken to mean functional mental illness such as depression or psychosis", noting that whilst dementia is also "a disorder of mind" it was his understanding that its impacts were usually considered under limbs 1-3 of *Banks*. Dr Warner noted however, that he considered this to be an "arbitrary and…somewhat unsatisfactory distinction". For reasons I have already explained, I consider that Dr Warner's understanding of the scope of limb 4 of *Banks* is erroneous (albeit that his instincts are right). In any event this is, of course, a matter for the court.

478. It was suggested to me that various other provisions in the 2015 Will, including the hotchpot provisions, the failure to provide for Susan and the decision to split his estate seven ways were irreconcilable with Jack being able to exercise his natural faculties, but on balance, I disagree. Dealing with each of these in turn:

    a. The hotchpot provisions certainly appear to have been both inaccurate and unjust, failing to achieve the parity between Jack's children that he had said he wanted. Sara's hotchpot figure included an unexplained sum of £34,000; Megan's hotchpot figure apparently failed to have regard to the reasons why she ceased to be involved with the Tally Ho! together with the advice Jack had received from Barclays as to his ability to set off any losses he may have; and there was no figure for Jonathan at all, despite Jack having identified (and

instructed) a figure (albeit an erroneous one). However, the 2007 Will, made at a time when there is no question other than that Jack was in full command of his natural faculties, also took no account of a hotchpot provision for Jonathan and apparently estimated a figure for Sara, thereby giving the lie to the suggestion that Jack would inevitably have taken great care to ensure accuracy in relation to the hotchpot provisions. Although there was a curious asymmetry in the 2015 Will in the treatment of the 2014 Gift (in that there was no hotchpot provision for Charlotte), I do not consider that alone to support the proposition that the 2015 Will would have looked different had Jack not been suffering from cognitive impairment. It would not necessarily be irrational to take the view that this was an isolated gift to one of Margaret's much-loved grandchildren which other members of Margaret's family would not begrudge (consistent with Charlotte's evidence). Although his own children might begrudge its omission, Jack's apparently relaxed approach to the identification of hotchpot provisions, including in the 2007 Will, tends in my judgment, to militate against a finding that this omission could only have been a function of a perversion of moral sense brought about by his dementia.

b. As for the disposition of the Findon Property, I return to the fact that the 2007 Will made no provision for Susan's continuing occupation after Margaret's death. Although Jack had said to Susan that the Findon Property was her "home", he gave clear instructions to Ms Wells at the February 2014 Meeting that he felt no sense of obligation to her; she and her mother had been occupying rent free for a very considerable time. He repeated this sentiment in his email of 23 July 2014. On balance, whilst the decision to exclude Susan from the 2015 Will may appear harsh, I reject the suggestion that it was irrational or inexplicable such that it was the product of a perversion of moral sense brought about by Jack's dementia.

c. Finally, in relation to the seven way split of his estate, I reject the Claimants' submission that this, in itself, was "out of character" for Jack, such that he could not possibly have disposed of his estate in this way had he not been suffering from cognitive impairment. It was certainly not irrational or inexplicable. A seven way split was entirely consistent with Jack's desire to provide for his children, whilst at the same time providing for members of Margaret's family, for whom he had plainly developed a great deal of affection over many years. That Margaret's family may have had less need for the money does not shift the dial.

479. For the reasons I have given, I consider that Jack did not have testamentary capacity as at 28 October 2015.

Parker v Felgate

480. I do not consider the Defendants' reliance on the rule in *Parker v Felgate* to assist them. I do not need to consider the Claimants' submission that the point has not, in any event, been properly pleaded. In my judgment, it fails for the following reasons:

a. As at the date of 2 July 2015 (the date on which the Defendants say that Jack had testamentary capacity for the purpose of giving his (final) instructions to Ms Wells in the form of the "I now wish the wills to be written" document), I do not consider that Jack in fact had testamentary capacity having regard to the complex will that Ms Wells prepared for him. My reasons will be clear from what I have already said – Jack's instructions to Ms Wells on 2 July 2015 were sent at a time when he was suffering from obvious cognitive difficulties and confusion.

b. The 2015 Will was not, in any event, prepared so as to give effect to the instructions that Jack gave on 2 July 2015. At best it was unclear from those instructions whether any of his previous instructions (for example as to hotchpot provisions) should be carried through into his 2015 Will. I do not consider that it is safe to assume from Jack's total silence in relation to the contents of the Third Draft Will that he understood or agreed with these provisions.

c. If it was Jack's intention that instructions he had given to Ms Wells previously (that did not conflict with his instructions of 2 July 2015) should continue to apply, then the 2015 Will failed to make provision for (i) the lifetime gift of £10,000 that Jack had instructed Ms Wells to bring into hotchpot for Jonathan; (ii) the gift of an amount up to the nil rate band to Jack's children; or (iii) the £300,000 distribution to each of his children "off the top" of the residue. It is worth observing in this context that the 2 July 2015 instructions to Ms Wells expressly stated that "[t]he will is to be written to minimise Taxation". Particularly in this context, the failure of the 2015 Will to make provision for gifts up to the nil rate band is, in my judgment, contrary to Jack's instructions (albeit that I rather doubt that Jack would by now have understood any provisions concerning nil rate bands). In closing, the Defendants sought to suggest that Ms Wells must have realised that there was no need to make provision for the use of nil rate bands given other gifts that had been made by Jack and that this was of "no practical impact", but there is no evidence that this deviation from Jack's instructions was ever discussed or agreed with him.

d. If, instead, it was Jack's intention that effect should now be given simply and only to the instructions set out in his 2 July 2015 communication to Ms Wells, the 2015 Will quite obviously failed to implement that intention.

e. The power to apply capital and the revocation provisions had never been properly explained to Jack and he had never had an opportunity to express his intentions in relation to those provisions. Indeed I have already found that he was not able to understand them on 28 October 2015 and I also find, for present purposes, that he would not have understood them on 2 July 2015.

f. The 2015 Will did not give effect to the intention Jack expressed in relation to Andrew in his 2 July 2015 instructions to Ms Wells that the US Property "is to be inherited by Andrew alone". It was instead subject to the complexities to which I have referred, including the effect of the revocation clause and the hotchpot provision, which were never explained to him and which left considerable uncertainty in respect of Andrew's inheritance. Absent a US Will,

Andrew would not inherit the US Property but would be subject to the option to purchase in the 2007 Will.

g. Further and in any event, there is no evidence whatever to support the Defendants' proposition that when Jack executed the 2015 Will on 28 October 2015 he had the capacity to understand and did understand that he was executing a will for which he had given instructions. Ms Wells was not present and Christopher and Melissa can remember nothing about the will signing process. There is not even any evidence that Jack made an effort to read through the 2015 Will before he signed it. In the circumstances, I find that, on balance, Jack did not have the necessary capacity and understanding.

Knowledge and Approval

481. It will already be clear from what I have said, that I do not consider, based on my evaluation of the evidence, that the Defendants have discharged the burden of establishing that Jack knew and approved of the 2015 Will. I repeat the points I make above in relation to testamentary capacity and the *Parker v Felgate* argument. Those points appear to me to compel a conclusion that Jack did not know and approve the 2015 Will.

482. However, even approaching this issue on the hypothetical (and rather artificial) basis that Jack had testamentary capacity, I consider that an holistic approach (as approved by the Court of Appeal in *Gill v Woodall* at [22]) to the available evidence as set out at length above establishes that, on balance, Jack did not know or approve of the 2015 Will. If it were necessary to establish the existence of facts which "excite the suspicion of the court" so as to displace the "strong presumption" in the Defendants' favour flowing from capacity and due execution (see *Reeves v Drew* [2022] EWHC 159 (Ch) per Michael Green J at [404]) I consider that the following facts, when taken together, are plainly sufficient to raise a well-grounded suspicion: (i) Jack's age; (ii) his dementia; (iii) the fact that Ms Wells was not a solicitor and did not assist him at the time of execution of the Will by reading it through; (iv) the lack of evidence as to whether Jack in fact read through his will on 28 October 2015; (v) the inconsistency between Jack's final instructions on 2 July 2015 and the provisions of the 2015 Will, including, in particular, (vi) the inclusion of clause 9(f), which it is accepted had not been discussed with, or explained to, Jack; and (vii) the confusion likely caused by Ms Wells' various failures to implement Jack's instructions. The Defendants have failed to discharge the burden of establishing that, on the balance of probabilities, the 2015 Will represents Jack's testamentary wishes.

483. The evidence shows that various of the provisions of the 2015 Will had not been explained to Jack and so did not reflect choices he had already made. He neither understood what was in the 2015 Will when he signed it, nor what the effect of key provisions would be. The revocation clause, the hotchpot provision at 9(f) relating to the US Property and the interaction of those two provisions is an obvious example. These provisions did not reflect Jack's testamentary intentions in relation to Andrew and accordingly, he cannot have known or approved of the contents of the 2015 Will.

484. Mr Dumont suggested that Jack could be taken to know and approve of the hotchpot provision at clause 9(f) because that clause was necessary in order to give effect to his instructions that the estate be split seven ways. I disagree. Clause 9(f) was new to the Fourth Draft Will and Jack's instructions made no mention of any such provision. It was a complex provision which required the urgent making of a US Will if Andrew was not to be left in an uncertain and detrimental position. In my judgment, clause 9(f) is very far from being a pure technicality inserted into the will so as better to reflect Jack's testamentary intentions.

485. Towards the end of their closing, the Defendants appeared to acknowledge the potential difficulty caused to their case by reason of the provisions in the 2015 Will relating to Andrew, because Mr Dumont first submitted that the hotchpot provision made for Andrew was "inoperative" (submitting that because Jack has died without making a US Will, the hotchpot provision in relation to the US Property has no effect) and then, secondly, that it would be open to the court to omit, or strike through, that provision if it was nonetheless satisfied that Jack knew and approved of the remainder of the 2015 Will. This argument was not foreshadowed in the Defence and had not previously been suggested to the Claimants.

486. In their reply, the Claimants acknowledged that the court has jurisdiction to admit a will to probate with the omission of words that did not reflect the testator's intentions (see for example the discussion in *Mundil-Williams v Williams* [2021] EWHC 586 (Ch) per HHJ Keyser QC at [67]-[79]), albeit they submitted that it should only be done sparingly (drawing my attention after the close of trial to *Fuller v Strum* [2002] 1 WLR 1097, per Peter Gibson LJ at [36]). In their submission it should not be done in this case.

487. In circumstances where I have found an absence of testamentary capacity, there is no real need for me to consider these submissions in any detail. However, whilst I accept that clause 9(f) of the 2015 Will would have been inoperative if the will had been admitted to probate (essentially because it was a condition precedent of clause 9(f) that Andrew had inherited the US Property), I reject the submission that the 2015 Will could be "saved" if that provision were to be removed and I further reject Mr Dumont's submission that it would be "bizarre" to find a lack of knowledge and approval simply because of the inclusion of a clause that would have been inoperative in any event. My reasons are as follows.

488. First, given my evaluation of the evidence, I consider it to be unreal to suggest (for reasons I have already given) that the hotchpot provision relating to Andrew is the only provision that Jack did not know or approve of such that its removal would leave a will which more closely represents his testamentary intentions. In this regard, I note the observations of Peter Gibson LJ in *Fuller v Strum* at [36] to the effect that while it is possible for a court to find that part of a will did have the knowledge and approval of the deceased, while another part did not, "the circumstances in which it will be proper to find such a curate's egg of a will are likely to be rare". I agree with the Claimants that (even leaving aside the position in relation to his testamentary capacity) Jack's inability to know and approve of clause 9(f) casts serious doubt over his ability to know and approve of the remainder of the 2015 Will.

489. In any event, the removal of clause 9(f) would leave intact the revocation clause, which I have found was also not explained to Jack. The effect of the revocation clause would be that the option to purchase the US Property in the 2007 Will would apply, a state of affairs which was contrary to Jack's intentions as stated on 2 July 2015 (that Andrew should inherit outright). The effect of this provision was not known to Jack and, in my judgment, the revocation clause also does not therefore reflect Jack's testamentary intentions. He did not know or approve of its contents.

Conclusion

490. In light of my conclusions in this judgment I shall pronounce in favour of the 2007 Will and against the force and validity of the 2015 Will.

491. By way of postscript, I wish to make it clear that I know how difficult this judgment will be for Margaret's family, who saw far more of Jack in the final years of his life, took on many of the caring responsibilities and plainly had a deep love and affection for him, which he reciprocated. Relatively little of this judgment has turned on what they would (perhaps) regard to be the central difference between the 2015 and 2007 Wills, namely whether Jack sought a seven-way or five-way split of the trust of the residuary estate. Although on my application of the law I have found in the Claimants' favour, I have also accepted that a desire for a seven-way split was not obviously irrational or out of character for Jack.

492. I consider it to be extremely regrettable that, knowing Jack's affection for both sides of the family, the parties were unable to find a means of resolving this claim without a trial. Parties to cases of this sort should be under no illusions as to the emotional and financial toll they extract and the considerable ordeal for both sides of contesting the matter to a final judgment.

493. If the parties are able to agree upon an order then I invite them to do so.