Judgments

Catling and others v Catling and another

[2014] EWHC 180 (Ch)

CHANCERY DIVISION

Mr D Halpern QC (Sitting as a Judge of the Chancery Division)

4 February 2014

Will - testator - Testamentary capacity - Testator having eight children - Testator making will in 2004, dividing property equally between children - Testator's condition worsening - Testator making new will favouring defendants in 2007 - Claimant first to seventh children commencing proceedings - Whether testator having capacity to make wills.

Judgment

APPROVED JUDGMENT

I DIRECT THAT PURSUANT TO CPR PD 39A PARA 6.1 NO OFFICIAL SHORTHAND NOTE SHALL BE TAKEN OF THIS JUDGMENT AND THAT COPIES OF THIS VERSION AS HANDED DOWN MAY BE TREATED AS AUTHENTIC.

MR D HALPERN QC:

1. This is the trial of a probate action relating to the estate of the late Mrs Joyce Beech Catling ("Mrs Catling"). She was married to Arthur Joseph Catling ("Mr Catling") and they had 8 children. The youngest child is Kevin Catling, the First Defendant. (As most of the protagonists are members of the same family, I shall use first names for the siblings, without intending any disrespect).

2. The Claimants, who are the 7 older children, seek probate in solemn form of her Will dated 23rd August 2004 ("the 2004 Will") and Codicil dated 2nd November 2005 ("the 2005 Codicil") and say that the court should pronounce against a later Will dated 11th May 2007 ("the 2007 Will"), on the ground that Mrs Catling no longer had testamentary capacity and/or did not know and approve its contents. Under the 2004 Will the estate is divided equally between the 8 children (in the events which have happened); under the 2007 Will it is given entirely to Kevin, subject to 3 small bequests.

3. The Second Defendant is Claude Wallace ("Mr Wallace"), who drafted the 2007 Will and is appointed executor under it. Both Defendants are unrepresented. Mr Wallace sought to speak for Kevin, as well as himself, but I told Kevin that this was inappropriate in view of the potential conflict of interest between them. However, I allowed Mr Wallace to address me first. Kevin's own submissions and cross-examination were minimal and he was content to adopt Mr Wallace's. I have formed the clear impression that the 2 Defendants regard their interests as closely allied, despite what I said.

The witnesses of fact

4. I heard evidence from 5 of the Claimants: Maureen, Tony, Patricia, Roger and Jane. I am satisfied that their oral evidence was broadly reliable and I shall set out below the conclusions which I have reached on the basis of that evidence. I was particularly impressed by the evidence of Maureen, whom Mr Wallace described as the "gang-leader". She is a woman with a determined spirit and a forthright manner. She clearly feels very strongly that Kevin and his wife Shirley behaved very badly towards their mother and siblings and has a very low opinion of Mr Wallace. However, even after making allowances for the extent to which this might have coloured her evidence, I am satisfied that she was an honest witness and that her evidence is broadly reliable. At one stage counsel sought to use her statement to refresh her memory, but I reject this, since her statement was made as recently as December 2013. Nevertheless, I was impressed by her oral evidence for the following reasons:

> i) Her demeanour in the witness box;
>
> ii) Her evidence was corroborated by the other Claimants, each of whom gave evidence in his or her own words and style, with no obvious signs of collusion (although I bear in mind the risk that there might be collusion in a case such as this);
>
> iii) Corroboration in the documents for parts of her evidence e.g. the dispute over the transfer of land in 2001 and her complaints to social services about Kevin and Shirley's behaviour towards Mrs Catling (demonstrating at least that her evidence is not a recent invention); and
>
> iv) That Kevin chose not to give evidence to contradict his siblings.

5. Neither Kevin nor Shirley served a witness statement. I told Kevin in opening that the Claimants might seek to draw an adverse inference if he failed to give evidence, since he plainly had relevant evidence to give. However, he chose not to give evidence, and nor did Shirley. I asked him in his very brief closing submissions whether he wished to put forward any reason for not giving evidence and he said that he did not.

6. The approach to be taken to a party who chooses not to give evidence is summarised by Brooke LJ in *Wisniewski v. Central Manchester Health Authority* [1998] PIQR 324 at 340:

> "(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may

be reduced or nullified."

7. I am satisfied that the Claimants' evidence raised a strong prima facie case which calls for an answer, that Kevin had material evidence to give, and that he chose not to give evidence because he did not wish to face cross-examination.

8. Mr Wallace made a *Larke v. Nugus* statement and was cross-examined for nearly 5 hours. He treated the court with courtesy at all times, both in the witness box and in his submissions. However I formed the conclusion that I cannot believe anything that he said, unless it has been independently corroborated or accords with the inherent probabilities of the situation. My reasons, which are explained in detail in the course of this judgment, are in summary as follows:

i) He has made dishonest representations that he was a barrister;

ii) He refused to cooperate or provide a *Larke v. Nugus* statement for a period of 18 months;

iii) There is not a shred of evidence in his Will file to corroborate his story that Mrs Catling gave instructions to change her Will in Kevin's favour;

iv) The inherent implausibility of the allegation that Mrs Catling gave instructions to change her Will in December 2005 or January 2006 but then instructed him not to draft the new Will until May 2007;

v) The coincidence that the version of events set out in the preceding sub-paragraph was never mentioned until after production of the medical notes which showed that Mrs Catling probably did not have testamentary capacity in May 2007;

vi) He stands to benefit considerably if the 2007 Will is proved; and

vii) The absence of any corroborative evidence from Kevin, in circumstances where it was Kevin who brought him in and where he and Kevin have served a joint Defence and continue to defend these proceedings jointly.

9. In reaching this conclusion I have borne in mind the words of Lord Nicholl in *Re H (Minors)* [1996] AC 563 at 586 and Lord Hoffmann in *Re B (Children) (Care Proceedings: Standard of Proof)* [2009] 1 AC 11 at [13] as to the evidence needed to discharge the burden of proof in a case of fraud.

10. In addition to the members of the family and Mr Wallace, there were a few minor witnesses who also gave evidence. I shall express my conclusions on their evidence as I go through the facts.

The facts

The period before Mr Catling's death

11. Mr and Mrs Catling originally owned Widmore Farm, Gaddesden Row, Hemel Hempstead ("the Farm"). This comprised a 40-acre farm and the family home, where they brought up their 8 children. I was told by the Claimants, and I accept, that Mr Catling was unable to read or write, and that Mrs Catling was an intelligent woman who looked after the family finances. However, by the late 1980s she had became virtually blind and at some point before her final years she became progressively disabled. All the children were close to their parents and concerned for their wellbeing as they both became old, sick, irascible and demented (I will deal with the vital issue of Mrs Catling's dementia below). Maureen and Penny had both emigrated to Australia, but returned from time to time to visit their parents. The others all lived nearby and visited or spoke to their mother regularly, often on a weekly basis or more frequently. Kevin and his wife Shirley used to visit frequently and Shirley was recognised in some way as being Mrs Catling's carer.

12. In 2001 Mr and Mrs Catling transferred part of the farmyard to Kevin for £30,000. Maureen gave evidence that the transfer included more land than had been agreed and that Kevin had taken advantage of his father's illiteracy and his mother's blindness. She told me that when her father found out, he was furious and telephoned her in Australia, this being the only time that he ever rang her in Australia. She came to England to resolve the problem, as a result of which Kevin was required to give back the excess land. I was taken to the office copy entries which confirm that the plan was rectified by deleting part of the land transferred to Kevin. I accept her account, which understandably led to mistrust of Kevin by his siblings.

13. Pictons Solicitors LLP ("Pictons", by which I include predecessors to that firm) had been the solicitors for Mr and Mrs Catling for very many years. Mr Christopher Brown was the partner who looked after Mr and Mrs Catling and prepared their Wills. Mrs Catling made a Will on 9th February 1999, under which she left a sum equal to the nil-rate band to be held on discretionary trust for her family, with the residue to go to Mr Catling if he survived; if Mr Catling did not survive, the whole estate was to be divided equally between her 8 children. I have also seen a Will of Mrs Catling dated 12th July 2000 which is similar to the 1999 Will; however the final page is missing and accordingly I do not know whether it was executed. Maureen told me, and I accept, that she never saw her parents' Wills and never discussed the contents with them in detail, but she was always aware from her parents that their estates were to be divided equally between all the children after the death of the surviving parent, and that this was partly in recognition of the work which the older sons had done on the farm for many years without pay.

14. On 23rd August 2004 Mr and Mrs Catling each made new Wills prepared by Pictons. Each Will gave a sum equal to the nil-rate band to the children and the residue to the surviving spouse. If the other spouse did not survive, the residuary estate was to divided equally among all 8 children. Mrs Catling's Will appointed Kevin and Pictons as executors. These Wills were in accordance with their previous Wills.

15. On 14th February 2005 Mrs Catling executed an enduring power of attorney in favour of Mr Brown, which was registered in August 2005.

After Mr Catling's death

16. Mr Catling died on 4th May 2005 and his estate fell to be distributed according to his 2004 Will. At the time of his death he and Mrs Catling were living at the Farm. The Claimants told me, and I accept, that there was a meeting of the siblings (including Kevin) shortly after their father's death to decide what to with their mother. They all agreed that she was incapable of looking after herself. Kevin and Shirley wanted her to live with them, and she also wanted this. The majority of the siblings were in favour of giving effect to her wishes. Roger and Patricia were not happy but agreed to go along with the majority. Mrs Catling was present during the conversation but said nothing. Later in May 2005 Mrs Catling moved into Kevin and Shirley's house at 27 Cromer Close, Little Gaddesden.

17. On 2nd November 2005 Mrs Catling executed a Codicil to her 2004 Will. She appointed SA Law to be her executor with Kevin in place of Pictons. (I was told by Mr King of Pictons, and I accept, that the partners in Pictons had sold the firm's St Albans office to former partners who formed SA Law and that Mr Brown had joined SA Law.) Secondly, she gave 2 legacies of £5,000 each, 1 being a legacy to Shirley. In all other respects she confirmed her 2004 Will. Mr Brown drafted the Codicil. He signed a statement that day confirming that he was satisfied that she was of sound mind, memory and understanding and was capable of making the Codicil. It is obvious that he wrote this because he recognised that there might be concern after her death as to her capacity.

18. On 3rd November 2005 Maureen met with Kevin. I have been taken to Maureen's handwritten note of the meeting, on which she was extensively cross-examined by Mr Wallace. He put to Maureen that this was a declaration of war by her. I do not accept this. I am satisfied, on her evidence, that there was already a considerable degree of mistrust and that this was an attempt by Maureen to find a solution that would benefit the entire family.

19. I was told by the Claimants that for the first few weeks after Mrs Catling had moved into Kevin and Shirley's house they continued to see and speak to her on a regular basis. However, it then became much more difficult to see her or speak to her. Each of them told me, and I accept, that Kevin or Shirley would make excuses as to why it was not convenient for the caller to see Mrs Catling or take her on an outing. Kevin arranged for Mrs Catling to have her own telephone line, but when the Claimants phoned the number, they were often unable to speak to her. It is not clear to me whether the difficulty in making contact with Mrs Catling began before or after she made her Codicil but I am satisfied that it was the case, at least from the time that Mr Wallace first came on the scene.

20. For example, Tony said that on numerous occasions he tried to see his mother but was told by Kevin or Shirley that it was not convenient and that in the end he only saw her when she was in hospital or respite care. Roger's evidence was to the same effect. Tony also said that on 1 occasion he was phoned by a neighbour who had seen an ambulance outside Kevin's house. Tony immediately went to the house but Kevin refused to let him in. Tony then phoned the police, who escorted him into Kevin's house. Maureen also gave evidence of an occasion when she was refused access to see her mother.

The first involvement of Mr Wallace

21. Mr Wallace gave evidence that he was first contacted by Kevin on or about 4th December 2005. He said that he had previously helped Shirley's brother-in-law and other family members by acting as a Mackenzie friend in an employment tribunal and that the brother-in-law had apparently recommended him to Kevin.

22. Mr Wallace told me that he visited Kevin's home for the first time on Sunday 11th December, where he met Kevin, Shirley and Mrs Catling. He produced a document headed "Cawlaw Appointment and Authorisation to Act" which Mrs Catling apparently signed that day. This stated:

> "I hereby authorise Claudius Wallace of Cawlaw [address given] to act on my behalf in relation to the matters listed below:
>
> 1. Probate of Mr Arthur Joe Catling
>
> 2. Will for Mrs Joyce Beech Catling

> 3. Power of attorney for Mrs Joyce Catling
>
> 4. Sale of the Property [i.e. the Farm]
>
> 5. And any related matters."

23. Mr Wallace said in cross-examination that he sought to obtain probate of Mr Catling's Will but failed because Pictons or SA Law were dealing with this. At the relevant time the legal position was that it was a criminal offence for anyone other than a solicitor, barrister or other limited class of persons or persons granted exemption by an approved body, to prepare papers on which to found or oppose a grant of probate in expectation of a reward (section 23 of the Solicitors Act 1974 as amended by sections 54 and 55 of the Courts and Legal Services Act 1990). Mr Wallace accepted in his closing submissions that this was the legal position but he alleged (for the first time) that he never intended to apply for probate of Mr Catling's Will, but simply to write some letters for Mrs Catling to send to her solicitor; that is not what he had said in cross-examination. I am satisfied that he agreed to act on the grant of probate in expectation of reward. Of the remaining items in the Authorisation to Act, the only one which Mr Wallace carried out was the second, i.e. the preparation of a Will for Mrs Catling.

24. Mr Wallace stated in his *Larke v. Nugus* statement, and confirmed in his oral evidence that:

> " Mrs Joyce Catling had always maintained exactly the same stance in respect of how she wished to dispose of the assets of her estate. The phrase that she used quite often was '*don't let the bastards get a single penny. I'm giving it all to Kevin.*'"

25. He said that the reason why Mrs Catling instructed him was that Mr Brown had suddenly severed all contact with her. This suggests that the severance by Mr Brown preceded the instruction of Mr Wallace. However, his oral evidence was that Mrs Catling was thoroughly dissatisfied with the service provided by Mr Brown and therefore decided, not merely to change to a different adviser, but to change to someone who was not a solicitor. I have seen a letter dated 14th December 2005 from Mr Brown to Mrs Catling in which he referred to the Claimants' concern that she was being manipulated by Kevin and Shirley and concluded that his position had become untenable. Mr Wallace's oral evidence is that it was agreed that Kevin, Shirley and Mrs Catling would see Mr Brown on 14th December and ask him to renounce the power of attorney, so that Mr Wallace could be appointed in his place, and that if there was any problem then Kevin would ring Mr Wallace on his mobile phone and arrange for him to speak to Mr Brown. Mr Wallace told me that he did indeed speak to Mr Brown that day. It would appear that the letter was drafted before the meeting (since it does not refer to the meeting) but that it was not sent or not received until after the meeting (since the letter was not apparently mentioned during the meeting). Next day Mr Brown executed a deed of disclaimer, disclaiming his appointment as attorney.

26. I reach the following conclusions on this evidence:

> i) Having seen Mr Brown's letter and deed of disclaimer, I accept Mr Wallace's evidence that he had his first meeting with Mrs Catling, Kevin and Shirley on 12th December and that he agreed with Kevin and Shirley that they would visit Mr Brown on 14th December.
>
> ii) I reject Mr Wallace's evidence that Mrs Catling had had a bad experience with Mr Brown and therefore decided to instruct someone with no legal qualifications. I have seen no evidence that Mrs Catling was dissatisfied with Mr Brown; she had instructed him to prepare the Codicil only

a month earlier. If she had been dissatisfied that would have been a reason for changing solicitor, but not for instructing someone unqualified.

iii) I reject Mr Wallace's evidence that Mrs Catling said she wanted to make a Will cutting out the Claimants.

Cawlaw's terms of business and the nature of Mr Wallace's business

27. Mr Wallace has produced a document headed "Cawlaw Terms of Business and Conditions" which Mrs Catling apparently signed on 2nd January 2006. The following extracts are particularly striking:

"2.1 The scope, nature and requirement of services will be set out in broad terms in the Authorisation to Act letter ....

2.3 All completion dates are estimates only and the time of completion shall not be of the essence of the contract. In no circumstances shall Cawlaw be liable to compensate the client in damages or otherwise for non-completion or late completion of the provision of the Services or any of them for whatever reason or for any loss, consequential or otherwise arising therefrom.

4.6 Cawlaw reserves the right to charge the client interest ... on any unpaid invoices at the rate of 12% per annum above the Bank of England base rate....

5.2 In the event that the element of work can be precisely defined, we are pleased to identify a fixed fee: this will be exclusive of disbursements and value added tax. Fixed fees may be expressed in three ways: a lump-sum; a percentage of construction costs (in building projects); or as a success fee - a percentage of the saving or settlement in a claim, court compensation/damages awards, or any other saving/income criteria that can be identified ...

6.1 The current hourly charge rates for the categories of people in this firm who might work for you are set out below. (The amounts shown are exclusive of VAT ...)

6.1.1 Partners £95-250 per hour

6.2.2 Associates £50-105

6.1.3 Trainee/assistants £35-60.

... The person dealing with your instructions is Mr Claude Wallace - partner/hourly rate £125/hr.

8. All fees quoted are net of VAT, which will be added at the prevailing rate where appropriate.

15.1 [After referring to a complaints procedure obtainable from the office:] If the complaint is not finally resolved between us, the complaint must be have [*sic*] referred to the *(delete as*

appropriate):

15.1.1 Chartered Institute of Builders (CIOB) adjudication scheme or arbitration scheme or

15.1.2 The General Council of the Bar complaints scheme."

28. There are a number of disturbing features about these conditions, including:

i) The very wide purported exclusion of liability;

ii) The high rate of interest;

iii) The reference to success fees in the context of claims for damages: Mr Wallace told me that part of his work was in the construction industry and that he provided "litigation support" for which he charged a success fee (It is not necessary for me to reach any conclusion in the current proceedings as to whether he was holding himself out as conducting litigation or was engaged in champerty); and

iv) The reference to VAT: Mr Wallace confirmed in evidence that Cawlaw was not registered for VAT but maintained that Cawlaw has never charged VAT.

v) The reference to partners, associates and trainees "in this firm". Mr Wallace told me that Cawlaw was initially a partnership between himself and his father, who retired in 2006 or 2007, leaving Mr Wallace as the sole proprietor. Mr Wallace states that he is a chartered builder, albeit currently unemployed, and that is father was a carpenter. Neither has any legal professional qualification. He told me that the only person whom Cawlaw ever employed was a plasterer who was treated as a trainee. He said that he would engage others to assist on a subcontracted basis and that it was common in the industry to describe such persons as associates "in the firm". He also told me that Cawlaw is currently dormant but that he would like to resume trading.

29. However, over and above these disturbing features, I must refer to paragraph 15, which stated that any unresolved complaint be referred to the Chartered Institute of Builders or the General Council of the Bar (to be deleted as applicable, but not deleted on the version signed by Mrs Catling). Given that Mr Wallace's retainer was as a will writer, anyone reading these terms would assume that the appropriate body was the Bar Council. In my view this was a representation that he was regulated by the Bar Council and hence that he was a barrister. At one point in his oral evidence he accepted that he was not regulated by the Bar Council but at another point he claimed that he thought he was regulated.

30. Mr Wallace said in his oral evidence that he had never held himself out as being a barrister but that he did tell anyone who asked him about his professional qualifications that he was a "student barrister". He told me that he has a law degree and he showed me his card, which confirms that he has been a student member of Lincoln's Inn since 9th September 1998. He told me that he was accepted on a course to do his Bar Finals in or about 1998 but did not have the money to proceed. As a result, he had not yet taken his Bar Finals and not yet been called to the Bar, but claims to have retained an intention for the past 15 years to do so in the future. He told me that he checked with the Bar Council in 1998, who said that he was entitled to describe himself as "student barrister". However, I have seen a letter dated 10th November 2006 from the

Bar Council confirming that Mr Wallace is "not a member of the Bar". I find it inherently implausible that the Bar Council would have told him that he could give himself the title "student barrister" and I reject his evidence. Nor have I seen any evidence that he was studying to become a barrister late 2005 or early 2006.

31. I am told that Mrs Catling described Mr Wallace in a telephone conversation as being her "barrister". Although I did not hear the tape of this conversation, Mr Wallace confirmed that this is what she said, but he submitted that she and the whole family tended to use terminology in a loose sense. Maureen said in her witness statement that in their first telephone conversation Mr Wallace described himself to her as being a barrister and that it was in reliance on that representation that she forwarded documents to him. Mr Wallace did not challenge this part of her statement until I reminded him that he needed to do so if he denied it. He then put to her that he had never said he was a barrister, and she staunchly maintained that this is what he had said. He did not put to her that he had described himself as a student barrister; this emerged for the first time in his oral evidence. I am satisfied that whether or not he used the term "student barrister", the impression which he deliberately gave her was that he was a barrister and that this is consistent with the impression which he deliberately gave to Mrs Catling. It accords with paragraph 15 of the Terms and Conditions and also with the name "Cawlaw". Mr Wallace confirmed that the first 3 letters of the name are his initials and that the last 3 letters incorporate the word "law".

32. Further corroboration is provided by a letter of 7th November 2006 from Mrs Catling's consultant psychiatrist to her GP, which refers to Mrs Catling's cognitive impairment and adds:

> "As regards capacity to make an Enduring Power of Attorney, the request has to come from a solicitor, and Shirley has agreed to discuss this with their solicitor."

Mr Wallace accepted that this was a reference to himself, because Shirley had no solicitor of her own, but said that he had made it clear to the whole family that he was not a barrister or solicitor. In my judgment the letter and Mr Wallace's evidence in relation to it are significant for 2 reasons:

> i) Mr Wallace accepted that the family (including Mrs Catling) failed to understand his role and that Mrs Catling thought he was a barrister. As stated above, I find that this was the result of his misrepresentation. But even this had not been caused by his misrepresentation, it would have been incumbent on him to correct it, once he became aware of it. (It is not necessary for me to make any finding as to whether Kevin and Shirley believed that he was a barrister or whether they were parties to the misrepresentation.)
>
> ii) According to the letter, Shirley described him as "their" solicitor, not as Mrs Catling's. I did not hear any evidence from Kevin or Shirley to contradict this.

33. The Terms of Business were self-evidently ones which nobody in his right mind would sign, if he understood them. Mr Wallace told me in his closing submission that when he first met Mrs Catling she was virtually blind, practically deaf and confined to a wheel-chair, and that he did not read these Terms to her because she was only interested in his hourly rate.

34. I conclude as follows:

> i) There was a fraudulent misrepresentation by Mr Wallace that he was a barrister and that Cawlaw was a firm which employed associates and trainees and which had a turnover that took it above the VAT threshold;

ii) There was a fraudulent misrepresentation that Mr Wallace was entitled to do work which could only be done by a lawyer, such as the preparation of papers leading to a grant of probate; and

iii) Mrs Catling would never have signed these terms, had she understood how disadvantageous they were. At one point in his cross-examination Mr Wallace said that he could not have misled her by the Terms and Conditions because she was blind and could not read them. Needless to say, this compounds, and does not exculpate, the wrong which he committed.

The Will file

35. Mr Wallace has produced a file which he says is his complete Will file. It comprises the following documents (all the notes being in his writing):

i) A manuscript note dated 11th December 2005 of a 3-hour meeting which gives some background information about the family. It uses the words "mum" and "dad". Mr Wallace told me that Kevin and Shirley were present during his first meeting with Mrs Catling. He initially accepted that the term "mum" showed that it was Kevin who was speaking, but later he said that it might have been Mrs Catling. The notes include the words:

"No offers. (6 bedroom house)

Split 8 ways - £800,000 say.

Give some now."

It is clear that this is a reference to the Farm. Mr Wallace said that the 8-way split was a reference to Mrs Catling's 2004 Will and did not reflect her clear instructions on 11th December 2005 that the entire residuary estate should go to Kevin. Mr Wallace could not explain the words "give some now". Whatever else those notes might mean, it is clear that there was absolutely no written record of any intention to change her Will by cutting out the Claimants.

ii) The Authorisation to Act signed by Mrs Catling (see above).

iii) A note confirming that he spoke to Mr Brown on Kevin's mobile between 11.30 and 11.45 am on 14th December 2005. The note includes the words "disclaim - power - today" and "he feels compromised", which I assume is a reference to Mr Brown.

iv) A note of a meeting on 28th December 2005 which apparently lasted 2½ hours. The only reference to Wills is the phrase "Wills Arthur Joyce".

v) 2 partial copies and 1 full copy of the 2004 Will which have been annotated by Mr Wallace.

> He confirmed in his oral evidence that he must have annotated these pages (in a version which is not on the file) and then copied the annotated version several times and added further annotations. He told me that he was not sure of the dates or the order in which they were written, save that 1 document bears the date 24th February 2006, which he told me is the date it was written. Schedule 2 to the 2004 Will (which lists the residuary beneficiaries if Mr Catling does not survive) has not been struck out in any of the versions. On the contrary, the concluding words "if more than one in equal shares absolutely" are underlined in all versions, suggesting that this was in the original annotated version. Each version contains the following annotation next to Schedule 2:
>
> "nothing now - and 1/8 = £25,000 each child sum later. Therefore total £200,000 on your death."
>
> It then lists 3 legacies of £10,000 each and concludes with the figure of £230,000.
>
> vi) The annotated complete version of the 2004 Will has the word "OK" below clause 4, which is the nil-rate band gift in favour of all the children. Against the definition of nil-rate band he wrote "£275,000 + interest". Above Schedule 2 he wrote:
>
> "OK below therefore 1/8 each. Therefore £280,000/8 = £35,000 appx each."

36. Mr Wallace accepted in his oral evidence that there was nothing in his Will file which showed that Mrs Catling had decided to change her Will in the form of the 2007 Will. There was no reference even to the 3 small bequests in the 2007 Will, let alone the radical change to the residuary estate. His explanation was that the instructions were so clear that he did not need to write them down. I am satisfied that this is a lie and that Mrs Catling never gave any such instructions. He also accepted that there is no draft of the 2007 Will in the file and that there is no note regarding execution. I cannot be sure when the notes and annotations were made in the Will file. Insofar as one can glean anything from them, they indicate that she had no intention of cutting out the Claimants.

Mr Wallace's ongoing involvement

37. According to his *Larke v. Nugus* statement, he visited the house "most weeks" between December 2005 and November 2006:

> "I also visited Mrs Joyce Catling about 2/3 times a month. This was in addition to communications by telephone every week. From December 2006 until the date of her death I visited the deceased approximately twice a month."

He confirmed this in his oral evidence. He said that Kevin and/or Shirley were usually at home and often in the room, but sometimes they were in another part of the house when he spoke to Mrs Catling. I am satisfied, that if Kevin and Shirley left Mrs Catling unsupervised with Mr Wallace, it was only because they were satisfied that he could be trusted not to ask her about her real intentions and to ignore anything inconvenient that she might say.

38. Mr Wallace gave evidence that he did not charge for his time before 2nd January 2006 but intends to charge for his time since that date. He said that Mrs Catling paid him about £2,000 by cheque in or about

April 2006. He said that he has not yet produced any invoice for any of his time spent with the family, that he had no complete record of the time spent and had not yet decided what to bill. He told me that he said to Mrs Catling that she should not pay him immediately because she was short of money and that Mrs Catling said: "Kevin will pay me with Kevin's money."

39. Mr Wallace said in evidence that he declared estimated fees on his tax returns, which he agreed to bring these to court. In the event, the only document which he has produced is a tax return for 2012-3 filed online on 3rd February 2014 which refers to "losses" of £3,450 and £2,000 in earlier years and adds:

> "Income tax losses - source of loss for 2013-14 income or certain capital losses Contested probate in the High Court after my client died. The work that I had carried out had not been paid for. Once case heard or settled I may get some money back."

I observe that:

> i) Mr Wallace has not produced tax returns for the relevant period (December 2005 to May 2007) and there is nothing to indicate that HMRC were informed of the position for those years.
>
> ii) The tax return for 2012-3 was filed after the deadline of 31st January and also after the request in court to see tax returns.
>
> iii) The reference to "losses" makes no sense. If Mr Wallace's account were correct this might be a bad debt, but it is not a loss.
>
> iv) The total amount of £5,450 is equivalent to 43.6 hours at his rate of £125 an hour. This is inconsistent with his evidence as to the amount of time he claims to have spent and with his evidence that he had not yet decided how much to charge.

40. Mr Wallace accepted that he was aware of the golden rule for solicitors dealing with aged or seriously ill testators, viz. that it is best practice for the will to be witnessed or approved by a medical practitioner who ought to record his examination. He said that this did not apply to non-solicitors but recognised that it was good practice. However, his evidence was that he regarded it as unnecessary because he was relying on the fact that the doctors knew her mental state.

41. Mr Wallace said in oral evidence that:

> "I regarded my conduct as assisting Kevin and helping myself. Kevin is part of Mrs Joyce Catling. She relied on Kevin and Shirley. I was assisting Kevin assisting Joyce."

The *Larke v. Nugus* statement

42. In *Larke v Nugus* (1979) (reported at [2000] WTLR 1033 at 1044) Brandon LJ said:

> "When there is litigation about a will, every effort should be made by the executors to avoid

> costly litigation if that can be avoided and, when there are circumstances of suspicion attending the execution and making of a will, one of the measure which can be taken is to give full and frank information to those who might have an interest in attacking the will as to how the will came to be made"

This was said in the context of a solicitor who prepared the will and was himself an executor. Although it led to guidance being given by the Law Society to solicitors, it is a general statement of best practice that is not confined to solicitors.

43. On 22nd August 2008 Pictons wrote to Mr Wallace making it clear that the Claimants intended to challenge the 2007 Will. They asked for a copy of his Will file and for a *Larke v. Nugus* statement. They said that they appreciated that he was not a solicitor but would argue that the provisions of that case applied to him as if he were. He responded on 26th August 2008, alleging (wrongly, as a matter of law) that the burden of proof was on the Claimants to show lack of capacity and refusing to provide the requested information. In 2009 he was asked again and said that he would not provide a *Larke v. Nugus* statement since he was not a solicitor. However he did offer to provide a voluntary statement. He then instructed Taylor Walton, who wrote on 26th April 2010 confirming that he was willing to engage in voluntary disclosure. However no *Larke v. Nugus* statement was provided at this stage.

44. I am satisfied that he was sheltering behind the fact that he is not a solicitor in order to avoid having to provide this information. The statement (which he described as a *Larke Negus* statement) was not served until 27th January 2012, after the issue of proceedings. The contents of that statement are entirely uncorroborated by written evidence. I have already referred to some passages and will not go through the whole statement in detail. I am satisfied that it is as much a work of fiction as is his oral evidence.

The 2007 Will

45. In May 2007 Mrs Catling executed a new Will, drawn up by Mr Wallace. Under this Will she appointed Mr Wallace as her sole executor and left her entire residuary estate to Kevin, save for 3 items of sentimental value. The Will is dated 11th May 2007 and bears that date in 4 places, including twice on the page which Mrs Catling and the witnesses signed. However Mr Wallace's evidence is that it was in fact signed on Sunday 13th May 2007.

46. Paragraph 3 of the 2007 Will entitles Mr Wallace as executor to be paid for "all professional or any other charges for any business or acts done by him in connection with this will." In his oral evidence he accepted that as a matter of construction this (i) included preparation of the Will, (ii) obtaining probate, (iii) administration of the estate and (iv) defending the current proceedings. However he asserted that he had no present intention of charging for all these matters and had not discussed it with Kevin.

47. Mr Wallace said at paragraph 8.8 of his *Larke v. Nugus* statement:

> "We made a clear decision that we would not produce the will at this time, i.e. January 2006, as it would only fuel further harassment nuisance and other activities from Maureen et al. Mrs Catling's reasoning for this was that she was not able to stop Maureen et al on this campaign of harassment and nuisance but she would be able to make them pay for it."

48. This is implausible and I have no hesitation in rejecting it:

i) I have already concluded that there is no evidence that Mrs Catling gave such instructions in 2005/6 but that the evidence, such as it is, points the other way.

ii) I do not accept that Maureen or the other Claimants were harassing Mrs Catling (this was never put to Maureen in cross-examination).

iii) Even if they had been harassing her, that was not a good reason for delaying execution of the Will by 16 months, in the case of an elderly testatrix in poor health and suffering from some degree of dementia. There would have been no reason for Mrs Catling to tell Maureen that she had changed her Will, if she chose to say nothing.

iv) Mr Wallace had no explanation for why Mrs Catling changed her mind in May 2007 and decided to execute the Will at that time.

49. Mr Hicks submitted that the more likely explanation is the production of the medical notes in the second half of 2010, which probably led Mr Wallace to concoct a story so that he could seek to rely on the principle in *Parker v. Felgate*. It is telling that this principle is first mentioned in his letter to Pictons dated 12th January 2011. This may well be right, but it is not necessary for me to reach a conclusion on this submission.

50. As regards the actual execution of the Will, I heard evidence from the 2 witnesses, Neil Stevenson and Mark Bulpit, as well as from Mr Wallace. The evidence of the 2 witnesses is that they arrived together and found Mrs Catling, Kevin and Shirley sitting together with Mr Wallace. Mr Wallace then started to read the Will. At that point the 2 witnesses left, feeling that it was none of their business. They returned at the end of the reading. Mrs Catling signed the Will and appeared to be content to do so, but neither of them could say whether the Will had been read to her in full or whether she had understood and assented. I have no reason to doubt Mr Stevenson's evidence. I found Mr Bulpit to be less impressive but his evidence was broadly consistent with Mr Stevenson's.

51. I heard from Mr King of Pictons, who contacted Mr Bulpit in 2008 and Mr Stevenson in 2010. His account of what they had previously told him was in some respects different, but nothing turns on this.

52. In the light of the evidence from the witnesses to the Will I conclude as follows:

i) The Will was executed on Sunday 13th May 2007.

ii) I am not satisfied that was read in full to Mrs Catling. Had it been read out, someone would have noticed that it bore the wrong date.

iii) Mrs Catling signed the document.

iv) The evidence does not establish that she knew or approved the contents of the Will, nor that she had testamentary capacity.

53. I also heard from Mrs Wendy Harvey. She gave evidence that Kevin and Shirley used to take Mrs Catling on outings to the tearoom which she runs. She said that Mrs Catling was often in tears, complaining that her

other children did not visit her, and that she intended to leave all her money to Kevin. I accept that Mrs Harvey is reporting what she heard, but I attach very little weight to it. Firstly, elderly demented patients will often say things that are not true. Secondly, it is conceivable that Mrs Catling was angry with her family for not visiting, and that she did not realise that this was Kevin and Shirley's fault. Thirdly, given her vulnerability, she might simply have said whatever she thought Kevin and Shirley wanted to hear.

54. Mrs Catling died on 19th April 2008 aged 82.

The expert evidence

55. Professor Robin Jacoby was initially instructed by the Claimants alone. His first report was made on 30th December 2010, with the benefit of the medical notes but before the *Larke v. Nugus* statement. I quote extracts from this report:

> "32. In summary, in my opinion, it is beyond reasonable doubt that the testatrix developed dementia in the last years of her life. ... By 2005 cognitive impairment was established, although appeared less on testing than the effect of her ability in activities of daily living. By November 2006 her MMSE score was still in the range consistent with mild dementia but by June/July of the next year (2007) it was well within the severe range.
>
> 35. As I have not seen any documentation about how the disputed Will came to be made, I cannot make any firm comments about the testamentary capacity of the testatrix at the material time. I can assist the Court only as far as follows.
>
> 36. By May 2007 I consider that the testatrix was suffering from dementia of at least moderate degree. If the MMSE score of 4/26 elicited one to two months after she made the Will was a reflection of her cognitive state at the time she made her Will, it is likely that she was severely demented and would, in my opinion, probably not have fulfilled the *Banks-v-Goodfellow* test because she would have been unable to exercise judgment in assessing the completing [*sic*] moral claims of her 8 children for her bounty. It is also probable that she would not have been able to appreciate the extent of her estate. However, it is also possible that delirium contributed to the low MMSE score in June or July 2007 and that her score could have been higher in May.
>
> 37. My summary opinion is that I do not consider it safe to presume that the testatrix did have the capacity to make a Will in May 2007."

56. In their Allocation Questionnaires dated 23rd November 2011, both Defendants requested that Professor Jacoby be appointed as expert. Accordingly on 26th April 2012 Master Bowles ordered that he be appointed as the single expert. No direction was given for cross-examination.

57. On 7th January 2014 he made his second report, with the benefit of the *Larke v. Nugus* statement and the evidence of the lay witnesses. His report includes the following:

> "22. I am less clear when dementia first became apparent. The Claimants aver that cognitive impairment was noticeable in 2004 ... Given that she did clearly develop severe dementia by the end of 2007, I consider that, on the balance of probability, the family did detect changes that were heralds of dementia.

> 24. In my opinion there is very strong evidence that over the year between November 2006 and November 2007, the Testatrix's dementia went from mild to severe.
>
> 25. If the Court accepts the *Larke v. Nugus* statement that instructions for the disputed Will were finalised in January 2006 when, in my opinion the severity of the Testatrix's cognitive impairment was relatively mild, she probably would have understood the nature and consequences of the act of making a Will and the extent of her estate. ...
>
> 26. In May 2007 when the Testatrix executed the disputed Will, I consider, on the balance of probabilities, that her degree of dementia would have been severe. In which case I think that she would not have had the ability to appreciate the moral claims of those who might reasonably have expected to benefit from her bounty. Nor, in response to the so-called *Question in Parker v. Felgate*, do I think that she would probably have been able to recall that she was signing a Will drawn up on her previous instructions."

58. I accept Professor Jacoby's first report as qualified by his second, for the following reasons:

> i) Although his reports are necessarily imperfect, because he never met Mrs Catling, they are the best expert evidence available. The Defendants have only themselves to blame for not having Mrs Catling assessed by a psycho-geriatrician in order to determine her testamentary capacity in May 2007. Mr Wallace accepted in evidence that he was aware at all times that this was the best practice.
>
> ii) Following sight of his first report, the Defendants were content for him to be the joint expert. This was sensible, since he is highly qualified in his field and very experienced as an expert witness.
>
> iii) He based his second report on all the relevant evidence, including the *Larke v. Nugus* statement and the witness statements. On the first day of the trial the Defendants applied to strike out the proceedings for breaches of the Rules. I refused to do so, partly because this was a probate action and the court had to determine which Will should be proved. One of the Defendants' grounds for complaint was the lateness of the instructions to the expert to produce his second report and the fact that he had not been asked to attend for cross-examination. Mr Wallace told me that he wanted to cross-examine him, but was unable to tell me in opening what questions he wished to put. I therefore disallowed the request for cross-examination.

59. In his closing submissions Mr Wallace drew my attention to a report by a social worker dated 20th December 2007 which concluded that the records consistently showed that Mrs Catling preferred the support of Kevin and Shirley to that of her other children and that there was no evidence that she was being materially deprived on a day-to-day basis. He also drew my attention to the medical records in May 2007, at about the time of the Will. I attach very little weight to either of these pieces of evidence. Both were before Professor Jacoby and were taken into account by him in his conclusions. Even though Taylor Walton (then acting Kevin) confirmed on 6th July 2010 that they had received the medical records, the Defendants never requested that Professor Jacoby be cross-examined on these matters.

The law

60. During closing submissions Mr Wallace accepted that the law was as set out below, but disagreed with the conclusions which Mr Hicks sought to draw when applying the law to the facts. There are 3 issues of law.

61. The first is testamentary capacity. It is sufficient to cite from the judgment of Briggs J in *Re Key deceased* [2010] 1 WLR 2010:

> "93. There was no significant dispute between counsel as to the relevant legal principles, which are well settled and continue to derive from *Banks v Goodfellow* (1870) LR 5 QB 549. The testator must be able (1) to understand the nature of his act, i.e., making a will, and its effects (2) to understand the extent of the property of which he is disposing (3) to comprehend and appreciate the claims to which he ought to give effect. He must not be subject to any disorder of mind as shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties.
>
> 97. The burden of proof in relation to testamentary capacity is subject to the following rules. (i) While the burden starts with the propounder of a will to establish capacity, where the will is duly executed and appears rational on its face, then the court will presume capacity. (ii) In such a case the evidential burden then shifts to the objector to raise a real doubt about capacity. (iii) If a real doubt is raised, the evidential burden shifts back to the propounder to establish capacity none the less: see generally *Ledger v Wootton* [2008]WTLR 235, para 5, per Judge Norris QC."

62. The second is the principle in *Parker v. Felgate* (1883) 8 PD 171. This derives from the following extract from Sir James Hannen's direction to the jury:

> "There is also a third state of mind which, in my judgment, would be sufficient. A person might no longer have capacity to go over the whole transaction, and take up the thread of business from the beginning to the end, and think it all over again, but if he is able to say to himself, [3] I have settled that business with my solicitor. I rely upon his having embodied it in proper words, and I accept the paper which is put before me as embodying it; it is not, of course, necessary that he should use those words, but if he is capable of that train of thought in my judgment that is sufficient."

63. The validity of this principle was affirmed by the Court of Appeal in *Perrins v. Holland* [2011] Ch. 270. It is convenient to quote from the judgment of Lewison J at first instance ([2009] EWHC 1945 (Ch) at [43]), whose judgment was upheld on appeal:

> "What is required at the date of execution is that the testator understands that he is executing a will for which he has previously given instructions. It is not necessary that the will is put to him clause by clause; or that its general purport is explained. It is not even necessary that the testator would have understood the will if it had been put to him clause by clause. What is necessary is that the testator knows that he is making a will; and believes that it is the will for which he had previously given instructions. The justification of the principle is the importance that English law has always attached to testamentary freedom."

64. The third is want of knowledge and approval. It is sufficient to cite from the judgment of Norris J in *Wharton v. Bancroft* [2012] WTLR 693 at [28]:

> "(a) The assertion that [the testator] did not "know and approve" of the 2008 Will requires the

> Court, before admitting it to proof, to be satisfied that [he] understood what he was doing and its effect (that is to say that he was making a will containing certain dispositive provisions) so that the document represents his testamentary intentions.
>
> (b) The burden lies on [the propounder] to show that [the testator] knew and approved of the ... Will in that sense.
>
> (c) The Court can infer knowledge and approval from proof of capacity and proof of due execution ....
>
> (d) ... The Court of Appeal observed in *Gill v Woodall* at paragraph [14], that, as a matter of common sense and authority, the fact that a will has been properly executed, after being prepared by a solicitor and read over to the testator, raises a very strong presumption that it represents the testator's intentions at the relevant time.
>
> (e) But proof of the reading over of a will does not *necessarily* establish "knowledge and approval". Whether more is required in a particular case depends upon the circumstances in which the vigilance of the Court is aroused and the terms (including the complexity) of the Will itself.
>
> (f) So the [party challenging the Will] must produce evidence of circumstances which arouse the suspicion of the Court as to whether the usual strong inference arising from the manner of signature may properly be drawn.
>
> (g) It is not for [that party] positively to prove that he had some other specific testamentary intention: but only to lead such evidence as leaves the court not satisfied on the balance of probabilities that the testator understood the nature and effect of and sanctioned the dispositions in the will he actually made. But this evidence itself must usually be of weight, because in general the Court is cautious about accepting a contention that a will executed in the circumstances described is open to challenge.
>
> (h) Attention to the legal and evidential burden can be decisive where the evidence is in short supply. But in other circumstances 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."

Discussion

Testamentary capacity in 2004 and 2005

65. Although it is common ground between the parties that Mrs Catling had testamentary capacity in August 2004 and November 2006, the court cannot admit the 2004 Will and the 2005 Codicil to probate unless the court itself is satisfied that she had capacity. I am satisfied, having regard to the evidence of Professor Jacoby set out above. I also take account of the fact that the 2004 Will and the 2005 Codicil do not represent

a radical departure from her 1999 Will.

Testamentary capacity in 2007

66. I am satisfied in the light of Professor Jacoby's expert evidence, and of the factual evidence on which it is based, that Mrs Catling did not have testamentary capacity in May 2007 and that she certainly did not have the capacity to understand the radical change made by the 2007 Will. This conclusion is reinforced by the Defendants' failure to follow the golden rule.

The *Parker v. Felgate* question

67. The first question is whether Mrs Catling in fact gave instructions in December 2005 or January 2006 for the 2007 Will. I am satisfied that she did not, for the reasons set out above. That is sufficient to dispose of this issue.

68. However if, contrary to my finding of fact, she did give instructions, I am satisfied on the basis of Professor Jacoby's second report that she did not have the limited capacity needed in May 2007, even if she had capacity in December 2005 or January 2006. I am strengthened in this conclusion by the radical departure of the 2007 Will from her earlier Wills.

Want of knowledge and approval

69. The issue of knowledge and approval does not arise, given my conclusion that she did not have testamentary capacity in May 2007. However, I will address it for the sake of completeness. In my judgment the circumstances surrounding the 2007 Will are sufficient to put the onus on the Defendants to show that Mrs Catling knew and approved the 2007 Will.

70. I make the following findings on the basis of the facts as set out above:

i) Mrs Catling was living with Kevin and Shirley and was more or less cut off by them from contact with her other children, even though the others tried to see her.

ii) It was Kevin who first made contact with Mr Wallace and arranged for him to act for Mrs Catling. Mr Wallace regarded himself as acting in Kevin and Shirley's interest (insofar as he was not acting in his own interest), and he looked to them for payment, no doubt out of the estate of Mrs Catling in due course.

iii) Kevin and Shirley conspired with Mr Wallace to unseat Mrs Catling's long-term trusted solicitor, Mr Brown, and replace him with Mr Wallace. She was thus left without a professional adviser.

iv) Even if Mrs Catling had genuinely formed the view that she was dissatisfied with Mr Brown and did not wish to rely on him in the future, that does not explain why she changed the dispositions under her Will, as distinct from merely changing the executor.

v) Mr Wallace was not, and is not, a barrister or solicitor. He was not subject to any professional code of conduct and relied on this fact when it suited him (e.g. in failing to have Mrs Catling assessed by a psycho-geriatrician before she made the 2007 Will and in initially refusing to provide a *Larke v. Nugus* statement). However, he fraudulently represented that he was a barrister or solicitor, or fraudulently allowed such a representation to remain uncorrected.

vi) He claims to have visited Mrs Catling several times a month for about 2 years, which would appear to be wholly unnecessary for a will writer taking instructions for this Will. Kevin and/or Shirley were usually present when he was taking instructions.

vii) I have heard no evidence that would begin to explain why she made the radical change in the contents of her Will. The events of 2001 do provide a satisfactory explanation, firstly because I have rejected the Defendants' version of what happened and secondly because her 2004 Will was made long after those events. Nor does the fact that Kevin and Shirley were caring for her provide a satisfactory explanation, since this was presumably taken into account in the legacy of £5,000 in the 2005 Codicil.

viii) His Will file contains no instructions for the 2007 Will. On the contrary it tends to show that she was content with the gift of residue under the 2004 Will.

ix) In contrast to her earlier Wills, which divided her estate equally among her children, the entire residue under the 2007 Will is given to Kevin, who was responsible for instructing Mr Wallace and who had some undisclosed arrangement for paying Mr Wallace. Further, Mr Wallace himself stood to gain under clause 3 of the 2007 Will.

x) Even if Mrs Catling had testamentary capacity in May 2007, she was elderly, disabled, virtually blind and suffering from some degree of dementia.

xi) The Will was not read out in full.

xii) After Mrs Catling's death, Mr Wallace was evasive and refused to provide a *Larke v. Nugus* statement for some time.

Disposition

71. I therefore pronounce against the Will of 13th (but dated 11th) May 2007 and in favour of the Will dated 23rd August 2004 and the Codicil dated 2nd November 2005.

72. I will hear the parties regarding costs and any consequential matters.

Postscript

73. In view of the evidence I have heard and the conclusions I have reached regarding Mr Wallace, who is a student member of Lincoln's Inn, I propose to send a copy of this judgment to the Under Treasurer of the Inn.