Neutral Citation Number: [2022] EWCA Civ 386

Case No: CA-2021-000681
(Formerly A3/2021/1225

ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
PROPERTY TRUSTS AND PROBATE LIST (ChD)
His Honour Judge Jarman QC
[2021] EWHC 1580 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/03/2022

Before :

LORD JUSTICE MOYLAN
LADY JUSTICE ASPLIN
and
LADY JUSTICE ELISABETH LAING

- -

Between:

GARETH HUGHES	**Appellant/ Claimant**
- and –	
1) CARYS PRITCHARD **2) GWEN HUGHES** **3) STEPHEN HUGHES**	**Respondents/ Defendants**

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- -

Penelope Reed QC and **Elis Gomer** (instructed by **Allington Hughes Law**) for the **Appellant**
The 1st Respondent did not attend and was not represented
Alex Troup (instructed by **Hugh James Solicitors**) for the **2nd and 3rd Respondents**

Hearing date: 1 March 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email, and release to BAILII. The date and time for hand down is deemed to be 10.30 a.m. on Thursday 24 March 2022.

Lady Justice Asplin:

1. This appeal raises some important issues about the proper weight to be given to the drafting solicitor's evidence and a medical practitioner's assessment of a testator's testamentary capacity and the tasks which they need to undertake.

2. The issues arise as a result of an order dated 11 June 2021, made by His Honour Judge Jarman QC, sitting as a judge in the Chancery Division ('the judge') by which he: dismissed the claim of the Appellant, Gareth Hughes, for a grant of probate in solemn form in relation to the last will of Evan Richard Hughes (the "Deceased") dated 7 July 2016 (the "2016 Will") on the ground that it was invalid due to the Deceased's lack of testamentary capacity; admitted the Deceased's previous will dated 7 August 2005 (the "2005 Will") to probate; and ordered Gareth Hughes to pay the Respondents' costs (the "Order").

3. In addition to determining the question of testamentary capacity, the judge addressed the other heads of the second and third Respondents' counterclaim. The judge dismissed the Respondents' alternative case that the 2016 Will was invalid for want of knowledge and approval or undue influence. He also held that in the event that he was wrong about the invalidity of the 2016 Will, a proprietary estoppel arose in favour of the estate of Elfed Hughes (represented by the Second and Third Respondents) in respect of the Deceased's agricultural land including "Yr Efail", an agricultural holding of 58 acres which was left to Gareth Hughes under the 2016 Will and that it should be transferred to Elfed's executrix. The Order contained a recital to this effect.

4. The citation for the judgment is [2021] EWHC 1580 (Ch).

5. The Deceased died on 7 March 2017 aged 84. Gareth Hughes, the First Respondent, Carys Pritchard and Elfed Hughes were his children from his first marriage. His son Elfed predeceased him. He committed suicide on 18 September 2015. Elfed's widow, Gwen Hughes, the Second Respondent, is the executrix of his estate. Elfed and Gwen had three children, Stephen Hughes, the Third Respondent, Geraint and Sion. They are all adults but are represented in these proceedings by Stephen. I should also mention that Gareth and Carys are respectively the Deceased's executor and executrix and that they are both beneficiaries of his estate. Although Carys gave evidence before the judge, she was not represented and took no part in those proceedings or in the appeal before us. For ease of narrative, I shall refer to the members of the Deceased's family by their first names. I mean no disrespect in doing so.

6. As some of the grounds of appeal and the question of testamentary capacity itself turn upon the facts, it is important to have a detailed grasp of the background to this matter. It is important, in particular, to have an understanding of the medical evidence before the judge and the evidence of the drafting solicitor, Ms Manon Roberts. I shall set out the essential elements. They are taken from the judgment and the documentation which was before the judge and to which we were referred.

7. Before turning to the facts, I should add that the judge heard over twenty witnesses over the course of a four-day trial, some in person and some by video link, some of whom gave their evidence in Welsh, the judge also being a Welsh speaker. He also read two statements admitted under the Civil Evidence Act 1995.

Relevant background

8. The Deceased was a director and shareholder in J. Parry & Hughes Ltd, a family building company which had been established by his grandfather (the "Company"). Gareth, Elfed and Carys became directors and shareholders in the Company in around 1985 when the Deceased's cousin, Ian Hughes, decided to leave the business. Gareth took over the supervision of the building work carried out by the Company, after the Deceased retired in 2003. Both he and Elfed worked on the construction side whilst Carys and her husband were responsible for administration.

9. By 2014, business was beginning to decrease and the Company sold property to pay off debts. Each of Gareth, Carys and Elfed put capital into the Company and in 2016, the Deceased made a director's loan of just under £108,000. By then the Company was making a significant loss and work had dried up. The Company ceased trading in 2016 and it is recorded that it was in the process of being dissolved in or around March 2016.

10. The Deceased was also farmer on Anglesey. He owned and rented various plots of land and owned both sheep and cattle. He had inherited farmland from his family.

11. At the time of his death he owned substantial assets including: the bungalow where he lived, known as "Arfryn"; 79 acres of farmland known as "Bwchanan"; another 58 acres of farmland about 3 miles from Bwchanan known as "Yr Efall" or "Yr Efail"; a cottage known as "Derwyddfa"; and livestock. He also had a bank balance of around £290,000. The land at Yr Efail is at the centre of these proceedings. It is variously named as Yr Efall, Yr Efail and Yr Refail. I will refer to it as Yr Efail.

12. Elfed began working on his father's farm shortly after leaving agricultural college and built up a substantial herd of cattle and flock of sheep of his own. He also looked after his father's stock and land for some thirty-eight years. He was permitted to keep his animals on his father's land rent-free and the arrangement was reciprocal. In 1999, Elfed bought farmland next to that of his father and farmed both as a single unit, although the accounts were kept separately. He built a bridge to link the two and a large cattle shed to house his own and his father's cattle. He and the Deceased also agreed to rent various agricultural holdings jointly.

13. It is common ground that Elfed worked very long hours. He was allowed to reduce his hours with the Company around lambing and silage-making time in order to concentrate on farming. Otherwise, he undertook farming tasks before and after work and at the weekend. Elfed hired staff to work on the farm both for himself and his father and paid expenses on behalf of them both. In due course, his sons, Stephen, Geraint and Sion also helped.

14. Elfed was keen that his son, Geraint, should come to work with him on the farm. In 2012, Geraint gave up his job and went to work with his father on the farm for less than half of the wage that he had been receiving. The judge records that Geraint continually asked his father for a wage rise but his father became annoyed and told him not to ask because everything would be his one day ([11]).

15. Each of the Deceased's children received substantial lifetime gifts from him. Elfed received the farmhouse and 17 acres of land at Bwchanan where he lived with his family throughout the relevant period. The Deceased also gave plots of land to Gareth

and Carys on which they built their homes. In 2008, the house which Gareth built was transferred to his ex-wife and shortly afterwards, the Deceased gave him another house which was rented out at the date of the trial.

16. The judge noted at [8] of his judgment that for many years, the Deceased had made his testamentary intentions clear. He intended to leave his shares in the Company to Gareth and Carys equally and the farmland to Elfed. The judge also found that there was an understanding between the Deceased and Elfed over many years that the farmland would be Elfed's on the Deceased's death and that he would inherit the land ([113]).

17. The Deceased executed his first will on 18 December 1990 which put those intentions into effect (the "1990 Will"). In outline, he left his shares in the Company to Gareth and Carys equally and his farmland to Elfed. His second wife was given the right to reside for life in his bungalow with remainder to his three children, who also shared the residuary estate equally. After his divorce from his second wife, the Deceased executed the 2005 Will. The provisions in the 1990 Will in relation to the shares in the Company, the farmland and the residuary estate were repeated. The Deceased's bungalow and garden and his personal effects were left to Carys. All other freehold and leasehold land was bequeathed to Elfed and a pecuniary legacy of £2,000 was given to each of his grandchildren.

18. It is common ground that from 2014, the Deceased experienced problems with his memory and that those problems fluctuated, and were to an extent affected by his physical condition from time to time. These included losing keys, forgetting to shut farm gates, being confused about the time of day and erratic driving ([12]). The judge also notes that: in 2014, the Deceased did not recognise his cousin, Ian, when out shopping ([13]); in May 2015, the Deceased shouted at his grandson, Geraint, for keeping sheep and cattle in the same field, which had been the practice for many years ([14]); and during the end of lambing in March 2016, the Deceased referred to lambs as heifers and to a field at Bwchanan as part of Yr Efail ([15]).

19. As a result, the Deceased's family considered that it would be sensible for him to execute a lasting power of attorney. He did so on 4 March 2015 granting powers to Carys. Elfed committed suicide in September 2015. This had a devastating effect on his family, including the Deceased. He was hospitalised for two days in December 2015 as a result of gastrointestinal bleeding. He became confused and his doctor, Dr Harri Pritchard, referred him to a psychiatrist. Later that month, the Deceased was assessed by a consultant psychiatrist. He scored 47/100 on an Addenbrooke's test which indicates a moderately severe degree of mental impairment. A CT scan was carried out in April 2016 which revealed evidence of an old stroke and damage to the small sized blood vessels in the brain.

Making the 2016 Will

20. Nevertheless, as the judge put it, the Deceased was "astute enough to realise that it might be prudent to change his will following his son's death" ([19]). On 11 March 2016, the Deceased attended an appointment with Ms Manon Roberts, a solicitor at the firm of T. R. Evans Hughes & Co. Gareth took him to the meeting and also attended it, as did the Deceased's close companion, Ms Florence Jones. Ms Roberts had not met the Deceased before and did not have a copy of the 2005 Will. She described him as "distant" during the meeting.

21. Instructions were given for the 2016 Will. The main difference from the provisions of the 2005 Will were that Yr Efail was to be left to Gareth; the remainder of the farmland was to be held in trust for Gwen (Elfed's widow) for life and then to her three sons equally; the property known as Derwyddfa was left to Carys; and instead of a legacy of £2,000, the Deceased's grandchildren were to inherit his residuary estate in equal shares. Both the shares in the Company and the Deceased's cash, amongst other things, fell into residue.

22. The judge records at [22] that: "[T]here were further meetings between Evan and Gareth Hughes and Manon Roberts concerning the proposed new will on 30 March and on later dates. In respect of each a detailed attendance note was taken. . . " He does not make express reference to the content of those attendance notes, however.

23. Ms Roberts' attendance note of the 11 March 2016 meeting is very detailed. It records, amongst other things, that: the Deceased confirmed that he had a previous will (the 2005 Will) which he believed was held by solicitors in Chester; that he wished to amend his will as a result of recent circumstances and made reference to the death of his son, Elfed, who had committed suicide; that he now had two children and that he wished Gareth and Carys to be his executors; that his property known as Derwyddfa and his property known as Arfryn and its contents should be left to Carys; the land at "Yr Refall" (Yr Efail) of approximately 58 acres should be bequeathed to Gareth; he would like to provide a life interest in his daughter-in-law, Gwen, in the land at Bwchanan, Y Felin, Ty Mawr and Arfryn which she was already farming and that on her death it should pass to her three sons equally; and that the residue should be divided between his eight grandchildren, with the proviso that should any grandchild predecease their grandfather, their share would pass to any children they might have. The judge recorded at [20] that Ms Roberts could not recall who had voiced the instructions.

24. Ms Roberts produced an initial draft will on 22 March 2016. She then had a further meeting with the Deceased, Gareth, and Ms Jones on 30 March 2016. Ms Roberts' attendance note of that meeting records, amongst other things, that the Deceased explained that he had just made enquiries about the whereabouts of the title deeds of Derwyddfa at another solicitor's offices because he believed that they had dealt with it and that the title might well be registered; that he realised the importance of obtaining title deeds to ensure that the properties were correctly described in the will because he had sold a farm named Arfryn, retained outbuildings and subsequently built a house, also called Arfryn; that Ms Roberts asked for confirmation as to whether to retain a clause providing that Carys' children should be substituted for their mother in relation to the bequest of Arfryn and Derwyddfa, if Carys predeceased the Deceased and whether the Deceased wanted a similar substitution clause to be retained in relation to the bequest of "Y Refail" (Yr Efail) to Gareth. Ms Roberts recorded that "[C]lient confirmed that he wishes the issue clause to remain in respect of the three gifts".

25. The attendance note then records that Gareth raised the issue of the Deceased's shareholding in the Company which had not been mentioned before. Ms Roberts stated that on the basis of the present draft, the shareholding would pass to the grandchildren and questioned the Deceased as to whether he wanted that to remain the case. The note records: "Client confirmed that he was happy for his shareholding in the Company should the same be in existence, to pass to his grandchildren". The reference to the Company being in existence was made because it was also recorded the Company was in the process of being dissolved.

26. The attendance note also records a discussion about Inheritance Tax and agricultural property relief. Ms Roberts recorded that the Deceased stated that they had attended upon their accountant who had confirmed that all his property, save for Derwyddfa, would qualify for full agricultural property relief. It also records that the Deceased stated that the top value for Derwyddfa would be £100,000. When asked about his cash balance at the bank, he stated that it would not be a "colossal amount" but confirmed that it would be more than £225,000.

27. It was also stated that Ms Roberts suggested that it would be prudent to obtain a medical certificate for the Deceased to avoid issues in respect of contesting the will and that Gareth stated that he would like to avoid that if possible.

28. At around this time, the Deceased informed his cousin, Ian, that he was not sure of the full extent of the land he owned and asked if he (Ian) would provide a plan. A plan was produced in around April 2016 ([23]).

29. Ms Roberts discussed "her concerns" about the Deceased's will file with her senior colleagues. Her note is dated 13 April 2016. She records, amongst other things, that she was "concerned in respect of Mr Hughes' [the Deceased's] capacity". She was advised, amongst other things, that it was essential to obtain a capacity assessment before a new will was executed. Accordingly, Ms Roberts wrote to Dr Pritchard, the Deceased's GP, on 25 May 2016 asking him to carry out an assessment. She enclosed a copy of the 2005 Will and the draft of the 2016 Will; extracts from the Code of Practice to the Mental Capacity Act 2005; the Court of Protection form numbered COP3 which is concerned with lack of capacity to conduct one's affairs; and the guidance which accompanies COP3.

30. Dr Pritchard duly visited the Deceased on 14 June 2016, taking the draft will with him. In his letter to Ms Roberts of the same date, Dr Pritchard stated that when asked whether the Deceased was aware of the purpose of the doctor's visit he had "immediately informed me that it was following a consultation that we had about 3 weeks previously regarding changes in his Will". The doctor went on: "[He] was also aware that I was assessing his capacity to understand and retain information regarding the changes he wishes to be made" and that he was aware that "the changes in the Will had to be made after the sudden death of his son Elfed and as a result he wishes to amend some details within it". He noted that the Deceased was fully orientated in time and person and did not appear to be confused or distressed. The doctor then states that he asked the Deceased to go through his will "bit by bit" which he did "with very little prompting" (See also [24]).

31. Dr Pritchard went on, where relevant, as follows:

> "He made it clear where he wished his different property to be left following his death and also regarding the future of Bwchanan. He informed me that he wished Gwen, Elfed's widow, to remain in the house and then to be passed to her three sons whom he clearly named."
>
> He then named all eight grandchildren and made it clear that the remainder of his Will would be left between them.

> He had clear understanding of the nature of the Will and was clearly understanding of the process. He had a full understanding of the extent of his property and his judgments regarding the changes to the Will were due to circumstances within the family.
>
> I have therefore no issues regarding his capacity to change the will and would be happy to act as a witness with yourself at a time convenient to you."

32. On 8 June 2016, an inquest had been held into the death of Elfed. Carys went the next day to tell her father what had happened. Carys' evidence was that on that occasion, the Deceased did not seem to know what was going on and was agitated and told Carys that he had seen Elfed at the window ([25]).

33. On 7 July 2016, Gareth drove his father to the solicitors' offices in order to execute the 2016 Will. He remained outside Ms Roberts' office, however, when the draft was read over to the Deceased and the will was signed and witnessed. Dr Pritchard was present. After each clause was read, the Deceased confirmed that he agreed. The plan of the land which had been provided by Ian was attached to the draft. The 2016 Will was then signed by the Deceased and his signature was witnessed by Ms Roberts and Dr Pritchard. After Dr Pritchard had left, Gareth came into the office and the Deceased signed forms giving Gareth lasting power of attorney and revoking the previous grant to Carys ([27]).

34. Ms Roberts' attendance note of the meeting is detailed and lengthy. It states that the meeting took 55 minutes. Amongst other things, it includes a record of the Deceased's doubt about whether Carys should be an executrix which followed Ms Roberts' reference to clause 2 of the draft will in which the executors were appointed. The note records that the Deceased stated that Carys was "currently being awkward" and that he knew that "Gareth would not want Carys to act as well". In the end, the Deceased decided to appoint both Gareth and Carys. In relation to "Yr Refall" (Yr Efail), the note records that Ms Roberts explained that it was shown coloured orange on Plan B and that it was to be given to Gareth and that if he predeceased the Deceased, to his children equally. It goes on: "Client confirmed this was his wish and approved Plan B".

35. The note also records a comment made by the Deceased in the context of the life interest in land granted to Gwen and interest in remainder to her sons in equal shares. The Deceased is recorded as stating that Stephen is quite academic and not farming at present, that he and his mother are very close and that he also spoke highly of Sion.

36. At the end of the attendance note under "NB" Ms Roberts noted as follows: "MER [Ms Roberts] had attended upon Mr. Hughes for approximately 50 minutes minus the period of some 5 minutes when she attended to amend the Lasting Power of Attorney. MER had no issues whatsoever in respect of Mr Hughes' capacity. He was able to answer open questions without any issue as well as volunteering information and having a general conversation. He appeared alert and lucid throughout."

After the 2016 Will was executed

37. On 19 July 2016, Dr Pritchard referred the Deceased to a community psychiatric nurse stating that he "has mixed type dementia which is deteriorating quite rapidly". The

nurse repeated the Addenbrooke's test on 10 November 2016, in Welsh. The Deceased scored 41/100 ([28]).

38. Between August and October 2016, the Deceased, Gareth, and Gareth's wife had meetings with another solicitor in a firm which had merged with Ms Roberts' firm, Rhys Hughes. His evidence was that the Deceased gave instructions to transfer shares in the Company to Gareth and described him as a forceful personality, whose instructions were clear and who took an active part in the discussion ([29]).

39. At a meeting in September, instructions were given for a letter to be sent to Carys stating that she should no longer visit the Deceased. However, at a Company meeting in October 2016, attended by the Deceased, Gareth, Stephen and Carys, the Deceased asked her why she had not visited him. He said that he knew nothing about the letter, even though it had been copied to him. Carys stated in cross examination that the Deceased seemed bewildered and Stephen stated that his grandfather seemed to have forgotten about it ([30]).

40. Further, in January 2017, the Deceased signed the stock transfer form in respect of the shares in the Company to be transferred to Gareth without the safeguards suggested by the solicitor, Rhys Hughes, having been carried out. The stock transfer form was not signed in the presence of two partners in the firm nor was Dr Pritchard asked to carry out a further capacity assessment, nor did he do so. Subsequently, Dr Pritchard told Gareth that he doubted his father's capacity to understand the details. Carys wrote to the Office of the Public Guardian expressing concerns and her solicitors wrote to Gareth's solicitors objecting to the transfer on the basis of lack of capacity. On 28 February 2017, a protection of vulnerable adults referral was made to social services. All of this was overtaken by the Deceased's death on 7 May 2017 as a result of dementia-related complications ([32] –[34]).

Expert medical evidence – Dr Series

41. At trial, in addition to Dr Pritchard's capacity assessment and oral evidence, the judge also had the benefit of a report from Dr Hugh Series, a consultant old-age psychiatrist, who was appointed as a joint single expert. Dr Series' report is dated 6 March 2021. He had access to the pleadings and various orders in the proceedings, the Deceased's medical records, copies of his three wills, interim estate accounts and the witness statements of Dr Pritchard and Ms Roberts.

42. Dr Series stated that the Deceased's score in the Addenbrooke's test indicated a moderately severe degree of cognitive impairment and that he had particular cognitive deficits in the areas of attention, memory and fluency, that the CT scan showed evidence of an old stroke, together with widespread damage to the small sized blood vessels to the brain and that this pointed to vascular dementia ([49]).

43. Dr Series also noted that there was a relatively poor correlation between cognitive impairment and testamentary capacity and that where the impairment was moderate as in this case, "testamentary capacity may or may not be retained, and it is necessary to examine the evidence in such cases particularly carefully" ([50]).

44. He concluded, amongst other things, that: (i) it was more likely than not that the Deceased would have been able to recall and appreciate that Elfed had farmed the land

at Yr Efail although he was doubtful about whether he would have had a clear recollection of what he might or might not have promised Elfed about it in the past ([51]); and (ii) on the basis of Ms Roberts' attendance notes and Dr Pritchard's records and letter, it was more likely than not that the Deceased had testamentary capacity when he gave instructions for and then executed the 2016 Will ([52]).

Dr Pritchard's evidence

45. The judge also explained Dr Pritchard's evidence at trial at [53] – [59]. The judge noted that Dr Pritchard "himself cast some doubt" on the assessment of the Deceased which he had carried out at the request of Ms Roberts. The basis for the doubt was that he been under the apprehension that the 2016 Will made only minor changes to the 2005 Will so as to substitute the sons of Elfed as the beneficiaries of the gift of land previously given to their father.

46. Further, as the judge records at [54], Dr Pritchard had made a note in the Deceased's medical records when he attended the surgery with a chest infection on 19 May 2016. It stated: "Senile dementia (First). Appears better. Very logical. Needs to change will after Elfed's death – wants to give share to Gwen and the boys – nothing complex. Has full capacity and understands what he needs to do."

47. The judge preferred the evidence of Dr Pritchard over that of Gareth in relation to a conversation which they had at the surgery on 25 May 2016. The doctor's evidence was that Gareth had told him that a solicitor would be writing to him to ask him to assess the Deceased's capacity to change his will and told him that the purpose of the change was to leave the land in question to Elfed's sons instead of their father and that the proposed changes were "small" ([55]).

48. The judge set out paragraph 12 of the doctor's witness statement at [58] as follows:

> "As far as I recall, when I checked the Wills provided by Mr Hughes' solicitor in May 2016, there was no major change except the substitution of Mr Elfed Hughes with Mrs Gwen Hughes and Sons, and it was a surprise to me when I later found out, in or around June 2017, that other changes had been made."

49. The judge explained Dr Pritchard's oral evidence in this regard at [59] as follows:

> "He expanded upon this in his oral evidence by saying that he was worried that the changes were far more complex than he first thought. As a result he did not question Evan Hughes as to the reason why he was proposing to leave 58 acres to his son Gareth rather than to his daughter in law Gwen Hughes and/or her sons. Had he known of this proposal he would have asked this question. However, as he was the GP to several members of the family, had he known of this change it is more likely that he would not have carried out the assessment at all but passed it out to an independent medical expert. It was a matter of speculation whether or not the outcome of a full assessment would have made any difference."

50. The judge concluded that Dr Pritchard's evidence:

> ". . . impact[ed] significantly upon the weight to be attached to . . [his] assessment and in turn upon Dr Series' conclusion, which is based in part upon that assessment. On the facts of this case, it does not mean that no weight should be attached to Dr Pritchard's evidence. His recording of the assessment itself in my judgment is an indication that Evan Hughes did have testamentary capacity at that time. Moreover, Dr Pritchard in his oral evidence said that on the day of the execution of the 2016 will when Evan Hughes was shown the map attached to the draft will, he said without prompting that Yr Efail was to go to his son Gareth, but he did not say that this was a change." ([60]).

The judge also considered that this evidence impacted on Ms Roberts' evidence because as she accepted, she had placed reliance upon the doctor's assessment ([61]). The judge went on at [61] to record, nevertheless, that Ms Roberts "maintained in cross-examination that during her attendances upon Evan Hughes [the Deceased] she had well in mind the *Banks v Goodfellow* test, whilst also accepting that she has no medical qualifications."

The Solicitor's evidence in more detail

51. The judge went on to deal with Ms Roberts' evidence in the following way. At [62] - [64] he stated as follows:

> "62. In cross examination she explained her use of the word "distant" in her attendance note of her first meeting with Evans Hughes on 11 March 2021 as being "as if he had a bit of a cloud over him." She accepted that at this meeting she was not told about his medical background. In the meeting on 30 March 2016 she described him as having "a bright twinkle in his eyes." It is common ground that at this stage Evan Hughes was in denial of his condition which is not an uncommon feature of it, and this observation in my judgment gives little insight into his testamentary capacity.
>
> 63. She did not see the 2005 will until 13 April 2016 when she received a copy from other solicitors. She forwarded a copy to Gareth Hughes' home address. She confirms in her witness statement that she did not at any stage discuss the 2005 will with Evan Hughes or ask him as to why he wanted to change the provision of his land to his son Elfed so that 58 acres were to go instead to his son Gareth. This was also the position of the day of the execution. She read out the draft will and explained the land by reference to maps. Evan Hughes nodded and agreed. Dr Series, in answering questions on his report, says that it is possible that his measured impairment, which was partial, in visuospatial function could have caused him some difficulty in interpreting maps, but thinks it is likely that he would have relied

> more on his memory and knowledge of the land which he had been familiar with for many years rather than on looking at maps.
>
> 64. At the end of Manon Roberts' attendance note of that day she states that she had "no issues whatsoever" with capacity, based upon his being "able to answer open questions without any issue as well as volunteering information and having a general conversation." Accordingly in my judgment, her evidence is an indication of capacity but it has its limitations for the reasons set out above."

Further evidence

52. The judge summarised the remainder of the evidence at [65] – [78] as follows:

i) Gareth relied upon his own evidence, that of Rhys Hughes, the solicitor who dealt with the share transfer, Twm Jones, the psychiatric nurse, and Ken Williams, a neighbour. He also relied on the statements of his aunt, Nancy Thomas and the Deceased's close companion, Ms Florence Jones, which were admitted under the Civil Evidence Act 1995. They both stated that after the death of Elfed, the Deceased wanted to give something more than his shares to Gareth because of the downturn in the Company's fortunes made them less valuable and he wanted to be fair between his two surviving children as well as Gwen and her sons. The judge went on: "This is a further indication of testamentary capacity, but as this evidence was not tested in cross-examination only limited weight can be attached to it." ([66]) This appears to be a reference to the statements admitted under the Civil Evidence Act 1995;

ii) Gareth had accepted that the Deceased was not the man he was after the death of Elfed and had become frail, but maintained that he knew his own mind and was the boss until the last couple of months of his life; and his confusion was caused by urinary tract infections ([67]). He also accepted that on 3 May 2016 he had said to Ms Roberts that his father was deteriorating from week to week but that he was exaggerating because the Deceased was pressing him and he wanted Ms Roberts to speed up the process of executing the 2016 Will ([68]);

iii) There was evidence of episodes of good memory during this period, but that "the overall picture, consistent with the medical evidence is deterioration from 2014, to his not being the same man after the death of his son in 2015, to moderately severe impairment due to vascular dementia by March 2016, followed by relatively rapid deterioration. On the information before Dr Series, he states that that occurred in the year following execution of the 2016 [W]ill in July of that year. In my judgment, it is more likely that Gareth Hughes said what he did to Manon Hughes (sic) [Ms Roberts] about his father's deterioration in May 2016 as that is what he perceived at the time, and that is what was happening." ([69]);

iv) Soon after Elfed died, the Deceased had dinner with Gwen and Stephen. He was worried about his cattle over the winter and Gwen reassured him that they would continue to look after them as Elfed had done. He was relieved and said that he

wanted Geraint to carry on what his father had done. He further sand that "nothing would be changing in regard to the land." ([70]);

v) Towards the end of 2015, Geraint attended a meeting with the Deceased and their accountant Richard Williams and Carys at which the Deceased stated that he wanted Geraint to carry on his father's work and when asked about payment stated that he (the Deceased) would look after him (Geraint) and that he should not look for payment because they "would own everything one day." The evidence was not seriously challenged and was accepted by the judge ([71] and [72]);

vi) In his written evidence, Richard Williams stated that: at a meeting on 3 March 2016 in relation to the Company shares, the Deceased had stated that Elfed and now his family were deserving of his land and stock due to his son's dedication to the farming business; it had always been his understanding that the Deceased intended to leave the farmland to Elfed and the shares in the Company to Gareth and Carys equally; and that he had the feeling that the Deceased was reluctant to change the understanding that his son and family were to inherit the land; the issue of the loss of value of the shares and uncertain income from the Company was mentioned by Gareth but that the Deceased responded that he had put enough money into the Company to make it a success ([73]);

vii) Nevertheless, on 11 March 2016, instructions were given for the 2016 Will, including the bequest of Yr Efail to Gareth. Later in March, Mr Williams stated that the Deceased asked him about the implications of selling Yr Efail and was informed that a large amount of CGT would be payable. He then decided against it and said "that any sale of farmland would be disrespectful to his son Elfed and his family. ([74])";

viii) There was evidence in a similar vein from the Deceased's financial adviser, David Morgan, his cousin, Ian, and neighbouring farmers John Owen and Robert Tudor who told of specific conversations about the Deceased's testamentary intentions ([75]); and

ix) In his written evidence, Ian stated that after Elfed's death, he and his wife had visited the Deceased every third Sunday. He took a couple of minutes to recognise them and on one occasion could not recall having worked with Ian despite having jointly owned the Company with him. During these visits the Deceased made clear that he wanted to ensure that the farm and the land was kept for his grandsons and whilst protecting their mother did not want the land to pass out of the family in the event she remarried. He discussed changing his will in a way which suggested "neatening up" ([76]).

53. At [77] the judge stated as follows:

> "In my judgment there is an impressive body of evidence that there was such an understanding over many years prior to the death of Elfed Hughes which his father shared within the family and to others. Nevertheless Gareth Hughes maintained that his father changed his mind after his son's death and wanted to leave Yr Efail to him. That was something which their father was

> entitled to do, especially given the downturn in the financial position of the company."

54. Lastly, the judge recorded at [78] that despite the value of the shares having been recorded as nil in the IHT form completed on behalf of the Deceased's estate, the Company retains land with development value for dwellings. It is recorded in the Company minutes that four or five dwellings might be built, whereas Carys thought that there was room for up to twenty. There was no valuation, but the judge concluded that it was likely that there is substantial value in the land. Further, the single joint expert appointed by the parties valued Yr Efail at £490,000 at the date of the Deceased's death and Bwchanan at £500,000 with modest increases since ([79]).

The judge's conclusions in relation to testamentary capacity

55. The judge's conclusions in relation to testamentary capacity are at [79] – [89]. At [79] he noted that the "focus of the doubt about the testamentary capacity of Evan Hughes, [the Deceased] as at 7 July 2016 was whether he had sufficient capacity to understand the change he was making from his previous wills which implemented this understanding and the 2016 will which departed from it in respect of 58 acres of land".

56. At [80] the judge accepted that the question was whether the Deceased had the ability to understand the claims not only of beneficiaries included in the will but those who are excluded and he noted that that would include Carys and Gareth in circumstances where the financial position of the Company had deteriorated significantly since the 2005 Will in the light of the family understanding that they would inherit the shares.

57. At [81] he found that: ". . . it is clear on the evidence which I have accepted, that Evan Hughes [the Deceased] had the capacity to appreciate, and did appreciate, the claims of persons who had a claim and to judge fairly between competing beneficiaries, at least until 3 March 2016 and the meeting with Richard Williams. These included those of his son Elfed and his family, but also those of his son Gareth by referring to the money which he had put into the company."

58. He went on at [82] – [84] as follows:

> "82. It is possible that he changed his mind in the days following before his first meeting with Manon Roberts, but matters do not end there. A couple of weeks later he told Richard Williams that to sell Yr Efail would be disrespectful to his son Elfed and his family. By this stage he was suffering from moderately severe impairment. By the beginning of May he was deteriorating from week to week. On the 19 May, whilst appearing to Dr Pritchard to have capacity he also said that he was changing his will so that his grandsons would inherit the share of their father but there was "nothing complex."
>
> 83. Again, it is possible that he was deliberately saying one thing to his solicitor and another thing to his GP for some reason. However, he gave a similar reason for the will change to his cousin, who said in his statement that he thought his cousin Evan was more inclined to discuss such matters with him as he handled the paperwork in the company over

> many years. In his oral evidence he said that his cousin used him as a sounding board to make sure he was doing the right thing. Evan Hughes gave a similar reason for changing his will again to Dr Pritchard during the 14 June assessment when there was no mention of 58 acres going to his son Gareth."

> "84. There was a period of some eight weeks between the beginning of May when he was deteriorating from week to week and the execution of the 2016 will. . . . On the evidence before me it is likely that this decline started a little earlier, by the beginning of May at the latest, as observed by his son. No reason was given during the process of changing his will for departing from his understanding with his son Elfed and what he said to his daughter-in-law and grandsons after their father's death, nor during this process was it mentioned that this did represent a change from that understanding."

59. These conclusions culminated in the judge's decision in relation to testamentary capacity. As it is central to this appeal, I will set out his reasoning in full:

> "85. Although the 2016 will was rational on the face of it, there is a real doubt about his capacity and in my judgment that doubt has not been displaced. . . . In my judgment on the balance of probabilities, it is likely that he did not have capacity as at 7 July 2016 in three particulars, any one of which is sufficient to vitiate the 2016 will. If these particulars are taken together, that likelihood is strengthened.
>
> 86. The first is that he did not by then have the capacity to appreciate the understanding that he had had with his son Elfed over many years during which his son had looked after his stock and land for no financial reward, or the promises made to his daughter-in-law and grandsons thereafter. This is not just a case of forgetting a promise made or the provisions of his previous wills.
>
> 87. The second is that he lacked capacity to understand the extent of Yr Efail. Although a map showing the 58 acres and his other land was produced during that process, it is likely that his visuospatial impairment was such that he had difficulty in interpreting maps. It is likely that he relied more upon his memory, but that memory by 7 July 2016 was significantly impaired as shown by some of the examples set out above including confusing a field at Bwchanan for Yr Efail. While that episode, taken by itself, might be put down to a slip of the tongue or lapse of memory, and while it appears that he did have an appreciation of the extent of this when speaking to Richard Williams in March 2016, there was significant deterioration in his vascular dementia between then and 7 July 2016.

> 88. The third is that he lacked the capacity to understand that the changes implemented by the 2016 will were more than just those necessary to "neaten" up (in the words of his cousin Ian Hughes) his testamentary provisions following the death of his son Elfed."

60. The judge decided, therefore, that the Deceased lacked testamentary capacity and the 2016 Will was invalid as a result. As I have already mentioned, in case he was wrong, the judge went on to deal with the other heads of claim including the question of whether a proprietary estoppel had arisen in favour of Elfed's estate.

Grounds of Appeal

61. Miss Reed QC, who appears with Mr Elis Gomer for Gareth, submits that the judge erred in his approach to testamentary capacity in numerous ways. In summary, they are that the judge: (i) was wrong to ignore the very strong presumption that a will which has been drafted by an experienced independent lawyer should only be set aside on the clearest evidence of lack of mental capacity - *Hawes v Burgess* [2013] EWCA Civ 74; (ii) misdirected himself in law when he concluded that making the 2016 Will was a "more complex transaction", testamentary capacity being relevant to the making of the will, as opposed to the precise will being made; (iii) was wrong to decide that Dr Pritchard's evidence that he would have carried out a different assessment had he been aware of the terms of the 2016 Will should vitiate the doctor's opinion on three occasions, including 7 July 2016, that the Deceased had testamentary capacity; (iv) was wrong to disregard the evidence of Ms Roberts, the drafting solicitor; (v) on the basis of the evidence of Dr Pritchard, Ms Roberts and Dr Series, the finding of a lack of testamentary capacity was not reasonably open to the judge; and (vi) in the light of the fact that the judge found that the Deceased had testamentary capacity in March 2016 when he gave instructions for the 2016 Will, and those instructions did not change, the judge should have found that the will was valid: *Parker v Felgate* (1883) 8 PD 171.

General principles – Testamentary Capacity

62. Both the trial and the appeal before us proceeded on the basis that the test for whether a testator has sufficient testamentary capacity to execute a will remains that set out in *Banks v Goodfellow* (1869-70) LR 5 QB 549 per Cockburn CJ at 549 which is as follows:

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

It was not suggested either by Miss Reed, on behalf of Gareth, or by Mr Troup, for Gwen and her sons, that that test does not survive the Mental Capacity Act 2005 and we did not hear any substantive submissions on that issue.

63. On the basis of the *Banks v Goodfellow* test, in the circumstances of this case, therefore, there are three relevant questions to ask: (i) was the Deceased able to understand the nature of the act of making the 2016 Will and its effect? (ii) was the Deceased able to understand the extent of the property of which he was disposing? (iii) Was the Deceased able to comprehend and appreciate the claims to which he ought to give effect?

64. It is also common ground that the burden of proof in relation to testamentary capacity is on the person propounding the will. Where the will is duly executed and appears rational on its face, the court will presume capacity, in which case, the evidential burden shifts to the objector to raise a real doubt as to capacity. If a real doubt is raised, the burden shifts back to the person propounding the will to establish capacity, nonetheless: *Key v Key* [2010] EWHC 408 (Ch) per Briggs J (as he then was) at [97]. Further, despite the fact that expert evidence may be of great assistance, the issue as to testamentary capacity is a decision for the court: *Key v Key* at [98].

65. Moreover, capacity must be considered in relation to the particular transaction and its nature and complexity: *Hoff v Atherton* [2004] EWCA Civ 1554 per Peter Gibson LJ at 35.

Function of the Court on an appeal in relation to testamentary capacity

66. Before turning to the grounds of appeal, it is important to take note of the nature of the decision which is under appeal and the role of this court. First, it is not in dispute that a determination that a testator lacks testamentary capacity is a finding of fact based on the judge's evaluation of the evidence as a whole. Accordingly, this court should be wary of interfering with it for all the well- known reasons given by Lewison LJ *in Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at [114]- [115]. As May LJ (who gave the judgment of the court) stated in *Sharp v Adam* [2006] EWCA Civ 449 at [95]:

> "We are not a court of first instance. Our task is to review the deputy judge's decision . . . His decision was in the end a decision of fact based upon all the evidence he heard. We can only allow on appeal if we are satisfied he was wrong . . . There was good evidence to support his finding. Mr Cooper [counsel for the Appellants] accepted that [the Appellants'] case had to be that no reasonable jury could have reached the deputy judge's conclusion. . . ."

67. Given the number of witnesses in this case and the fact that we have been referred to a fraction of the evidence, we bear these warnings very much in mind.

Validity on the basis of Parker v Felgate

68. I turn to Miss Reed's last ground of appeal first in order to clear it out of the way. She submits that the judge should have found that the 2016 Will was valid in accordance with the exception to the general rule to be found in *Parker v Felgate* (1883) 8 PD 171. That rule was explained in *Perrins v Holland* [2011] Ch 270 in the following terms:

> ". . . a will which had been drawn up in accordance with instructions given by a testator at a time when he had had full testamentary capacity but executed at a time when he no longer had such capacity would nevertheless be valid provided that he testator knew that the document he was signing conformed with the instructions he had given to the draftsman and approved it by executing it in those terms; that the need for testamentary capacity at the time of execution was not imported by the requirement that the testator know of and approve the contents of the will, which meant no more than that it had to be shown that the testator accepted its contest as representing his true intention."

69. In summary, therefore, 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. See *Perrins v Holland* at [2]- [4] and [48] – [55].

70. In summary, Miss Reed submits that: the judge found that the Deceased had testamentary capacity on 3 March 2016 when he was discussing matters with his accountant, Richard Williams; the instructions for the 2016 Will were given on 11 March 2016, a very short time later; the instructions did not change up until and including the day on which the 2016 Will was executed on 7 July 2016; the judge found that the Deceased knew and approved the contents of the 2016 Will, the corollary of which is that the Deceased was aware that he was making the 2016 Will and approved its terms; and accordingly, the judge should have held that the 2016 Will was valid.

71. This is a new point which was not taken before the judge. It was not pleaded and formed no part of the case at trial. Miss Reed requires permission to advance it, therefore. As Mr Troup, on behalf of Gwen and Stephen, pointed out, an appellate court should be cautious about allowing a new point to be raised on appeal and will not generally permit it if either it would necessitate new evidence or had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence: *FII Group Test Claimants v HMRC* [2020] 3 WLR 1369 at [89].

72. I agree with Mr Troup that had this matter been raised at trial, the evidence before the court would have been different. For example, Dr Series would have been instructed to consider whether the Deceased had testamentary capacity when he met with Ms Roberts on 11 and 30 March 2016 and whether on 7 July 2016, when the 2016 Will was executed, he was capable of understanding that he was executing a will for which he had given instructions in March. As Mr Troup points out, the agreed joint letter of instruction to Dr Series did not pose those questions. In fact, although he had not been asked to do so, Dr Series did state that the Deceased had capacity at the time he gave instructions for the 2016 Will but also expressed his conclusions in relation to the date of execution. Had the rule in *Parker v Felgate* been in issue, further questions may well have been posed and permission may have been sought to cross-examine the expert.

73. The judge would also have been asked to make a positive finding about who gave the instructions for the 2016 Will at the meeting on 11 March 2016. As it is, the judge recorded at [20] of his judgment that Ms Roberts' evidence at trial was that she could not recall who spoke in relation to the instructions. It was not necessary for the judge to decide the point because Gareth was not advancing a case based on *Parker v Felgate*. Inevitably, in addition, the cross-examination of other witnesses would have been different.

74. Accordingly, I would refuse permission to take the *Parker v Felgate* point.

Hawes v Burgess – "presumption" in favour of will drafted by experienced lawyer

75. Miss Reed also relies on what is described as the very strong presumption that a will that has been drafted by an experienced independent lawyer should only be set aside on the clearest evidence of lack of mental capacity: *Hawes v Burgess* [2013] EWCA Civ 74. She submits that the judge was wrong to ignore the presumption and there was no clear evidence of a lack of mental capacity and therefore, his finding was not open to him.

76. *Hawes v Burgess* was a case in which the judge had pronounced against the validity of the will both on the grounds of lack of testamentary capacity and want of knowledge and approval. On appeal, Mummery LJ explained that the decision was criticised on two grounds that: (i) the facts found did not support the judge's conclusion that at the time of giving the instructions for the will and at the time of its execution, the deceased lacked the necessary degree of understanding to comprehend and appreciate the claims to which she ought to give effect ([8]); and (ii) the judge was wrong to conclude that the deceased did not know and approve the content of the will without giving reasons for, or stating any evidential basis for, displacing the strong presumption of validity in favour of a will executed at the offices of an independent experienced solicitor after he had read out the document drafted by him on instruction and explained its contents ([9]).

77. Mummery LJ, with whom Patten LJ and Sir Scott Baker agreed, dismissed the appeal on the basis that there was sufficient evidence to support the judge's conclusion on the deceased's want of knowledge and approval of the contents of the will ([64] and [65]). He stated that accordingly, it was unnecessary for him to express a concluded view on lack of testamentary capacity ([66]).

78. Nevertheless, when considering the question of lack of testamentary capacity, Mummery LJ observed as follows:

> "54. Her overall submission was that the judge's finding that the Deceased lacked the requisite capacity to make the 2007 Will was amply justified on the evidence, in particular on the expert opinion of Professor Jacoby. The key question is whether the judge's findings are sufficient to overcome the strong prima facie case for the validity of a will drafted by an independent solicitor who oversaw its execution and justify the judge's conclusion that the Deceased lacked testamentary capacity in a case in which the judge found that she knew she was making a will and appreciated the extent of her property."

> . . .
>
> 57. . . . it is, in my opinion, a very strong thing for the judge to find that the Deceased was not mentally capable of making the 2007 Will, when it had been prepared by an experienced and independent solicitor following a meeting with her; when it was executed by her after the solicitor had read through it and explained it; and when the solicitor considered that she was capable of understanding the will, the terms of which were not, on their face, inexplicable or irrational.
>
> …
>
> 60. My concern is that the courts should not too readily upset, on the grounds of lack of mental capacity, a will that has been drafted by an experienced independent lawyer. If, as here, an experienced lawyer has been instructed and has formed the opinion from a meeting or meetings that the testatrix understands what she is doing, the will so drafted and executed should only be set aside on the clearest evidence of lack of mental capacity. The court should be cautious about acting on the basis of evidence of lack of capacity given by a medical expert after the event, particularly when that expert has neither met nor medically examined the testatrix, and particularly in circumstances when that expert accepts that the testatrix understood that she was making a will and also understood the extent of her property."

Mummery LJ had made similar remarks at [13] and added at [14]:

> "14. I should add a statement of the obvious in order to dispel any notion that some mysterious wisdom is at work in this area of the law: the freedom of testation allowed by English Law means that people can make a valid will, even if they are old or infirm or in receipt of help from those whom they wish to benefit, and even if the terms of the will are hurtful, ungrateful or unfair to those whose legitimate expectations of testamentary benefit are disappointed."

Sir Scott Baker also added:

> "69. . . where a will is drafted by an experienced solicitor who oversees its execution and records at or close to the time that the testatrix was compos mentis and able to give instructions persuasive evidence to the contrary is required."

79. In my judgment, Miss Reed was right not to suggest in her oral submissions that Mummery LJ's dicta in *Hawes v Burgess* amounts to a true presumption. It seems to me to be no more than a statement of the obvious. Where the will is explicable and rational on its face, the conclusion reached by an independent lawyer who is aware of the relevant surrounding circumstances, has taken instructions for the will and produced

a draft, has met with the testator, is fully aware of the requirements of the law in relation to testamentary capacity and has discussed the draft and read it over to the testator, is likely to be of considerable importance when determining whether a testator has testamentary capacity. It is a very strong thing, as Mummery LJ described it, to find that such a testator was not mentally capable of making a will. It seems to me that Mummery LJ's use of "presumption" was no more than a means of expressing the considerable importance of such evidence particularly in comparison with evidence from a medical expert who did not meet the testator and arrived at his conclusions on the basis of the papers only.

80. I do not suggest that the evidence of such a solicitor is definitive and nor did Miss Reed. Although it 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 *Ashkettle v Gwinnett* [2013] EWHC 2125 (Ch) at [43]: "Any view a 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.

81. That is not the case here. Ms Roberts was eight years qualified and kept what appear to be meticulous attendance notes. She took instructions, drafted the 2016 Will, which was rational and explicable on its face, discussed it with the Deceased on a number of occasions and read it over to him. She had been informed by him of his previous will and that he wanted to make changes in the light of the death of Elfed and there was also mention on 30 March 2016 of the fact that the Company was being dissolved.

82. She described the Deceased as being "distant" at their first meeting on 11 March 2016 and having met him again on 30 March, she had concerns about his capacity amongst other things, and sought the advice of her senior colleagues. As a result, Dr Pritchard's assessment of the Deceased's capacity was obtained. As I have already mentioned, her attendance note for 7 July 2016, the date of the execution of the 2016 Will records that she had "no issues whatever" with the Deceased's testamentary capacity.

83. The judge's reservations about Ms Roberts' evidence appear to have been: that she placed reliance on Dr Pritchard's evidence ([61]); she had no medical qualifications ([61]); and she did not discuss the 2005 Will with the Deceased and did not ask him why he wanted to change the disposition of Yr Efail ([63]). I return to these matters below. I shall also return to the remainder of the body of evidence upon which the judge relied. Before doing so, it is important to have in mind Dr Pritchard's evidence.

The Golden Rule – the status of medical evidence

84. It is well known that a rule of practice has long been established that when making the will of an aged testator or a testator who has suffered a serious illness, it should be witnessed and approved by a medical practitioner who satisfies himself of the capacity and understanding of the testator and records and preserves his findings. That has become known as the "golden rule" which was explained in *Kenward v Adams* (Times Law Reports, 29 November 1975).

85. The Court of Appeal considered the status of such medical assessment in *Sharp v Adam*. May LJ who gave the judgment of the court, stated as follows, at [27]

> ". . . [Counsel] on behalf of the Appellants, came quite close to submitting that such meticulous compliance with the golden rule should in principle be determinative. In our view, this would go too far. The opinion of a general practitioner, unimpeachable in itself and supported by that of one or more solicitors, may nevertheless very occasionally be shown by other evidence to be wrong. The golden rule is a rule of solicitors' good practice, not a rule of law giving conclusive status to evidence obtained in compliance with the rule."

Briggs J also observed in *Key v Key* at [8] that compliance with the golden rule does not operate as a "touchstone" of the validity of the will, nor does non-compliance demonstrate its invalidity.

86. It seems to me, therefore, that the real question in this appeal, is not whether the judge should have merely accepted Ms Roberts' evidence together with that of Dr Pritchard as if it were a "touchstone" as to the validity of the 2016 Will as some of the grounds of appeal might suggest. The relevant questions are whether: the judge was right to place less reliance upon Ms Roberts' evidence because of her reliance upon Dr Pritchard and because she did not ask the Deceased about the change in the bequest of Yr Efail, the fact that she had no medical qualifications and was not told about his medical background ([61] – [64]); whether he was right to conclude that Dr Pritchard's failure to ask the Deceased about the changes in his testamentary intentions at Yr Efail and his reason for the change impacted significantly upon the weight to be given to Dr Pritchard's evidence ([60]); and ultimately, when evaluating the evidence as a whole he was right to place greater weight on evidence, other than that of Ms Roberts and Dr Pritchard, relating to the Deceased's conduct and conversations before and after the 2016 Will was executed.

87. These are essentially questions of fact in relation to which this court must be wary and must not be tempted to re-make the judge's decision. As May LJ put it in *Sharp v Adam*, the question is whether no reasonable jury could have reached the conclusion the judge did. Putting the matter another way, giving appropriate weight to the evidence of Ms Roberts and Dr Pritchard, was the judge entitled to find as he did on the basis of the evidence as a whole?

88. It is also necessary to consider whether the judge misdirected himself in law in relation to whether the making of the 2016 Will was a more complex transaction than a will which did not leave Yr Efail to Gareth.

Dr Pritchard's and Ms Roberts' evidence and the significance of the change from the 2005 Will

89. Although the evidence of a general practitioner who assesses a testator is not definitive and the matter is for the court, it is clear that, in principle, the medical evidence of a practitioner who assesses capacity, having met a testator, should be given considerable weight when determining whether that testator had testamentary capacity. I have set out

a summary of Dr Pritchard's conclusions in his letter of 14 June 2016, at [30] and [31] above. He was also present on 7 July 2016 and witnessed the 2016 Will.

90. Was the judge wrong to conclude that Dr Pritchard's subsequent evidence that he was worried that the changes in the 2016 Will were "far more complex" than he first thought and that he would have asked the Deceased the reason why he was proposing to leave Yr Efail to Gareth rather than to Gwen and her sons, should vitiate (or at least, severely downgrade) his opinion that the Deceased had testamentary capacity and, accordingly, should have an impact upon the weight to be given to Ms Roberts' evidence and that of Dr Series?

91. The judge noted at [59] that "[I]t was a matter of speculation whether or not the outcome of a full assessment would have made any difference.". He concluded at [60] that the evidence had a significant impact upon the weight to be given to Dr Pritchard's assessment but, nevertheless, stated that the assessment was "an indication" that the Deceased did have testamentary capacity at the time (which is presumably a reference to the date it was carried out being 14 June 2016). He went on to note in the same paragraph that Dr Pritchard had stated in his oral evidence that on 7 July 2016, when shown the plan attached to the draft will, the Deceased had said, without prompting, that Yr Efail was to go to Gareth. The judge noted, however, that "he did not say that this was a change".

92. In oral submissions, Miss Reed submitted that the task which a medical practitioner must undertake when assessing testamentary capacity is to satisfy himself of the questions posed by the test in *Banks v Goodfellow*. Mr Troup, on the other hand, whilst not suggesting that the task of the medical practitioner was different, emphasised the decision of Templeman J (as he then was) in *Re Simpson deceased* (February 7, 1977), (1977) 121 Sol Jo 224. We were referred to a short extract from his judgment which was published in the New Law Journal on 19 May 1977. Having made reference to the "golden rule" Templeman J went on: "There are other precautions which should be taken. If the testator has made an earlier will this should be considered by the legal and medical advisers of the testator and, if appropriate, discussed with the testator. . . These are not counsels of perfection. . . ".

93. Mr Troup submits, therefore, that both Dr Pritchard's assessment and that of Ms Roberts (who did not receive the 2005 Will until 13 April 2016 and did not discuss it with the Deceased) were limited as a result because they did not explore the changes with the Deceased. They were not in a position properly to assess the Deceased's capacity to understand the moral claims upon his bounty. Accordingly, the judge was correct to adopt the approach he did.

94. It seems to me, however, that they should not have been downgraded for those reasons in this case. Although it may be prudent for a solicitor and for that matter, for a medical practitioner whose attention has been drawn to significant changes in testamentary intentions, to ask the testator about those changes, there is no rule to that effect. It seems to me that all that Templeman J meant in *Re Simpson* was that reference to the terms of a previous will may be a helpful safeguard when seeking to confirm that the testator is aware of those who have a call upon his or her bounty. (It is difficult to be more definitive in the light of the very small snippet from the judgment which was available to us.) In any event, it seems to me that it is no more than that. It is a helpful tool when seeking to confirm that the *Banks v Goodfellow* test and its third limb, in particular, is

satisfied. Reference to changes from provisions of a previous will, although a prudent step, should not be elevated into a requirement either for the drafting solicitor or the medical practitioner before their evidence in relation to capacity can be accepted. Furthermore, the relevance of those changes and therefore, of any enquiry about them will depend on the circumstances of the case.

95. Neither should the testator be required to justify any changes in testamentary dispositions whether to his solicitor or his general practitioner in order to prove that he has testamentary capacity. He does not have to give reasons. Subject to the provisions of the Inheritance (Provision for Family and Dependants) Act 1975, a testator is entitled to leave his estate as he chooses, however, capricious that choice may be and however ungrateful or unfair the terms may be to those whose expectations of testamentary benefit are disappointed. Of course, if the terms are inexplicable or irrational, it is likely that there will be serious doubt as to capacity.

96. In my judgment, therefore, in this case, it was not a requirement that Dr Pritchard question the Deceased about the change in relation to Yr Efail, to require him to give reasons or expressly to acknowledge the change. The same is true of Ms Roberts. In this case, the change in circumstances which led to the need for a new will was well known. It was the death of Elfed and the imminent dissolution of the Company. Furthermore, Ms Roberts discussed the way in which the shares in the Company were to be dealt with expressly with the Deceased. The previous will had been made some eleven years earlier in different circumstances. I should add that the judge's focus in relation to changes appears to have been upon Yr Efail alone. In fact, there were numerous changes from the 2005 Will. Were it a requirement that changes be discussed, it would apply to each and every such change.

97. This conclusion is consistent with Lewison LJ's approach in *Simon v Byford* [2014] EWCA Civ 280. That appeal, which was also concerned with whether a testatrix who executed a will at or immediately after her 88th birthday party, had testamentary capacity and knew and approved the contents of her will. The judge had answered both questions in the affirmative and Lewison LJ, with whom McFarlane and Sullivan LJJ agreed, dismissed the appeal.

98. In relation to testamentary capacity, Lewison LJ, quoting Peter Gibson LJ in *Hoff v Atherton* [2004] EWCA Civ 1554, [2005] WTLR 89, made clear that capacity is concerned with the potential to understand. It is not a test of memory or a requirement for actual recollection ([39] and [40]). Lewison LJ went on to address the judge's finding that the testatrix had not been "capable" of remembering why her earlier will had benefited one of her children, Robert, and concluded that what he meant was that she had forgotten. He stated that the judge's important finding was not that the testatrix had forgotten the terms of and reasons for her earlier will but: "[I]t was that she was capable of accessing and understanding the information; but chose not to. Her decision to benefit her children equally was a perfectly rational decision . . . As an expression of understanding the claims upon her bounty that seems to me to be unexceptionable." ([41])

99. Testamentary capacity does not require a testator to recall the terms of a past will they have made, or the reasons why it provided as it did, as long as they are capable of accessing the information, if needed, and of understanding it once reminded of it.

100. In this case, as the judge pointed out, the Deceased was astute enough to realise that he needed to change his will in the light of Elfed's death and there is no suggestion that he had forgotten that Yr Efail had previously been bequeathed to Elfed. Dr Series concluded that it was more likely than not that the Deceased would have been able to recall that Elfed farmed the land at Yr Efail. He also considered that it was likely that the Deceased had testamentary capacity on 7 July 2016. It is also clear from Ms Roberts' attendance note of the meeting on 30 March 2016 that the Deceased was also aware that the Company was being dissolved and was content that his shares should fall into residue. There is nothing to suggest that he was not capable of accessing the information in relation to the 2005 Will, if needed, and of understanding it once reminded of it.

101. In *Hoff v Atherton* Peter Gibson LJ, with whom Chadwick LJ and Lindsay J agreed, noted at [44] that "In *Masterman -Lister* at para 82 Chadwick LJ pointed out that on a question of capacity the outcome was likely to be an important, although not conclusive, indicator of the existence or lack of understanding. In the present case, the outcome is dispositions in a straightforward Will which are entirely sensible . . .". It seems to me that the same is true in this case. The Deceased left land to both Elfed's family and Gareth. The value of the land left to Elfed's family was slightly greater than Yr Efail but they were comparable. Carys received more under the 2016 Will than she had under its predecessor. The Deceased's surviving children and Elfed's widow and sons were treated relatively equally. The shares in the Company which were not considered to be of great value together with the Deceased's credit balance fell into residue to be divided equally between his grandchildren. Provision for them, therefore, was increased. There was nothing irrational about the 2016 Will when taken as a whole.

102. In my judgment, therefore, the mere fact that the 2005 Will and the change in the disposition of Yr Efail from Elfed to Gareth were not discussed, does not vitiate or severely downgrade Dr Pritchard's evidence or that of Ms Roberts and Dr Series for that matter. The nature of all of the dispositions contained in the 2016 Will were described to Dr Pritchard by the Deceased and were discussed with Ms Roberts and ultimately approved by the Deceased. It was also noted that the disposition of the shares in the Company had changed.

Complexity

103. I also agree with Miss Reed that if, and to the extent that the judge based his conclusions upon the difference between the 2016 Will and what was described by Ian and by Dr Pritchard as a "neatening up" exercise and concluded that the 2016 Will was much more complex and therefore required greater capacity, he was wrong. It is common ground that capacity must be considered in relation to the transaction in question, its nature and complexity. It is issue-specific: *Hoff v Atherton* [2004] EWCA Civ 1554 at [35] per Peter Gibson LJ. However, as Miss Reed submits, it seems to me that the 2016 Will was no more complex than its predecessor. Save for the creation of a life interest in certain land, in favour of Gwen, the structure was much the same. In relation to the life interest, it would appear from Ms Roberts' attendance notes that it was the Deceased himself who had suggested it. His ex-wife had been granted a life interest in Arfryn under a previous will.

104. It is said, however, that it is the complexity of the moral claims which makes the difference here. However, there was no evidence to suggest that the Deceased did not have the capacity to appreciate those moral claims.

Discussion and conclusions

105. Where does this leave us? I am very much aware of the fact that an appeal court should be extremely wary of overturning the trial judge's evaluation of the facts. We must be satisfied that the judge's evaluation was outside the reasonable conclusions which he could have reached on the evidence before him or was one which, in other circumstances, a jury could not reasonably have arrived at. Although the hurdle is high, it seems to me that it has been surmounted in this case.

106. First, although the judge stated that although Dr Pritchard's oral evidence had a significant impact on his assessment of the Deceased's testamentary capacity, it did not mean that no weight should be attached to it at all and that it was an indication that the Deceased had testamentary capacity at the time, it seems, in fact, that he gave Dr Pritchard's assessment no weight whatever as far as 7 July 2016 was concerned.

107. Secondly, his approach to Ms Roberts' evidence was similar. Although he stated that it had its limitations, he appears to have given no weight to her evidence and in particular, her assessment of the Deceased on 7 July 2016 when the 2016 Will was executed. It will be apparent from what I have already said that it seems to me that the judge's reasons for concluding that Ms Roberts' evidence had its limitations were not justified. Like most solicitors, Ms Roberts did not have medical qualifications, as the judge pointed out. However, prudently, she sought Dr Pritchard's assessment of the Deceased's testamentary capacity. She was entitled to rely upon it and did so. It will be apparent from what I have already said that I also do not consider that she was required to ask the Deceased to give reasons for leaving Yr Efail to Gareth rather than to Elfed's estate. Therefore, it seems to me that the judge's reasons for considering that her evidence had limitations do not hold good.

108. Thirdly, the judge's focus was on whether the Deceased had the capacity to understand the "change he was making from his previous wills" ([79]) rather than whether he had capacity in the *Banks v Goodfellow* sense. Furthermore, he emphasised that no reason was given for parting from the Deceased's understanding with Elfed and his family ([84]). The judge also appears to have been concerned about whether the Deceased had judged "fairly" between competing beneficiaries ([81]) and appears to have concluded that he did until 3 March 2016 but not thereafter because on 11 March he gave instructions leaving Yr Efail elsewhere. Not only is this contrary to the judge's finding in relation to capacity in mid-June 2016, at [60], it also appears to import an aspect of fairness when considering competing claims upon a testator's bounty and a need to justify a change in testamentary dispositions. As I have already mentioned, this is not the law. As long as the *Banks v Goodfellow* test is satisfied, a testator is entitled to leave his estate as he thinks fit however unkind or unfair the dispositions may seem and does not have to provide reasons for it.

109. It appears that it is the judge's focus on the change in relation to Yr Efail and fairness which not only led him to downgrade Ms Roberts' and Dr Pritchard's evidence generally and in relation to 7 July 2016 in particular, but also to rely heavily upon the further anecdotal evidence to which he refers at [82] – [84] of his judgment. Despite

accepting that the 2016 Will is rational on its face, the judge focussed solely upon the change in the disposition of Yr Efail and the promise to Elfed, rather than the disposition of the estate worth £1,976,463 odd before tax as a whole and all of the moral claims upon the Deceased's bounty including those of Gareth, Carys and all the Deceased's eight grandchildren, in the light of Elfed's death and the imminent dissolution of the Company. This is apparent from his first reason for deciding that the Deceased did not have capacity at [86]. He also did not ask whether the Deceased had the capacity to understand the promises which he made if he had been reminded of them.

110. It was on this basis that he appears to have preferred the evidence which he sets out at [70] , [71] and [73] - [76]. In summary, that was: the assurances given to Gwen and Stephen in the autumn of 2015 once it was agreed that the arrangement in relation to the stock would continue; similar assurances given to Geraint at the end of 2015; Richard Williams' evidence that on 3 March 2016, the Deceased had said that Elfed's family were deserving of the land and that he had put enough money into the Company; Richard Williams' evidence that the Deceased had asked about selling Yr Efail but having been informed about the likely CGT liability had stated that it would be disrespectful to Elfed and his family to do so; the evidence about the longstanding understanding about the land; and Ian's evidence that the Deceased's discussion suggested merely a neatening up of his will to ensure that if Gwen remarried, her sons would inherit the farm.

111. The judge's second reason (at [87]) that the Deceased did not have the capacity to understand the extent of Yr Efail takes no account of Dr Pritchard's oral evidence that the Deceased expressly stated when the provision was read and he was shown the plan, that that was the land to go to Gareth.

112. The judge's third reason (at [88]) was the Deceased's inability to understand the changes to the previous testamentary dispositions. I have already considered this aspect of the matter.

113. In my judgment, therefore, if one gives proper weight to the evidence of Ms Roberts and Dr Pritchard, the judge's conclusion was not open to him on the evidence. The judge accepted that the Deceased had capacity on 14 June 2016 having gone through the provisions of the 2016 Will with Dr Pritchard on that date. Accordingly, the evidence to which I have referred and upon which the judge relied which all related to events before that date, was for the most part, irrelevant, or at least, of very little weight. Furthermore, it seems to me that once one gives proper weight to Ms Roberts' and Dr Pritchard's evidence in relation to 7 July 2016 and strips out the judge's reliance upon fairness which is used as a shorthand for leaving Yr Efail to Elfed's estate, and capacity to understand the change in disposition solely in relation to Yr Efail, his second and third reasons fall away. This is not merely a matter of evaluation and weight.

114. It follows, therefore, that I would set aside the judge's order that the 2016 Will is invalid for want of testamentary capacity.

Proprietary Estoppel

115. In the circumstances, it is necessary to consider the Respondent's Notice for which permission is needed. In the circumstances in which the 2016 Will is held to be valid,

Gwen and her sons seek an order that Yr Efail is subject to an equity by proprietary estoppel in favour of the estate of Elfed and should be transferred to Gwen as his executrix. They note that this was expressly recorded in a recital to the Order and Mr Troup submits that the judge was right to make the finding he did.

116. The judge described the first two necessary factors for a successful claim at [108]. They were that: Gwen and Stephen must show that the Deceased made it clear that his land would be left to Elfed; and that Elfed relied upon that representation to his detriment. He pointed out that when evaluating the extent of detriment, a benefit must be taken into account if it is enjoyed as a consequence of the reliance (*Chan v Leung* [2003] 1 FLR 23) ([109]). He went on to note that if an estoppel is established, the court has a wide discretion as to the remedy which should be granted but that the maximum extent of the relief is what is needed to honour the promise and that expectations arising from the promise will not necessarily be honoured and the court will not grant relief which is out of all proportion to the detriment ([110]). He also noted what Lewison LJ stated at [69] in *Habberfield v Habberfield* [2019] EWCA Civ 890, that if parties have made a bargain, which one party has kept, in the absence of countervailing factors, it would be unethical or unconscionable for the other party not to keep his side of the bargain.

117. The judge held that there was a sufficiently clear representation by the Deceased to Elfed that the land, meaning all the land which Elfed farmed which was in the ownership of the Deceased, would be Elfed's one day ([113] – [115]). It is common ground that the representations were made.

118. The judge's reasoning in relation to reliance is at [116]. The judge relied upon the fact that: Elfed maintained his father's stock for some 38 years; purchased farmland next to his father's so that he could work on both together; built a bridge to link the two and a large cattle shed for all the cattle; and told his wife not to complain about expenditure on his father's farming venture because the land would be theirs one day.

119. Detriment is dealt with at [117] – [120] and the appropriate remedy is addressed at [121].

120. Miss Reed, on behalf of Gareth, does not challenge the judge's conclusions about the representations. She does challenge his conclusions in relation to reliance upon those representations, detriment and the appropriate remedy. In essence, she says that the judge gave insufficient reasons for his conclusions on each of those matters, that the question of remedy is the subject of much academic debate and has led to an appeal to the Supreme Court in *Guest v Guest* [2020] EWCA Civ 387 and as a result the claim should be dismissed.

121. When questioned in the course of argument, Miss Reed also stated that she had no knowledge of a case in which an equity was granted after the death of the representee. Neither was Mr Troup aware of such a case. Neither counsel, however, addressed us on this aspect of the matter or included any consideration of it in their skeleton arguments. Mr Troup made clear, however, that it had never been argued or pleaded that Elfed's estate could not benefit from an estoppel. It seems to me, therefore, that the parties must be taken to have assumed, without investigation, that it could, and that, given that they all had professional advice, it would be unfair to allow the question to be ventilated at this stage.

122. As I have already mentioned, it is common ground that the representations were made and were sufficiently clear for the purposes of an estoppel. In my judgment, the judge's reasoning in relation to reliance at [115] is also sufficient. His reasoning in relation to detriment, however, appears to me to be superficial. Although it is touched on at [120] there is insufficient consideration of the advantages to Elfed of the symbiotic arrangement and no proper assessment of unconscionability. Furthermore, there is no suggestion that the judge gave any consideration to the effect of Elfed's death upon the remedy due to the promisee.

123. In these circumstances, and with enormous reluctance, it seems to me that we are not in a position to decide the proprietary estoppel aspect of this matter and it must be remitted to the High Court for proper consideration. However, the issues to be determined should be limited to the questions of detriment and remedy.

124. As I have mentioned, I have come to this conclusion very reluctantly, especially as a large amount of costs have already been expended.

125. To reiterate, for the reasons I have sought to explain, I would allow the appeal in relation to testamentary capacity and remit the questions of detriment and remedy in relation to the proprietary estoppel claim.

Lady Justice Elisabeth Laing:

126. I agree.

Lord Justice Moylan:

127. I also agree.