

# 5 Stone Buildings

---

## Testamentary capacity update

Hugh Cumber

[hcumber@5sblaw.com](mailto:hcumber@5sblaw.com)  
[@hbcumber](https://www.instagram.com/hbcumber)

---

3 July 2020

[www.5sblaw.com](http://www.5sblaw.com)

## Testamentary capacity - two recent cases

- *Re Baron Templeman of White Lackington (Deceased)* [2020] EWHC 632 (Ch) - decision of Fancourt J on 19 March 2020
- *Clitheroe v Bond* [2020] EWHC 1185 (Ch) - decision of Deputy Master Linwood on 21 May 2020

## The “insane delusions” limb

*"It is essential [...] that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if his mind had been sound, would not have been made[...]"*

*Here, then, we have the measure of the degree of mental power which should be insisted on. If the human instincts and affections, or the moral sense, become perverted by mental disease; if insane suspicion, or aversion, take the place of natural affection; if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions, and to lead to a testamentary disposition, due only to their baneful influence—in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand."*

*Banks v Goodfellow (1870) LR 5 QB 549*

## Insane delusions

- Not enough to be unfair, capricious, mean, or motivated by bad motives: *Boughton v Knight* (1873) L.R. 3 P. & D. 64
- Not enough to have delusions if they are unrelated to the testamentary dispositions: *Lloyd v Jones* [2016] EWHC 1308 (Ch)
- The delusion must be causative: *Kostic v Chaplin* [2007] EWHC 2298 (Ch)
- Not good enough to say things about your children which are untrue; you also have to believe them: *Re Ritchie* [2009] EWHC 709 (Ch)

## Clitheroe v Bond - the facts

- The testatrix: **Jean**, survived by
  - her son **John** (the Claimant, propounding the last will); and
  - her daughter **Sue** (the Defendant, challenging the last two wills).
- The estate: £350,000
- The disputed wills:
  - two wills in similar terms: John takes residue under both, and Sue is largely excluded.
  - both professionally prepared.
- Jean gave detailed reasons for excluding Sue;
  - Sue was "a shopaholic and would just fritter it away".
  - Sue was a "spendthrift and will just spend her inheritance".
  - lack of contact
  - Issues relating to the estate of a third child, Debs, who had predeceased Jean.

## Clitheroe v Bond - Sue's allegations

- **Fraudulent calumny:** the reasons Jean gave were false or else based on false beliefs induced by John, who knew them to be false or else did not care if they were or not
- **Insane Delusions:** Jean suffered from a complex grief reaction from about the time of her daughter Debs' death and this led to insane delusions regarding Sue
- N.B. grief reactions are an established ground: *Re Key*

*"Unless your minds are satisfied that there is no reasonable connection between the delusion and the bequests in the wills, those who propound the wills have not discharged the burdens cast upon them, and your verdict must be against them."*

*Smee v Smee (1879) 5 PD 84*

## Clitheroe v Bond - the expert evidence

- ‘Hot-tubbing’ of the two experts
- John failed to come up to proof:
  - His expert evidence did not show that Jean did not suffer from delusions



## Clitheroe v Bond - the delusions

- that Sue broken up Jean's marriage and was a homewrecker
- that Sue had stolen her Swarovski crystals, some trolls and various other items
- that Sue was a 'shopaholic' and a 'spendthrift'
- That Sue did not see or care for Jean and prevented Jean from seeing her granddaughter
- That Sue had 'ransacked' Debs' bungalow after her death.
- Jean could not accept that Debs was going to die and projected her guilt onto Sue

## Re Templeman - the facts

- Lord Templeman retired as a member of the Judicial Committee of the House of Lords in 1994.
  - Two sons from his first marriage, Michael and Peter
  - Predeceased by his second wife, Sheila, who had two step-daughters from her second marriage, who were the Claimants.
- Sheila owned a property called ‘Mellowstone’ built after her first marriage.
- Following his marriage to Sheila, Lord Templeman moved to live at Mellowstone with Sheila, where the couple lived until Sheila’s death in 2008.
- On Sheila’s death, Lord Templeman inherited Mellowstone
- This led to a decision to change his will, so as to pass Mellowstone to the Claimants.

## Re Templeman - testamentary arrangements

- 2004 codicil to his 2001 will: if Sheila predeceased him and left Mellowstone to him under her will,
  - £20,000 free of tax to each of his six grandchildren
  - £120,000 free of tax to Sheila's residuary beneficiaries
  - residue equally between his two sons.
- 2008 will:
  - Mellowstone to Sheila's step-daughters
  - no legacies to his grandchildren or to Sheila's residuary beneficiaries
  - residue of his estate was left to his sons in equal shares.
- Lord Templeman's son Michael and his wife challenged the validity of the 2008 will alleging:
  - Lord Templeman had been acting under the illusory belief that he had not provided for the eventuality that he inherited Mellowstone from Sheila (when in fact he had)
  - this illusory belief provided a false premise for the 2008 will.

## Re Templeman - the expert evidence

- no expert evidence of lack of capacity: the Defendants did not even adduce an expert report.
- Claimants called Professor Howard, who testified that, in 2008:
  - Lord Templeman suffered a mild degree of dementia caused by Alzheimer's disease, which caused him to have predominant difficulties with recent episodic memory, but with other cognitive functions and ability to manage day-to-day functioning largely unaffected at that stage.
  - there was a relatively high degree of probability that Lord Templeman had testamentary capacity.

## Re Templeman - illusory beliefs

- Focus of the Defendant's case, relying on *Re Belliss*:
  - Mrs Belliss wished to put provision for her two daughters on an equal footing.
  - Mistaken in her belief as to what she had done in the past
  - what she did in her will in fact failed to put the daughters on an even footing.
- The court concluded that she lacked testamentary capacity.

*"[Mrs Belliss] did not have the mental powers to enable her to recall and understand the true dealings between her and her daughters. This was not a case a mistaken belief that was capable of being corrected. It was a case of an illusory belief from which Mrs Belliss could not be shaken and which deprived her of reason. I therefore reject the suggestion that *Re Belliss* stands as authority for the proposition that a mere mistaken belief, which is the product of forgetfulness, is inimical to testamentary capacity.*

*In my judgment, the President was not using the phrase 'illusory belief' as meaning 'mistaken belief', but as denoting a kind of fixed belief, similar in character as an insane delusion, which the testator does not have the mental powers to overcome..*

*In re Templeman deceased [2020] EWHC 632 (Ch) at [142]*

## Practical points

- Now clear that a mere mistake is not enough
- Establishing insane delusions or illusory beliefs is a high bar
- If testamentary capacity is in issue, expert evidence is virtually essential.
- However, intensely fact-sensitive and lay-evidence is extremely important: in *Clitheroe*, John's evidence was comprehensively disbelieved

# 5 Stone Buildings

---

Thank you,  
any questions?

hcumber@5sblaw.com  
@hbcumber

---

t 020 7242 6201

w [www.5sblaw.com](http://www.5sblaw.com)

 [@5sblaw](https://twitter.com/5sblaw)