Neutral Citation No.**2010 EWHC 1575 (Ch)**

Claim No. **HC02871**

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, WC2A 2LL
28th June 2010

IN THE ESTATE OF VERA MAY GALE, DECEASED (PROBATE)
BETWEEN:

Janice Susan Gale **Claimant**
and
David John Gale **Defendant**

Judgment of Jules Sher QC sitting as a deputy judge of the High Court
Hearing dates 17-20 May, 8,11and 14 June

The Claimant in person

Mr Peter John (instructed by Barnes & Taylor, 4 Nelson Street, Southend on Sea) for the Defendant

I direct that pursuant to CPR 39A paragraph 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Introduction

1. This is a probate action concerning the estate of Vera May Gale ("the Testatrix") who died on 7th May 2007. She had two children who survived her, a son, the Defendant David John Gale ("the Defendant") and a daughter, the claimant, Janice Susan Gale ("the Claimant"). This dispute started as a dispute in relation to the validity of four codicils to a will of the Testatrix which was made on the 28th January 1994. That will gave and bequeathed all the Testatrix's jewellery to the Claimant absolutely and the residue to the Claimant and the Defendant in equal shares.

2. By Particulars of Claim dated the 13th October 2008 the Claimant sought to prove in solemn form four manuscript codicils dated, respectively, the 21st March 2002 ("the 2002 codicil"), the 6th February 2004 ("the 2004 codicil"), the 2nd September 2005 (" the September 2005 codicil") and the 18th November 2005 (" the November 2005 codicil").

3. The Defendant's Defence alleged, amongst other things, that the Testatrix did not have testamentary capacity to execute any of the four codicils. By her Reply dated the 6th November 2009, the Claimant admitted that from about the late summer of 2004 the Testatrix lacked testamentary capacity and that the September 2005 and the November 2005 codicils were not effective testamentary documents. Accordingly, from then onwards, this probate dispute related to the validity of the 2002 and 2004 codicils alone.

The two disputed codicils

4. The 2002 codicil, the text of which was handwritten by the woman who was employed by the Testatrix to clean, Corrinne Farmer, read as follows:

> ***21 March 2002***
>
> ***If she wishes, I wish my daughter to keep the house and everything in my house, and any remaining savings to be divided between my daughter and son, Janice and David.***
>
> ***I am worried for my daughter's future as she is unmarried and growing older and I wish her to feel safe here.***

5. It purported to be signed by the Testatrix and there followed beneath her signature the signatures of C. Farmer (with her name, Miss C. Farmer, in manuscript capitals beside her signature) and M. Migliorini (with his name, Mr. M. Migliorini, in manuscript capitals beside his signature). There was no attestation clause at all.

6. The 2004 codicil was written out by the hand of the Claimant herself and read as follows:

> ***6th February2004***
>
> ***I wish my daughter, Janice, to have my house, if she wishes, and its contents when I die, and the rest of the savings to be shared equally between Janice and David, my daughter and son.***

7. That codicil purported to be signed by the Testatrix and, again, there followed, without any attestation clause, the signatures of C. Farmer and M. Migliorini, this time with their respective addresses following their respective names written out in manuscript capitals. The 2004 codicil is simply a repetition of the 2002 codicil with slightly altered wording but no change in substance and with the reason for the codicil expressed in the 2002 codicil omitted.

Probate proceedings and Pleadings

8. The Testatrix died on the 7th May 2007. On the 19th July 2007 the Claimant entered a caveat against the grant of probate. On the 4th December 2007 the Defendant issued a warning to the caveat and an appearance was entered to the warning by the Claimant on the 14th December 2007. By summons dated 13th May 2008 the Claimant was summoned to show cause why the caveat should not be discontinued and on the 16th July there was a hearing before the District Judge in the Principal Registry when he extended the caveat until the 16th October 2008. These proceedings were issued by claim form dated 14th October 2008. The Claimant was represented by Messrs. Law, Hurst & Taylor and the Particulars of Claim were signed by counsel on her behalf.

9. By a Defence and Counterclaim dated 17th December 2008 and signed by counsel, Peter John, who represented the Defendant at the trial, the Defendant denied that the Testatrix signed and executed the 2002 and 2004 codicils. The Defence added that the Claimant was "***put to strict proof that the*** [2002 and 2004 codicils] ***were signed, executed and witnessed in the manner alleged on the*** [dates alleged]."

10. As to the 2002 codicil, the Defence added as follows:

> ***"The Defendant reserves the right to adduce expert evidence as to the Deceased's signature as it appears on the first codicil. The Defendant avers that the signature, if proved to be that of the Deceased, is not consistent with the Deceased's known signature at the date of the first codicil. The Defendant notes the Claimant's averment that the main content of the alleged first codicil was not written by the Deceased.***

11. In the alternative it was pleaded that the Testatrix lacked testamentary capacity and further, or in the alternative, that the Testatrix did not know and approve of the contents of the first codicil at the date of its execution on the 21st March 2002.

12. As to the 2004 codicil, it was not admitted that the signature which appears on that codicil was that of the Testatrix and the Claimant was put to strict proof thereof. The Defence added:

> ***"The Defendant reserves the right to adduce expert evidence as to the Deceased's alleged signature as it appears on the second codicil."***

13. Further, as to the 2004 codicil, there were similar defences to those in relation to the 2002 codicil in so far as testamentary capacity and want of knowledge and approval were concerned.

14. By her Reply the Claimant pleaded as follows:

> "***The defendant's denial in paragraph 4 of the Defence that the first codicil was signed executed and witnessed in the manner alleged on the date alleged is embarrassing. It is noted that the Defendant in paragraph 5 of the Defence "reserves the right to adduce expert evidence on the Deceased's signature as it appears on the first codicil". If the Defendant's case is that the Deceased's signature on the first codicil was forged or that there has been any other form of fraud then it is incumbent on the Defendant to plead such a case expressly and with proper particularisation rather than by implication. For the avoidance of any doubt any such forgery or other fraud is denied***."

15. Paragraph 4 of the Defence was the paragraph which put the Claimant "***to strict proof that the first codicil was signed, executed and witnessed in the manner alleged on the date alleged***". Under such a plea a defendant is not entitled to make a positive case of fraud or forgery. If such a case were to be made, it would be incumbent upon a defendant to allege the fraud or forgery clearly and with proper particularisation. It is inappropriate to plead such fraud or forgery by implication. The other party is entitled to know the case she has to meet. Counsel for the Claimant who settled the Reply was within his rights to complain that the Defendant's denial was embarrassing.

16. However the case came to trial without any further pleading in this respect. No expert handwriting evidence was served until, I think, the beginning of May and the trial was due to start on 17th of that month. The Defendant said in his witness statement signed on 15th December 2009 that he had wished to have the four codicils forensically examined but that he was told that all the originals had been mislaid. The case was opened before me on the basis that the originals had been lost and the only handwriting evidence (which was that produced by the Defendant) was based upon photocopies of the codicils and not the originals. I refused to accept this state of affairs and insisted that the originals must be found and must have been lodged with the Probate Registry during the proceedings precipitated by the caveat.

Change from non-admission to positive case of fraud

17. As a result of my intervention, by the morning of day three of the trial, the originals were produced from the Principal Registry and were released to the Defendant's handwriting expert for forensic examination. With a minimum of effort this could have been achieved months before. In the event, as will be seen below, this trial took on a completely new direction and emphasis from then onwards. It started on the first day as a case that was centrally concerned with the issue of testamentary capacity, with eminent experts in old age psychiatry scheduled to give evidence. From day four it turned into a

case of forgery. Regrettably, by this time, the Claimant was unrepresented. She had, as I have indicated, been represented by Messrs. Law, Hurst & Taylor. They remained on the record until 11th August 2009 when Deputy Master Smith ordered that they be removed from the record. This was the same day on which a case management conference was to be held, and when it was rather important that the Claimant had representation because it would have been an occasion on which to pursue the complaint of embarrassment contained in the Reply, and to require the Defendant to plead any alleged forgery or fraud with particularity. In the event, the Claimant was unrepresented at that case management conference and directions were given for expert handwriting evidence to be exchanged by the 12th January 2010.

18. The Claimant did not remain unrepresented for long. On the 9th September 2009 Messrs. Ronald Fletcher went on the record for her under a new Legal Aid Certificate. On the 12th November 2009, on the Claimant's application, it was agreed that the exchange of handwriting experts' reports should be extended to the 26th February 2010. The parties were content that they could do that without losing the trial date which was set for the 17th May. The Defendant's handwriting expert's report was not in existence at the time.

19. On the 31st March 2010 Messrs Ronald Fletcher & Co. served notice of discharge of the Claimant's Legal Aid certificate and, since then, she has been, and continues to be, unrepresented. This has made my task in trying this case exceptionally difficult.

20. On the 26th April 2010, on the Defendant's application, Master Bragge required the Claimant to exchange handwriting evidence within 7 days failing which she would be debarred from leading such evidence at trial. The trial opened before me without there being any expert evidence in support of her case. The Defendant's expert handwriting evidence was served at about the beginning of May. It suggested that there had been a fraudulent backdating of the 2002 codicil, but its scope was limited because the originals had not been examined. On day four of the trial the expert, having examined the originals which were produced the day before, firmed up his evidence into a clear view that the codicils of 2002, 2004 and November 2005 were forgeries. I shall consider the pleadings in this respect and the handwriting evidence later on in this judgment.

Family history

21. This would be a convenient point in which to introduce some of the family history and the events surrounding the making of the alleged codicils.

22. The Defendant was born on the 24th May 1947 and by all accounts enjoys a successful career as a spacecraft propulsion engineer. He is happily married and has a family. By contrast the Claimant (born on 18th March 1951) is unmarried and struggles financially. The two of them grew up, perfectly amicably, in the family home at 79 Keith Way and, subsequently, 15 Beverley Gardens, Southend-on-Sea. Their father died intestate in November 1993 and

the Defendant administered his estate. 15 Berverley Gardens was owned jointly by the father and the Testatrix and, apart from the father's car which was transferred to the Claimant, the father's estate was distributed to the Testatrix.

23. Unlike the Defendant, who went to technical college, the Claimant went to university and obtained a degree in English Literature. Certainly, I can say from observing her, both as a witness and an advocate on her own behalf, she is an intelligent woman. However, unlike the Defendant, who is practical and business-like, she is disorganized and has followed an alternative spiritual way of life that began in an Ashram in India. The detail does not matter. It suffices to simply point out the broad difference between brother and sister. Quite what the position is today, I do not know, but their parents, and particularly their father, looked with disfavour on her chosen way of life, which was so different from their traditional life-style.

24. After the father's death, the Testatrix continued to live alone in the family home at 15 Beverley Gardens. The Claimant would visit and on occasions would stay overnight but the Testatrix and her daughter did not get on. The Claimant was, as the Defendant described her, an "eternal student" and would spend days in libraries researching in minute detail all manner of things. I saw this for myself over the course of this trial, before and during which she has provided me with a considerable amount of documentation which has not been easy to manage from an evidential point of view. She scarcely missed an opportunity during the trial to produce additional witness statements and other documents including, on the last day of the trial, a new bundle of over thirty pages of various documents. With a certain amount of patience and cooperation exhibited by Mr. John on behalf of his client, I think I was able to manage this flow of paper without prejudicing the interests of either side. As the Claimant was unrepresented I was anxious to give her every latitude. In the event all this additional documentation has not added anything to the conclusions I would have reached in any event.

25. Between 1993 and 2000 the Testatrix was managing to look after herself quite well. She had many friends who visited her. As a consequence of his work commitment and time spent abroad, the Defendant was unable to visit as often as he would have wished. He telephoned on a regular basis but it could be up to 5 to 6 weeks between his visits to the house in Beverley Gardens. The Testatrix would however visit the Defendant and stay with him and his family while he was in England and at home. She would, for example, spend Easter and Christmas with them.

Medical evidence

26. Between 2000 and 2002 the Testatrix's health started to deteriorate. In October 2001 she began to show signs of confusion. The GP's notes of 1st October 2001 record: "confused yesterday morning and Friday. Says sometimes forgetful. Memory intact. Very lucid" And on the 18th November 2001 it is recorded that she was "a bit confused". An Occupational Therapy Assessment carried out on the 20th November 2001 identified her problems as

"right knee replacement" and recorded "short term memory loss". The Testatrix had had an operation on her knee on 18th October 2001 and had been quite disturbed about this. Although regarded (with the benefit of later medical evidence) as the early signs of Alzheimers' disease, Professor Howard, professor of old age psychiatry at the Maudsley Hospital, London, who gave evidence for the Defendant, did not think that these early signs of confusion on their own would have indicated a lack of testamentary capacity in March 2002, when the first codicil was signed. However, taken with the later record of her medical condition, he concluded that the chances of her having testamentary capacity in March 2002 was 50% which he reduced in the witness box to "up to 50%".

27. He reached this conclusion on the following basis. The GP in the Testatrix's general practice had referred her to Dr. O'Brien, a consultant physician, in 2004. The referral letter mentioned "increasing paranoid delusions about her neighbours and forgetfulness". Dr. O'Brien saw her on 10 August 2004 and reported that "he had no doubt that this is Alzheimer's disease", which he described as moderate to severe in nature. He was the first doctor to assess her cognitive impairment using the Mini-Mental State Examination (MMSE) in which she scored 11 points out of a possible 30 points. Dr. K. Mufti, a locum Consultant Old Age Psychiatrist, did a home visit to assess the Testatrix on the 20th October 2004. On an examination of her mental state, Dr. Mufti noted nominal dysphasia and word finding difficulties. He administered the MMSE and noted the result as 9/30, and he concluded that the Testatrix had "moderate to severe cognitive impairment clinically presumed to be Alzheimer's disease." He recorded further as follows: "Her daughter Janice, who is herself 54 years old and unmarried, has been living with her mother for about 3 years and she feels that Vera has become very suspicious of her and becomes quite confrontational and argumentative with her. She accuses her of moving things and hiding things from her. This invariably leads to disagreement and often arguments. I got the impression that Janice, her daughter, does not have a good understanding of Vera's cognitive impairment and memory difficulties and seemed to feel that Vera is accusing her deliberately and wants her to leave the house."

28. On 1st May 2005, during a post-admission ward round, the Testatrix was described as having dementia and an MMSE score of 0/10. On 23rd June 2005, on admission to the Southend Hospital, her abbreviated mental test score was recorded as 0/10. On 14th September 2005 she was tested again under the MMSE and scored 4/30. On the 19th November she scored 1/28 and, on the 24th April 2007, 0/28.

29. Professor Howard told me that the threshold between moderate and severe dementia is conventionally set at a score of 10/30 on the MMSE scale and that patients with Alzheimer's disease show a very characteristic slow and steady decline over a number of years. The decline in the Testatrix's score from 9/30 to 4/30 between October 2004 and September 2005 would be typical of the progress of the disease, most patients losing on average around 2 to 3 points a year. His opinion on her testamentary capacity at the time of execution of the 2002 codicil was arrived at by extrapolation backwards from these MMSE results. He calculated that she would have lost between 6 and 8 points in the

two years before October 2004, putting her at 15 to 17 out of a possible 30 in 2002, a score typical of a patient moderately affected by dementia. Taking it back the extra half year to March 2002 and extrapolating from Dr. O'Brien's 11/30 result in September 2004, he agreed with me that it was possible that she could have scored 21/30 in March 2002. I gathered from him that 20/30 would represent the borderline between having or not having testamentary capacity. His conclusion was based on the statistics of a research study which showed that of a hundred patients who were moderately affected by dementia fifty had, and fifty did not have, testamentary capacity. His view, therefore, was that if the Testatrix was an average Alzheimer's patient who lost between 2 to 3 points a year, she would have fallen into the category of "moderately demented" in March 2002 and, in consequence, following the statistical study, his view was that there was a 50% chance (or, as he said in the witness box, "up to 50% " chance) that she had testamentary capacity at the time. He added: "I am unable to reassure myself that she did have capacity".

30. As to the 6th February 2004, i.e. the date of the 2004 codicil, he concluded that the Testatrix was very close to entering the severely demented range of cognitive disability and his estimate was that she was only about 25% likely to have had adequate testamentary capacity at that time. "By this point", he said, "my opinion would be that she would probably not have understood the significance of the document she was being asked to sign…..or have been able to recall the property of which she was disposing or been able to appreciate the claims of others." This, of course, was a reference to the classical test of testamentary capacity laid down in **Banks v. Goodfellow, LR 5 QB 549 at 565**, which has not been displaced as the applicable test in this area by the Mental Capacity Act 2005, at least in relation to testamentary instruments which ante-date the coming into force of that Act: this was common cause and was accepted by the judge in the **Estate of George Douglas Key (deceased) 2010 EWCH 408 (Ch)**.

31. Professor Jacoby, Professor Emeritus of Old Age Psychiatry at the Warneford Hospital in Oxford, gave evidence for the Claimant. He told me that there can be little doubt that the Testatrix suffered from dementia characterised by impairment of memory and language, behaviour disturbance and persecutory ideas or delusions, and he agreed that the dementia was most likely due to Alzheimer's disease. He thought that the first signs of cognitive impairment were becoming evident in 2001 and he agreed with the Testatrix's doctors that it appeared to be moderate to severe by the end of 2004.

32. By March 2002 he thought her cognitive impairment would probably have been mild to moderate in severity but this would not of necessity have impaired her ability to fulfil all the limbs of the test in **Banks v. Goodfellow** at that point in time. By February 2004, the time of the second codicil, he considered it probable that the Testatrix would have shown dementia of at least a moderate degree.

33. The two experts conferred and signed a document which mapped out the areas of agreement and those of disagreement between them. They agreed that by 2004 the degree of dementia was either severe (Professor Howard) or

moderate to severe (Professor Jacoby). Although they recognized that there was a slight difference between them in this respect, they recognized that this difference did not have a significant impact upon their estimation of the probability of testamentary capacity in 2004. Professor Jacoby considered that in 2004 and 2005 it was "highly improbable that the Testatrix had capacity to make a will." Professor Howard agreed with this but repeated his opinion that the likelihood of her having testamentary capacity at that time would have been only 25%.

34. As to 2002 they recorded that Professor Howard had given the likelihood of retention of testamentary capacity at 50% whereas Professor Jacoby preferred not to put a percentage upon this and had not ventured an opinion on whether the Testatrix did or did not have testamentary capacity in 2002. They further recorded the following: "We agree that on the basis of the medical evidence that we have been able to review, it is difficult to give a definitive opinion."

35. In the witness box, Professor Jacoby told me that he did not feel able to base very much simply on the basis of the MMSE results extrapolated backwards as Professor Howard had done. He accepted that a typical Alzheimer's patient would lose 3 to 4 points a year, but, as he put it "not all are typical". He did not rule out capacity in 2002.

36. As to the 2004 codicil, he agreed that the dementia must have been moderate to severe and, although he was less categorical about this than Professor Howard, in his opinion, on the balance of probabilities, the Testatrix did not have testamentary capacity in 2004.

37. However, as to the MMSE testing scores, he was "terribly sceptical" because of the unreliability of the person administering the test. It is not easy, he told me, to control and achieve uniformity in the administration of the test. The questionnaire has to be agreed and the administrator has to be taught to ask the questions in some uniform way. The mental state of the patient may vary from day to day and, for example, if tested in the evening, may produce worse results than if tested in the morning. He urged caution in the use of these results. On their own they are not at all adequate as an indication of testamentary capacity.

38. The Claimant addressed many questions to both experts pointing out that the Testatrix had retained social skills and could conduct conversations with the gardener identifying all the plants in the garden. Many of these questions were founded on some of the statements and the material the Claimant produced during the course of the trial. I do not think it would be helpful to record in detail all the points which were put to the experts in this respect. Both experts agreed that they did not help them to assess the Testatrix's testamentary capacity at the various times to which they referred because social skills of this kind endured well beyond the onset of this disease. The Claimant put to the experts, for example, that the Testatrix retained the ability to play scrabble, and she produced the record of a scrabble score at or about the time of the first codicil. However, Professor Jacoby said that "over-learnt" skills like that tended to stay with the patient for a long time during the

disease. I do not think I need to record any more detail of the various things that the Claimant indicated the Testatrix was able to do at various times. As will be seen below the evidence as to testamentary capacity is not decisive of the outcome of this case. I have recorded sufficient of it to show that (except upon the hypothetical basis I put to both of them and which I deal with below) the experts could not express a concluded opinion one way or another with regard to testamentary capacity at the time of the 2002 codicil but were agreed that at the time of the 2004 codicil (and from then onwards) the Testatrix did not have testamentary capacity.

39. Both Professors Howard and Jacoby are eminent in the field of old age psychiatry and there is a large measure of agreement between them. However it is quite clear that Professor Jacoby pays far less regard to the MMSE results and views the statistical exercise and the extrapolation backwards from 2004 to 2002 with great caution. This accords with my instincts. I would have been very reluctant to rely upon the MMSE results at a time significantly distant from the critical time at which testamentary capacity was to be assessed. I do not think that the MMSE results for September or October 2004 should be relied upon exclusively in assessing the Testatrix's mental state in March 2002. In the end, the difference between the two experts is really a matter of emphasis, but, so far as there is a difference, I prefer the views of Professor Jacoby. They both agree that the Testatrix did not have testamentary capacity on the 6th February 2004. They differ in emphasis in relation to March 2002. Professor Jacoby leaves this entirely open, preferring not to express a view. Professor Howard suggests that there was an "up to 50%" chance that the Testatrix had testamentary capacity at that time.

40. I should mention two other aspects of their evidence that seem to me to be of some importance. On the 29th July 2003 the Testatrix signed an Enduring Power of Attorney in the presence of a solicitor, George Collin, who has been in practice in this field for some 30 years. He spent three quarters of an hour with the Testatrix. In his witness statement he said that he was satisfied that the Testatrix wished to make an EPA due to her physical frailty and that she wished her son and daughter to use it as soon as possible. He went on:

> ***"If I had any doubts about mental capacity to make an EPA, I would not have allowed her to make it. If I had thought that she had mental capacity but that others might question it, I would have made a detailed attendance note."***

41. That statement was put before Professors Howard and Jacoby but made no significant impact on their conclusions. Professor Jacoby said that capacity is "task specific" and that capacity to sign an EPA is not the same as capacity to make a Will. He considered, however, that Mr. Collin's statement was consistent with his opinion expressed in his report that the Testatrix's ability to make a Will in 2002 would not necessarily have been impaired.

42. I had the benefit (which Professors Howard and Jacoby did not have) of seeing Mr. Collin in the witness box. I found him to be a careful and impressive

witness. His practice is in the private client field and he regularly drafts wills and powers of attorney. He recognized that capacity to make a will is different from capacity to make an EPA but was not prepared to say that the one was necessarily more complex than the other. He was satisfied as to the Testatrix's ability to make an EPA. He emphasized more than once that he had not allowed clients to make a power of attorney when he was not satisfied as to their mental capacity to do so. On one occasion he was satisfied that a client understood an ordinary power of attorney but not an enduring power of attorney. In this case he was satisfied that the Testatrix understood the concept of an enduring power not merely an ordinary power of attorney. If there had been any suggestion of a significant lack of mental capacity, he would have made a more detailed note. He did not recall any such suggestion, only physical frailty.

43. He was however relying heavily on his usual practice and his limited attendance note that merely recorded that the Testatrix and her son signed the EPA and that the meeting with them lasted three quarters of an hour. He had very little recollection of the actual event and would not now be able to identify the Testatrix from a photograph. However, he told me that he would have gone through with her the various alternatives printed on the back sheet of the Oyez conveyancing form 36E, for example, whether a general power should be given or a power subject to specified restrictions, and he would have considered with the Testatrix each alternative in turn.

44. Although Mr. Collin was speaking largely on the basis of his general practice and procedure in these matters, he impressed me as a careful solicitor of considerable experience in dealing with wills and powers of attorney. Allowing for the fact that capacity to make a will is not the same as capacity to make a power of attorney, I did feel that Mr. Collins presence in the witness box lent some colour and life to a rather bland witness statement, which is all that Professors Jacoby and Howard saw.

45. Another indication of capacity that seems to me to be of some potential help is that the Testatrix was able on the 21st October 2003 in a community care review form to comment in her own handwriting on the services she had been receiving. She wrote:

> ***"I would like to have some one that could come and give me a bath like a nurse as I have a bad foot and some one to help with the help in the house. I have "meals on wheels" which is a help for my diner and I cook my other meals."***

46. Professor Howard quite fairly indicated that without knowing the context in which this document came into being it was not of much help. It would be important to know whether the text was initiated by the Testatrix or by the social worker. He noted, however, that the quality of her language was impoverished and childlike, as was the spelling. The Testatrix was a woman who was highly literate. If she had moderate dementia, it is highly unlikely that she picked up the form and wrote this text by herself. Professor Jacoby said that he would not want to read too much into this document and, bearing in mind evidence of her competence to play scrabble, this document was some evidence of cognitive deterioration.

47. In all these circumstances, although I do not think I can place much reliance on this last document, I have come to the conclusion that, on balance, the Testatrix retained testamentary capacity on 21st March 2002. Although he did not express a view on way or another, this conclusion is not inconsistent with Professor Jacoby's evidence. As to the 6th February 2004, I accept the evidence of both Professors that by then she had ceased to have testamentary capacity.

48. Finally, with regard to the medical evidence, Professor Jacoby in his report said that he had seen no independent accounts of how the alleged codicils came to be made and that he could not therefore give a firm opinion on the Testatrix's mental capacity at the material times. In other words, as I understood, he did not take into account the evidence surrounding the actual execution of the codicils. At all events I asked both Professors to assume that the 2002 codicil came into existence in the circumstances set out in the witness statements of the attesting witnesses and on that hypothesis to express a view on the Testatrix's testamentary capacity on the 21st March 2002. For example, Miss Farmer said, in short, that the Testatrix dictated the content of the codicil to her and she wrote it down, read it over to the Testatrix and the Testatrix then signed it. I pointed out, and Professor Howard agreed, that the provisions of the 2002 codicil were perfectly rational and included an explanation of why the unmarried daughter was being preferred over the son so far as the house was concerned. This was not a case in which we merely had a statistical study to go on. We had evidence of what the Testatrix thought and did on the very day in question. I asked Professor Howard to assume that Miss Farmer's evidence was accepted and then to express a view as to the Testatrix's testamentary capacity on 21st March 2002. On that footing, he revised his estimate of the likelihood of her having testamentary capacity to 65% to 70%. Professor Jacoby also agreed that if events happened as the attesting witnesses said they happened that would "tilt" the Testatrix in favour of capacity. Of course, this evidence depends on the acceptance of the evidence of the attesting witnesses. If that evidence is rejected, and the conclusion is that the codicils were not made by the Testatrix at all, the medical evidence as to the Testatrix's testamentary capacity on the 21st March would not be relevant at all. As will be seen below I have indeed rejected the evidence of the attesting witnesses and that is why I indicated earlier in this judgment that the medical evidence is not decisive of the outcome of this case. However, the medical evidence of the Testatrix's mental condition over the years between 2002 and her death has been important and of assistance in the assessment of the evidence of the attesting witnesses as well as the evidence of the Claimant herself. It is to that evidence that I now turn.

Miss Farmer's evidence

49. I have set out the content of the first two codicils but not the circumstances in which they are alleged to have been made. I shall start with the 2002 codicil and the evidence of Miss Farmer. She swore an affidavit in the proceedings in the probate registry concerning the caveat against a grant of probate. With regard to the events of the 21st March she said:

> ***"On this occasion I was visiting the Deceased. The document is in my handwriting. It was mid-afternoon. Vera told me that she was worried about Janice. She was also upset with David. She called his wife the "wicked witch of the west". [She was scared of his wife]. Janice Gale was not present on this occasion. The Deceased said that she wished the house to go to Janice. I asked the Deceased what was to happen about her savings. She said that they were to be divided equally between Janice and David. She told me that she was worried for her daughter's future and wanted her to be safe with the property. I wrote out the Deceased's wishes as instructed. It was clear to me that Vera was instructing me to write down her wishes for what was to happen after her death. The other signature to the document is Michael Migliorini. He was a driver for Vera. He was present when I wrote out Vera's wishes. Once I had done this. [I read it out to her. She understood.] Vera signed. Vera signed in the presence of both Michael and me. After Vera had signed Michael and I also both signed.***

50. The words in square brackets were not in the original affidavit. The witness statement for the purposes of this trial was signed by her on the 7th November 2009. It was rather sloppily produced by incorporating the original affidavit as an exhibit with the manuscript additions of the words in square brackets.

51. I regret to say that Miss Farmer was a wholly unsatisfactory witness. If ever there was a case where the demeanour of the witness in assessing the truth was important it is this one. She came into the witness box with her eyes fixed across the court. She did not engage with the court or with counsel. She was almost monosyllabic in her replies which, to the simplest questions, came after interminable pauses. In closing, Mr. John reminded me that at one time there was up to a minute's silence before a reply. I formed the distinct impression that Miss Farmer did not come to court to tell the truth but rather to help the Claimant, whose side she plainly took in the Claimant's conflict with the Defendant. Miss Farmer made clear her view that the Defendant had turned the family against the Claimant.

52. Although her relationship with the Testatrix derived from her assistance in cleaning the house, Miss Farmer was not a stranger to the professional world, at least so far as accountants were concerned. She had worked as a personal assistant in an accountancy firm. She knew that the Testatrix had a family solicitor but when asked: "Did it not give you concern that an old lady was asking for this to be done?" she took refuge in repeating "she was asking me to do this." She said she had no qualms about doing this despite the fact that she had no legal knowledge. As to the two signatures on the codicil in addition that of the Testatrix she said she thought two signatures would be better than one. When asked why she thought that she said: "I don't know". She said she did not know how many signatures were required for a Will. It was pure chance, she said, that two signatures were enough. "Why Migliorini?" she was asked. "Because he was around" she replied.

53. The text of the codicil and the date is in her handwriting. I am prepared to accept that much. It was put to her that the signature of the Testatrix on the 2002 codicil was very different from other contemporary signatures of the Testatrix at that time. The signature of the Testatrix on the 2002 codicil was obviously executed with very poor pen control. It was nothing like the fluent and flowing signatures taken from contemporary documents in or about 2002. It was very much more like the deteriorated signature that had become characteristic of the Testatrix's signature in later years, particularly 2005. When the signatures in or about 2002 were put to her, Miss Farmer said that the signature on the 2002 codicil looked "slightly different", but she refused to agree that the signature on the 2002 codicil was placed there at some later date, and not in 2002. She said she thought that the Claimant should have the house and she was trying to help the Claimant have the house. When asked "You are not being truthful about the document?" it took her a long time, perhaps half a minute, to say "I am".

Miss Farmer's evidence on the 2004 codicil

54. She was then taken to the next codicil which bore the date 6th February 2004. Her evidence in this respect was as follows:

> ***"This is another occasion in the mid afternoon at the Deceased's home. On this occasion it was Janice who wrote out the Deceased's wishes. Janice, Michael Migliorini, the Deceased and I were all present. Vera said that Janice was to have my house if she wishes. Janice wrote down what the Deceased said. The Deceased also said that the other savings were to be shared equally between Janice and David. Once Janice had finished writing the Deceased's instructions [Janice read this out to Vera] the Deceased signed the Will in the presence of both Michael Migliorini and me. Once the Deceased had signed, Michael and I also both signed in the Deceased's presence."***

55. She was asked whether it was a coincidence that Mr. Migliorini was there. She said Yes. She was asked whether she thought it was odd that the provisions of the 2004 codicil were almost identical to those of the 2002 codicil. She said No, she was just signing as a witness. She said she was there when the Testatrix gave instructions for this codicil. Asked whether those instructions were given by the Testatrix on her own initiative, she answered "She was saying a few wishes and then pointing to Janice". When questioned: "Did Vera clearly express her wishes or not?" she answered: "She was clear in her instructions".

56. Then there was put to her the statement of Mr. Migliorini in relation to the 2004 codicil in which he had said that on this occasion the deceased's mind was less alert than before and she was finding difficulty in finding the words to express what she wanted to say. She would utter a noise, he wrote in his statement, and those present would make a guess at what the Testatrix wanted to say, to which she would respond Yes or No.

57. That statement was hardly consistent with Miss Farmer's evidence that the Testatrix was clear in her instructions. When asked who was the more reliable witness she said, "We were both witnesses". Mr. John asked her: "Why are you having difficulty in answering questions?" "I find it hard to remember", was the answer.

Miss Farmer's evidence on the September 2005 codicil

58. She was taken next to the September 2005 codicil. This is one that the Claimant abandoned as a valid testamentary document in her reply. Miss Farmer said that she remembered being there. "I can remember everything" she said. The text of this codicil was written out in capital letters in manuscript by the Claimant. It read as follows.

> ***2nd September 05***
>
> ***I wish my daughter Janice Gale to also be executor of the will.***
> ***This is a replacement of the same instruction written & signed in May 2004 mislaid.***

59. It was signed by the Testatrix in a very shaky hand, typical of the deteriorated signature of the Testatrix seen on other documents in the years from 2004 onwards. Below her signature are the words "Witnessed by" followed by the signatures of Miss Farmer and one D Gilden, a neighbour.

60. Miss Farmer's evidence about this was as follows:

> ***"On one afternoon which appears from the date of the Codicil to have been the 2nd September 2005 I was visiting the Deceased, as I usually did. The Deceased's daughter Janice Gale, was also present as was a neighbour, David Gilden. The Deceased asked David and me if we would witness her signature on the Codicil. We both agreed.***
> ***The Codicil was written out by Janice Gale in the presence of all of us. Janice also read out to us all what was being written. Namely that the Deceased was to appoint Janice as an Executor of her Will.***
> ***The Deceased confirmed that she wanted Janice to be her Executor. She signed the Codicil in the presence of both David Gilden and me. After the Deceased had signed David and I also both signed in the presence of the Deceased. After we had all signed the Deceased gave the original document to Janice for safe keeping."***

61. She was asked whether the Testatrix played any part in all this and Miss Farmer said that in the case of each document the Testatrix's wishes were clearly expressed.

62. It appears that a further document was written out by the Claimant for the Testatrix to sign on that day. It read as follows:

> ***"2nd September 05***
>
> ***It is OK for my daughter Janice Gale to live here & to have exclusive keys to her rooms."***

63. This document was signed by the Testatrix, again with a very shaky signature characteristic of other signatures of hers at the time. There followed the words: "witnessed by" and the signatures of Miss Farmer and D Gilden. This document was not put forward as a codicil. In Miss Farmer's affidavit there were two separate groups of paragraphs dealing with what appeared in the affidavit to have been two separate documents of 2nd September 2005 witnessed by Miss Farmer and D. Gilden. It appears however that, having dealt with the September 2005 codicil, Miss Farmer seems to have repeated herself, as if there were two codicils appointing the Claimant as an executor. There appears to be no recognition that the second document of the 2nd September 2005 had to do with the Claimant having exclusive keys to her rooms in the Testatrix's house. I expect that this simply represents carelessness on the part of Miss Farmer but it does not fill me with any confidence that I can rely on her evidence.

64. In oral evidence she was asked about this second document of 2nd September 2005. She said that the Defendant had come to the house and put all the Claimant's "stuff" in the garage. It was put to her that this document was brought into being to be used as ammunition against the Defendant. Miss Farmer said that the Claimant felt that she needed to do something because the Defendant had removed all her "stuff". She was asked whether it was the Claimant who instigated the preparation of this document. Miss Farmer said "Yes" but, she added: "The testatrix agreed". She was then asked: "Did you know that she was suffering from severe dementia by 2005?" The answer was Yes but that this protected the Claimant and that the Defendant was not a proper brother.

Miss Farmer's evidence on the November 2005 codicil

65. Finally, so far as Miss Farmer is concerned, there is the November 2005 codicil. That read as follows:

"18th November 2005

I wish Janice my daughter to be sole executor of my will."

66. There followed the shaky signature of the Testatrix, followed by the word "witnessed", in turn followed by the signatures of Miss Farmer and Mr. Migliorini. Miss Farmer's affidavit evidence about this was as follows:

> ***"This document was also signed the mid afternoon. I had come to visit the Deceased. Michael Migliorini also arrived. The Deceased said that she had seen how David was treating Janice. Janice was her main carer and she wanted her to be the Executor. The Deceased confirmed her wishes to Janice. Janice wrote out the document. Michael and I were both present when the document was written up. Once Janice had completed the writing [she read this to Vera] and the Deceased signed first. Michael and I were both present when the Deceased signed. Then I signed and finally Michael. The Deceased was present when we both signed.***
> ***I knew the Deceased very well. Her condition did vary. There were days when she was lucid and other days less clear. I do believe that***

on the various occasions when each of these documents were signed the Deceased clearly expressed her wishes and knew what she was doing.".

67. I formed the clear impression that Miss Farmer's evidence was simply not reliable. I think that she came to court to help the Claimant and was prepared to sign anything and to say anything that would help the Claimant's case. Her written evidence read as if it was prepared according to a prescribed formula. "The Deceased signed" – "in the presence of both Michael and me" –and, finally, "Michael and I both signed." There was then a manuscript addition to her affidavit evidence made about a year and a half later that once the codicil was written out it was read over to the Testatrix. This addition was made in respect of the 2002 codicil, the 2004 codicil and the November 2005 codicil. It was as if there was a box which she had failed to tick when the affidavit evidence was prepared in mid-2008 and she appears to have remembered this detail in relation to each of those three codicils when she signed her witness statement a year and a half later.

68. On any view the Testatrix was suffering from dementia in 2004 and 2005. Yet Miss Farmer's evidence was that the Testatrix expressed herself clearly on each and every occasion. As will be seen below, as a result of the electro-static document testing evidence, it is likely that the writing on the paper that is put forward as a codicil executed on the 6th February 2004 came into being, not on the 6th February 2004, but at a later date, probably in 2005. In other words, the 2004 codicil was a false document purporting, as it did, to have been executed in February 2004. Timing is critically important in a case like this because of the steadily deteriorating mental capacity of a Testatrix suffering from Alzheimer's disease. Miss Farmer participated in bringing the 2004 codicil into being. She puts it forward as a document signed in the circumstances outlined by her on 6th February 2004. She was given every opportunity to say whether it may have been signed at a later date. If she participated in perpetrating a falsehood with regard to that one document, it leaves me in doubt whether any other codicil in which she participated is genuine or whether it represents a similar falsehood. The most important document, of course, is the 2002 codicil, because that is the only one which, in the light of the admissions made in the Reply and my findings in relation to testamentary capacity, stands any chance of being upheld as a testamentary document. I do not accept Miss Farmer's evidence about the events of that day, the 21st March 2002. I do not think that document was brought into being at that time. I believe that it was brought into being much later than that, probably in 2005 but possibly even later than that. As will be seen below I do not even accept that it was signed by the Testatrix at all. I do not accept Miss Farmer's evidence except where it is corroborated by other acceptable evidence.

The Claimant's Evidence

69. This brings me to a consideration of the Claimant's evidence. She said that the Testatrix had been soldiering on by herself for eight years after the

Claimant's father died. The Testatrix was expecting to have a total knee replacement operation on 18th October 2001 and she needed emotional reassurance. The Claimant therefore moved to stay with her before the operation. In paragraph 7 of her witness statement she said:

> ***"The Deceased was always asking whether I wanted her house because it was the family home. It was the house where I had been brought up and spent my childhood. Mum had put a great deal of nurturing in the house and she knew it was irreplaceable because it was home and not just bricks and mortar. So Mum knew it was special to me. She always worried about me."***

70. The Testatrix and the Claimant went to see a solicitor, Mr. G. Gilbert of Messrs. Barnes & Taylor, in November of 2001. Mr. Gilbert wrote a letter on the 4th December confirming what had been discussed. The letter is lengthy but, in summary, it concerned two issues: first, the transfer by way of gift of the house in Beverley Gardens into the names of the Claimant and the Defendant by way of trust or otherwise and, secondly, the creation of an enduring power of attorney. The motive for the gift of the house was to protect it against being taken into account by the social services in the event that the Testatrix had to go into residential care, and thus to prevent the house from being resorted to pay the costs of that residential care.

71. The Claimant and the Testatrix thereafter made an appointment to see Mr. Gilbert on 19th March 2002. The appointment is in the Testatrix's diary and in her handwriting. However, Mr. Gilbert cancelled that appointment because he was ill, and the Claimant says that she and the Testatrix never got round to making a new appointment. Her evidence about the 2002 codicil in her witness statement is as follows:

> ***"On 21 March 2002 I went out. I do not recall whether I knew that Corrinne was calling to visit that day or not. On this particular day I do not recall any discussion with the Deceased about the house or any preparation of any document. I was shown the document by my mother on my return to the house. She gave it to me for safe-keeping. I did not show or discuss the document with anyone else because of family relations".***

72. In her affidavit in the caveat proceedings she did recall some discussion about the house. She said:

> ***"Beforehand the Deceased had told me that she wished me to be able to stay in the house after she was gone……..When I returned home that day the Deceased said that she had written something down and that if I wanted the house I could have it. She handed the document to me to keep and I went upstairs and put it in a drawer.***

73. In the witness box the Claimant was asked whether she instigated the visit to the solicitor in November 2001. The Claimant was not straightforward in answering this question. She was evasive. She would not agree with the word

"instigated". She said that she had probably talked to her mother about the transfer of the property in trust because her mother "probably" would not have been aware that the transfer of the house would have been advantageous. It was pointed out to her that in 1994 the Testatrix had had solicitors prepare a Will for her and that again, in November 2001, she went to solicitors to prepare a power of attorney and a trust. If she was going to radically change her will, counsel suggested, the Testatrix would have gone to solicitors in order to do so. The Claimant answered: "Not necessarily, no". The Claimant said that it did not concern her that the Testatrix had not seen a solicitor and that she was not surprised that she had chosen to dictate the 2002 codicil, unprompted, to Miss Farmer. She was not surprised that there were two witnesses. She added: "I think she wanted to be sure that I could have the house if I needed it". It was put to her that the codicil represented a radical change. "I did not think it was radical because she was worried about me", she said. She added that she knew that the codicil could stir up problems. "I did not think that we should go to a solicitor because it was not uppermost in my mind. I didn't think it was necessary to go to a solicitor and they cost a lot. I knew if there were two witnesses it was a proper document. I thought it was fine as it was".

74. I have to say that I find the Claimant's evidence about the 2002 codicil difficult to believe. In 1994 the Testatrix made a Will under the guidance of a solicitor treating her two children equally (apart from the understandable gift of her jewellery to her daughter). She then consulted a solicitor in November 2001, when an outright gift to the daughter and son was under consideration and, after the solicitor wrote confirming the advice and discussion in November, an appointment for the 18th March 2002 was made to revisit the solicitor in this regard. That appointment was then cancelled by the solicitor because of illness. Now against these facts I am asked to believe that two days later the Testatrix, a woman of over 80, suffering from the early stages of dementia and plainly dependent on her daughter who was living with her, without discussing with the daughter the alteration of her Will in favour of her daughter and without discussing the house beyond the brief comment in the affidavit which I have quoted in paragraph 72 (and which the Claimant appears to have forgotten by the time of her witness statement made on 13th January 2010) made a codicil radically changing her Will in favour of her daughter by dictating the text to her cleaning lady while the Claimant happened to be out of the house. Quite apart from the many other reasons for rejecting the Claimant's evidence and which I consider below, I found it difficult to accept this evidence.

The Claimant's evidence as to the 2004 codicil

75. I turn to consider the Claimant's evidence about the 2004 codicil. Her evidence in this regard was contained in her affidavit of 16th July 2008. It was not repeated in her witness statement. She said in paragraph 4 of that affidavit:

> ***"I was present on the 6th February 2004 when the Deceased signed a second document). She had sometime before said to me that she***

wanted to be sure her wishes would be valid because it was sometime ago since she signed the last document. The document was prepared on the 6th February 2004 because Corrinne happened to be present and it was thought to be a good opportunity. The Deceased's words were to the affect "I want Janice to have the house and everything in it if she wishes and the money to be shared between Janice and David." I wrote down the Deceased's wishes as she spoke and changed the wording slightly to be more formal. The Deceased, Corrinne Farmer and Michael Migliorini were all present as the Deceased spoke and as I wrote out her wishes. The Deceased said that I was to have the house when she was gone. I understood from this that she meant after her death. It was obvious that I would not be wanting the house in her lifetime. Once I had written out the Deceased's wishes, I read out to the Deceased what I had written and the Deceased signed her name. She signed in the presence of both Corrinne Farmer and Michael Migliorini. Once the Deceased had singed Corrinne Farmer and Michael Migliorini also both signed while the Deceased was present. I recall that the Deceased on this occasion was able to sign and did so without help. After the document had been signed and witnessed the Deceased gave it to me. She said I should keep it. I took it to my room upstairs.

76. The Claimant was asked why this codicil was necessary bearing in mind that the 2002 codicil covered the same ground. The Claimant's answer was that she "probably" had mislaid the 2002 codicil and that she thought her mother wanted to reassure her. I found that answer unconvincing. If she had lost the 2002 codicil and had to replace it I would have expected her to remember this and tell me, simply, that she had lost the 2002 codicil and had to replace it. Instead, she tells me that this was "probably" the reason and she goes on to imply that the initiative came from the Testatrix.

The 2005 Settlement

77. If the 2002 and 2004 codicils were executed as the Claimant claimed an astonishing event took place in January 2005. In late 2004 and early 2005, the Claimant and the Testatrix consulted a company called Affinity Wills Limited, who prepared a settlement whereby the Testatrix would gift 15 Beverley Gardens in trust for herself for life with remainder to the Claimant and the Defendant in equal shares. The Testatrix duly executed the settlement on the 23rd January 2005. The trustees of the settlement were the Claimant and a Mr Prowse, both of whom executed the settlement as well. I did not hear any evidence from Mr. Prowse or from anyone else representing Affinity Wills Ltd.

78. Neither side has put this document forward as a valid settlement. It has, of course, been accepted since the date of the Reply that the Testatrix ceased to have testamentary capacity in the late summer of 2004 and no doubt it is accepted by both sides that the Testatrix did not have the mental capacity to make this settlement.

79. However, the fact that it was done at all is by no means irrelevant to an understanding to what really happened in this case. First of all, the event is consistent with the picture that emerged in the evidence of what seems to me to be a manipulation of the Testatrix by getting her to sign many different documents that she, in all probability, did not understand. Having regard to her likely mental state in January 2005, I infer that the Testatrix did not herself initiate the approach to Affinity Wills Ltd. Further, the fact that the Claimant was instrumental in procuring such a settlement, which disposed of the house after the life interest of the Testatrix to the Defendant and herself in equal shares, throws considerable doubt on whether the 2002 codicil or the 2004 codicil had, by January 2005, been brought into existence. Had they been, the 2005 settlement would of course have effectively undone the effect of the radical alteration of the Testatrix's will achieved by those codicils. When confronted with this in the witness box, the Claimant said that she thought the codicils were valid and stood despite the trust. I found this answer difficult to accept. The Claimant may not have been a lawyer but she was not, in my judgment, so unintelligent as not to understand that if the house was taken out of her mother's estate, the will or codicil would not have a continuing effect upon it. It was suggested to her that the 2002 and 2004 codicils came into being after the 2005 settlement, but she refused to accept this. In my judgment, it is probable that the 2002 and 2004 codicils had not been brought into being before the 2005 settlement. The making of that settlement was quite consistent with what had been discussed with Mr. Gilbert in 2001. Nothing was done about it at that time, but the idea of putting the house beyond the reach of the social services had not gone away and was ultimately carried into effect in January 2005. I find that it was only after that, and perhaps some substantial time after that, that the Claimant's mind turned to the possible disposition of the house in her favour by a codicil to her mother's will. Of course, if the house had been validly settled in January 2005, no will or codicil would have been able to control its disposition on the death of the Testatrix. The Claimant may well have understood this and appreciated the limited value of a codicil which attempted to do this, but there was always the possibility that the settlement might be suppressed or that the settlement might be regarded as ineffective because of the Testatrix's mental state at the time. It would not surprise me if the Claimant simply did what she could by way of procuring a codicil in her favour in the hope that, one way or another, it would improve her position later on.

80. I note that in her affidavit in the proceedings concerning the caveat, having referred to her mother's and her consultation of Affinity Wills Limited over putting 15 Beverley Gardens in trust, she said: "In the event this never happened." Of course, by this time, it would have been inconvenient if it had happened. From the evidence before me, although the settlement may have been invalid, it manifestly "happened" and was executed by all relevant parties.

Three further signed documents

81. It would be convenient at this point to complete the picture of the documents signed by the Testatrix. I have so far referred to the four codicils and the extra document of 2nd September 2005 concerning the keys to the rooms in the house occupied by the Claimant. There are three more documents purported to be signed by the Testatrix in 2005. None of them is witnessed. They are not codicils. They are in the handwriting of the Claimant and they read as follows:

> ***"21st August 2005***
>
> ***I wish my daughter to have exclusive use of her back bedroom and the boxroom for privacy and for her to be able to lock both rooms and keep the key for herself and not have to give the key out or a spare key out for her privacy. I suggest to my daughter that she has the upstairs and I have the downstairs of the house.***

> ***2005***
>
> ***I wish my daughter to have exclusive use of her back bedroom & the boxroom & for her to be able to lock both rooms and not have to give the key out or a spare key out. I suggested to my daughter that she has the upstairs and I have the downstairs of the house.***

> ***2005***
>
> ***I initiated asking Janice to live upstairs and I Vera Gale, downstairs, and she can lock her rooms for privacy and not give the keys out, even after my death.***

574(9) and the evidence of the Defendant

82. This last document I shall refer to as to 574(9) which was its page number in the agreed bundle and is the description by which it was identified in the evidence. To set these documents in their proper context, I should refer briefly to the evidence of the Defendant. I accept his evidence. I found him to be a careful witness who came to court to tell the truth. He was forced into these proceedings by the caveat against the grant of probate. His distaste for these proceedings was palpable; yet he was nothing but courteous to his sister in answering her questions, and was evidently sympathetic towards her and visibly concerned when she showed signs of distress. As it happens, all the codicils came as a total surprise to the Defendant and so, apart from helping me with some of the family history, there is not much direct evidence he can give about the codicils and the other documents. However, the incident involving the removal of the Claimant's belongings to the garage and the subsequent fitting of security deadlocks to the doors to the bedrooms occupied by the Claimant is of some importance and I quote below two paragraphs from the Defendant's witness statement.

"31. My relationship with Janice had started to break down soon after 2001 and completely broke down in about August 2004. My mother was very house proud and could still get upstairs at that time. Janice had stayed occasionally in the larger of the two back bedrooms and she also used the smaller bedroom for extra storage of her increasing hoarded paperwork, clothes, old magazines, notes and books, a broken computer and other plastic bags full of un-discarded matter. This use and filling of the small bedroom in particular upset my mother. The wallpaper in the room began to peel and mould appeared, it required redecoration because there was a lack of air circulating. You had to fight your way to get into the room. My mother wanted the room cleared and to get it decorated and a fixation on this and got very upset. I telephoned Janice a number of times and left messages on her various mobile phones, which she never answered. My mother had previously asked her to clear the room many times, but it just resulted in an argument. We came down one weekend to put my mother's mind at rest and clear it for her. In the end we put the piled up things into large boxes, sealed them all up and put them in my other's garage. The rest of the material was obviously rubbish (empty cereal boxes, dirty offd packaging, torn newspaper, part empty plastic bottles, etc) which we put into black plastic bin liners asking Janice to collect them and leaving voice mail messages. As she did not do so in the end I took the black bags of rubbish down to Janice's flat in Shoeburyness, really just to make a point and not to be accused of throwing things away. I knocked on her upper floor flat door several times but when she did not respond I left the bags undercover by the front door of the flat. I then got the bedroom completely redecorated for my mother. Janice was very much upset by my actions and from then on our relationship completely deteriorated.

33 Later in 2004 Janice fitted two separate security deadlocks to both back bedrooms and kept them locked even when she was in one. My mother was not given the keys. When I found out I told Janice that she had no right to do so and asked her to give me a set of the keys or leave some with my mother, but she refused. The main heating controls for the house were in the locked bedroom and no one but Janice had access. The front bedroom was taken over by Janice and the Carers were banned from entering by her. This bedroom, which used to be my mother's, then became a cluttered storage area which my sister used."

83. This is the event which is referred to by Miss Farmer when she talked about the Defendant removing the Claimant's "stuff" to the garage. That event appears to have happened in late 2004. The three documents I have quoted above all concern the use by the Claimant of the upstairs two bedrooms and her right to keep the rooms under her exclusive lock and key. The Claimant procured these documents from the Testatrix in order to justify her locking

these rooms against access by the Defendant. I am not concerned with the rights or wrongs of this unseemly dispute, although I pause to note the obsessive behaviour of the Claimant in bringing these pieces of paper (two of which are practically in identical form) into existence. The very multiplication of them, especially at a time during which (as it is now admitted) the Testatrix did not have testamentary capacity, inclines me to a rejection of all of them, including the codicils, as effective documents.

The forensic evidence

84. The reason why I have referred to these events and these documents is that, by chance, the forensic examination of the original of the 2004 codicil showed up indented impressions from the document at 574(9) of the bundle. This was first discovered by Mr. Michael Handy MSc CChem MRSC MFSSoc, the handwriting expert of the Defendant, when he had an opportunity to examine the original of the 2004 codicil on third day of the trial, the 19th May 2010. However, the fact that there were indentations on the 2004 codicil corresponding to the writing on 574(9) is not remarkable. After all, 574(9) appeared to be written in 2005 so that if the piece of paper containing the 2004 codicil was in the pad underneath it at the time it would have made indentations upon that piece of paper. 574(9) was written in 2005 or at least late 2004 because the subject matter of it concerns the locks on the bedroom doors and the event that led to those locks being installed only happened in August 2004.

85. What is remarkable, however, is that the Electrostatic Document Analyser (the "ESDA" test) can identify whether the indentations on the 2004 codicil were made before or after the ink writing on the 2004 codicil was applied to that piece of paper. The ESDA test produces what is known as an ESDA "lift" in which black writing represents the indented impressions and white or clear writing represents the actual ink writing on that piece of paper. At the intersections between the white and the black writing on the ESDA lift one of them will be dominant and continuous and the other broken. The unbroken colour will, of course, represent the one that came later. In this case the ESDA lift, which was put into evidence by Mr. Handy and is marked as exhibit D1, shows that the ink writing on the 2004 codicil was applied after the indentations derived from document 574(9). Mr. Handy did not express his view as categorical but his evidence is that it is likely that the writings on the 2004 codicil were made after the document at 574(9) was written. I found Mr. Handy to be a careful and impressive witness.

86. It was plainly of the greatest importance in the light of this evidence that the Claimant should have the opportunity of calling her own handwriting expert, not only because of the ESDA test but also because, as I shall mention below, Mr. Handy's evidence was that the purported signatures of the Testatrix on the three original codicils he was able to examine were forgeries. For that reason, I had no hesitation in granting the Claimant an adjournment on the fourth day of the hearing, to enable her to obtain her own expert evidence. Mr. John resisted this adjournment, asking me to deliver a formal reasoned judgment, which I did. At all events, the Claimant obtained expert evidence which was

heard on the afternoon of the 11th June. Her expert was Mrs. Fiona Marsh Msc, who was trained in document examination at the Metropolitan Police Forensic Science Laboratory where she worked for eight years.

87. I shall come to her evidence concerning the alleged forgery later on in this judgment. For the present I note that Mrs. Marsh's evidence concerning the indentations on the 2004 codicil coincided with that of Mr. Handy in confirming that the ESDA testing of the 2004 codicil shows that the ink writing on the 2004 codicil was written after the document at 574(9) was written. Mrs. Marsh did express the view that the quality of the ESDA lift in respect of the 2004 codicil was not as good as, for example, another ESDA lift that she and Mr. Handy performed showing indentations on the codicil of November 2005, which originate from another one of the three quoted documents concerning the locks on the bedroom doors. However, Mrs. Marsh confirmed Mr. Handy's conclusions in relation to the 2004 codicil. I find that the 2004 codicil was written after the document at 574(9).

88. I find further that the document at 574(9) was created at the earliest in or about August 2004. When confronted with this ESDA evidence the Claimant sought to downplay the significance of her notation in the right hand top corner of 574(9) of the year 2005. She said that she put that date on the document at a later time as an estimate of the date to help the handwriting expert date her mother's signature. However, she accepted that it must have dated from a time after she had fitted the locks on the bedroom doors. It was put to her that 574(9) cannot have been written until late 2004. She answered "round about that time or later".

89. In my judgment, the 2004 codicil was a false document in that, apart from the genuineness or otherwise of the Testatrix's signature, it was not brought into being on the date it bears. When it came into existence, I do not know although, as indicated above, I think and find that it was sometime after the date of the 2005 settlement.

90. This would be enough for me to reject the evidence of the Claimant. She was plainly the central figure in the production of the 2004 codicil. It was in her handwriting. If she can perpetrate a fraud by ante-dating a document like this, I cannot trust her evidence in relation to any other important document in the case.

The Claimant's evidence as to the 2005 codicils

91. Although I have indicated my rejection of the Claimant's evidence, I think it important in a case like this in which I am finding that a fraud has been perpetrated that I should set out the Claimant's evidence in relation to the two other codicils that she sought to prove in solemn form, but has abandoned in her Reply, following the admission that the Testatrix did not have testamentary capacity. As to those two codicils she said in her affidavit:

> ***"On the 2nd September 2005 Corrinne Farmer and I had a discussion with the Deceased. She had always been traditional in***

her view that the older son should take responsibility for me as the daughter. Hence her appointment of my brother as sole executor in the 1994 Will. She had however a change of heart. Because of the amount of help I was giving my mother by way of care she thought I should not be left out and should be able to help. Her words were that Janice was to be "Exect". I understood she meant Executor. I wrote out the Deceased's wishes as she spoke and in the presence of Corrinne Farmer and a neighbour David Gilden. Once I had done so, I read out to the Deceased what I had written and she signed. The Deceased signed in the presence of Corrinne Farmer and David Gilden. Once she had signed both Corrinne Farmer and David Gilden also signed in her presence. After the signing my mother gave me the original document (3) to keep. I put it in my room. The document refers to it being a replacement of the same instruction written and signed in May of 2004 but mislaid. There had been an earlier document which also appointed me as Executor with my brother. This was signed and witnessed in May 2004. The document had been lost and I had no copy. The document had been witnessed by neighbours Mr and Mrs Lovell of 3 Beverley Gardens. They have however since written to me that they are unable to sign to the effect that they witnessed any document.

The 18th November was the Deceased's birthday. The Deceased had been talking about appointing me to be the only Executor as against previously acting jointly with my brother. Her words were that she wished me to have the job of "Exec". The opportunity for completing the document arose because I had arranged for there to be company for the Deceased's birthday and both Corrinne farmer and Michael Migliorini were to hand. The Deceased gave her instructions and I wrote it down in the presence of both Corrinne Farmer and Michael Migliorini. Once I had finished writing I read out to the Deceased what I had written and the Deceased signed her signature. On this occasion I assisted her by holding the paper for her as she wrote. The Deceased signed in the presence of both Corrinne Farmer and Michael Migliorini. Once the Deceased signed Corrinne Farmer and Michael Migliorini themselves both signed in the Deceased's presence. After the Deceased had signed she gave me the paper to keep and I again I put it in my bedroom."

92. The Claimant accepts that the Testatrix did not have testamentary capacity after of summer of 2004. Yet here she is giving evidence that the Testatrix thought that she should be made an executor with her brother and then, in November, sole executor. The very fact that she originally put forward these documents as valid testamentary documents alongside the 2002 and 2004 codicils throws doubt upon the validity of all four codicils.

Signed document dated 13th September 2004

93. There is one curious feature of the September 2005 codicil and that is the reference in that codicil to it being a replacement of a similar instruction written and signed in May of 2004, which was mislaid. At trial there was included in the bundle and dated 13th September 2004 the photocopy of a document which read as follows:

> ***"This is to say that I wish my Daughter to also be an executor of the Will (Janice Gale)"***

94. It appeared to be signed by the Testatrix in the shaky signature of the later period and her signature appears without any attestation clause, to be witnessed by Patricia R Lovell and Bernard Lovell. This document was not sought to be proved in solemn form. It dates, of course, from a period when it is acknowledged that the Testatrix did not have testamentary capacity. Mr. & Mrs Lovell were called by the Defendant to give evidence, largely, I think on the issue of testamentary capacity and the behaviour of the Claimant in excluding them from visiting the Testatrix. They were transparently honest witnesses and I accept their evidence. They seemed to recognize their signatures on the document of 13th September 2004 but told me that they had quite forgotten the event. In the event, nothing, I think, turns on this document. It may well have been that the Claimant was concerned in late 2004 to ensure that she had joint control over the administration of her mother's estate. There was a certain amount of conflict during the Testatrix's lifetime in connection with the control of her assets by means of an enduring power of attorney and so it is not unlikely that the Claimant put her mind to the future control of those assets after her death.

Events after the death

95. After the death of the Testatrix the claimant wrote to Mr Carlisle of Messrs Barnes & Taylor who were acting for the Defendant in relation to the administration of the estate. She said, in a letter dated 20th May 2007:

> ***" I wish to advise you that I need to be fully involved in all the decision-making of Mum's estate, particularly in regard to the family home where I have been with my Mum all these years, caring for her, until the day she was removed to hospital totally against my will under the circumstances.***
> ***It is my express wish as regards the family home is concerned that I be included as a joint owner in the title deeds of the family home."***

96. She wrote a further letter dated 3rd June 2007 in which she said:

> ***"I wish to continue in the family home and I am sure that there is a way that I can remain in the family home where the estate is arranged in such a manner that is satisfactory both to myself and to my brother".***

97. This is scarcely the kind of letter a person who knew that codicils had been made which gave her the house would have written at the time. When this was put to the Claimant she said that the Defendant was in a hurry to sell and if he knew of the codicils he would have rushed the matter through. She added that she did not have the codicils to hand at that time. She had lost them. Counsel pointed out to her that "you don't mention codicils in the letter" she said: "I was frightened he would rush through the sale of the house". "You could still have said: there are codicils", said counsel. "I did not have them", she said. It was put to her that she knew that they were not valid documents. "No", she said "I didn't think so. I don't think that it is surprising that I didn't mention it. In the position I was in that was the best thing to do". Her reason given for not mentioning the codicils was not credible. She would have known or, if not, was well able to find out, that she could have stopped the grant of probate by registering a caveat, as she eventually did. This would have given her time to institute a search for the codicils.

98. On the 14th December 2007 the Claimant entered an appearance to the warning of the caveat saying that she had a "right to remain in the family home". It was not until 28th January 2008 that the existence of codicils was mentioned. On that day she filed an amended appearance to the warning and said:

> ***"I am the only daughter of Vera May Gale deceased and I am a beneficiary under her will dated 28/1/1994.***
>
> ***1. There are codicils making me joint executor and***
>
> ***2. There are codicils giving me a greater interest in the estate than stated in the Will."***

99. When this was put to her in the witness box she said:
"I only said it when I had to say it. I was disorganized".

100. It was put to her that it was not until July 2008, just before the hearing in the probate registry concerning the caveat, that she produced the codicils. In answer she said, ***"I did send, in March 2008, the codicil appointing me joint executor. I found the other codicils in June 2008".*** She attributed the loss of the codicils to the event when the Defendant removed her belongings to the garage in the house. After the amended appearance, which mentioned the codicils for the first time, Messrs Barnes & Taylor on two occasions requested sight of the codicils referred to in the appearance. On the 18th March 2008 she sent the codicil appointing her a joint executor and said: ***"I wish to show the other documents to my solicitor before submitting them."***

101. The only other piece of evidence in this regard was that at the funeral, when she and her brother were asked who was going to pay and her brother said that he would do so because he was the executor, she made some reference, in the hearing of her brother, to the fact that she had a letter or note that she was to share the executorship jointly. The silence of the Claimant for so long after the death about the existence of the codicils (and in particular those dealing with the house), apart from this oblique reference at the funeral, confirms my view that either the codicils did not exist at the time or, if they did, were not

genuine documents, and that the Claimant did not want to disclose them until she had absolutely no choice but to do so.

Claimant's evidence – conclusion

102. I found the Claimant to be a very complex person, preoccupied with conserving for herself the house in Beverley Gardens and quite obsessed with getting her mother to sign paper after paper concerning the disposition of the house after her death and the use of it during her lifetime. I do not doubt that she loved her mother but neither do I doubt that she was preoccupied with the impact on her inheritance if her mother went into residential care. She stood out against her brother and the social services in keeping the mother at home, and in the process came into harsh conflict with the social workers. This case is not about the care her mother received and I was not taken over the vast amount of material that may have been relevant to this issue. Rather than attempt to record the unhappy detail, I hope it will suffice to say that I accept the evidence of Mrs. Leigh Humpage, a lecturer in social work and a registered Psychiatric Social Worker who said that one could talk to Janice about her mother "but even in the face of clear evidence that her mother could not get out of bed and feed herself, Janice would deny the facts". I experienced something similar in the context of this litigation. At one point, when confronted with the evidence that it was likely that the 2004 codicil was not written in 2004, but later, she suggested that one explanation of the evidence might be that counsel or his solicitors might have tampered with the original codicil. There was a kind of relentlessness about her, never recognizing that she might be wrong. This gave her the appearance of believing in her own case. If she did I am afraid that she was deluded. However, I have to confine myself to deciding what actually happened and, in this endeavour, I felt wholly unable to rely upon the Claimant's evidence. I do not accept her evidence except where it is corroborated by other acceptable evidence.

Mr Migliorini

103. It became clear on the second day of the trial that the Claimant had made no arrangements for Mr. Migliorini to come and give evidence. When I expressed surprise at this the Claimant said to me: "You have his statement". I explained to her that evidence at trial was given orally and that I would give negligible weight to his statement if he was not called. The same thing had happened so far as Professor Jacoby was concerned. Fortunately, the Claimant was able to contact him and, as he was giving evidence in another court on the fourth day of the trial, I was able to take his evidence on that day. So far as Mr. Migliorini is concerned, he had written in capitals at the end of his witness statement: "DUE TO ILL HEALTH I CANNOT HELP ANY FURTHER". I asked the Claimant how old he was and she told me that he was about 40 and I was not told that there was any reason why he was unable to come to court to give evidence. I therefore authorised the issue by the Claimant of a witness summons to enable her, if she wished to have his evidence, to ensure his attendance at court on one of the two days to which the case was adjourned.

104. Although, as will be seen below, Mr. Migliorini has withdrawn his witness statement, I think it is instructive to note the detail in which he described his witnessing of the 2002 and 2004 codicil and the codicil of November 2005. His witness statement was dated 20th October 2009 and merely incorporated by reference his affidavit sworn on the 16th July 2008 for purposes of the proceedings concerning the caveat. I quote from three paragraphs of his statement:

> ***21st March 2002***
>
> ***"I called at the Deceased's home by chance. When I arrived I found Corrine Farmer sitting at the table with Vera. Corrine was writing out Vera's instructions. Janice Gale was not present on this occasion. I remember Vera stating that she wanted to make sure that Jan was okay. In the past she had done something for David but she wanted to change it all. David had not done anything to warrant what she had done for him in the past and that is why she wished to change it. I can confirm that Vera communicated her concerns for Janice and that she wished her to keep the house and contents. After Corrine had written out the Deceased's wishes, the Deceased signed the Will. Both Corrine and I were present and saw her sign. After the deceased had signed she remained present and saw Corrine and I both sign. I can confirm that the document dated 21st March 2002 is the one which Corrine wrote out and was signed by all three of us as I have described it.***
>
> ***6th February 2004***
>
> ***This document also contains my signature. On this occasion Janice telephoned me and asked me to go round to witness. I agreed provided it was not going to take too long. On this occasion the Deceased, Corrine Farmer and Janice Gale were all present. On this occasion the Deceased's mental state was less alert than before. She understood what was said to her. She was however in difficulty in finding the words to express what she wanted to say. If she could not say what she intended she would utter a noise. We would then make a guess at what she wanted to which she would respond yes or no. The Deceased said the word "the house" she also pointed at Janice. When asked whether she wished all of this to go to Janice she said yes. In relation to the other words were "Jan, David, same". Jan or Corrine then said equally and the Deceased said yes. I was satisfied that the Deceased knew what was happening. She was not coerced in anyway to sign. Jan wrote down what the Deceased said as she confirmed it. I did query in my mind why it was necessary to have a second document but assumed that the first one was lost. I can confirm that after Janice had finished writing her instructions, the Deceased signed in the presence of both Corrine and me. After she had signed Corrine and I both signed also in her presence.***

On the 18th November 2005 I recall being present at Vera's home. On this occasion there was a party for Vera's birthday. When I arrived at the Deceased's home Janice and Corrine were already there. They asked me to witness another document. I said "what again". On this occasion Vera wished to make Janice an Executor. In my presence the Deceased said Janice was to be her executioner. It was something like Executor but not quite. Janice and Corrine asked her to confirm whether she meant Executor and she said yes she did. No-one forced Vera to sign. The Deceased signed the Will in the presence of me and Corrine Farmer. After she had singed both of us also signed in her presence. I recall there was one of the three occasions when Janice had helped the deceased to hold the pen while she signed. The Deceased had a giggle at herself because she could not do it properly. I can confirm that the document dated 18th November 2005 bearing the signature of the Deceased, Corrine and me is the document which was signed and witnessed that day"

105. In advance of the adjourned day of the trial I received from the representatives of the Defendant a further statement from Mr. Migliorini taken by Mr. Carlisle of Messrs Barnes & Taylor while the case stood adjourned. In that statement he said that he took Vera Gale out on about six occasions in his car at Janice Gale's request. He went on as follows:

"I wish to give my explanation as to why I am uncomfortable with the scenario at that time. Six years ago I was nearly stabbed to death, I nearly died twice on the operating theatre. This has an adverse effect on me. Obviously I survived and initially from that time onwards until now I suffer from post-traumatic stress syndrome. In those days six years ago until now I was taking lots of prescribed tablets and unfortunately also non-prescribed tablets to ease my pain and day and night nightmares. In this period of time Janice Gale located me at my home and started coming round in the early hours of the morning, sometimes until 4.00am, for example, visiting at 11pm and staying until 4.00 am. She would talk about her mother a lot and her household chores. I would say that I could not help with her mother because I felt ill, even suicidal. I went to the mental health department at the Taylor Centre and they gave me cognitive therapy. That one hour per week of therapy did nothing to help me. When Vera Gale passed away Janice Gale would come and visit me and ask me whether I remember doing this and that, signing papers, and I would say "No I do not". She spoke to me in a way which convinced me that what she was saying was true about me witnessing two or three scenarios at home when her mother was alive to do with signing Wills or Codicils. Because of my mentality I thought I had just forgotten it and I just agreed with everything she said. There were one or two times which stuck in my mind when she said it was morally right for her to have the house instead of sharing with Dave Gale. Believing that what she was telling me was accurate and because of my drug intake, I agreed to help her out as she asked me

to do so on many occasions. When she used to come round she would give me things to sign and I just used to sign them believing that these were copies because she said she had lost the originals, and it was good to show the solicitor. I will admit that I did not take it too seriously and just said "Yes" to anything, not realising it would go to Court at that point because I was more worried about myself and my personal scenarios.

Janice Gale went over dates and scenarios and when I was supposed to have signed documents, I just thought that was the truth.

Then one day she asked me if I would go to a Solicitor's office and they wanted to hear the story and make me swear it was the truth and indeed I did believe it was true at that point".

106. There is much more in that statement but it would unduly burden an already lengthy judgment to quote it in full. He went on to say that after signing the affidavit the next he heard was in November 2009, when he was sent his witness statement, which he signed and endorsed with the words "due to ill health I cannot help any further".

107. He then wrote about a visit to him by the Claimant and Miss Farmer during the period of the recent adjournment of the trial. The details of what happened do not matter. In short, a witness summons was served upon him to attend the resumed hearing which was to take place on the 8th and 9th of June. He then noted in his statement that he cannot go into crowded places, he said:

"I cannot get on a train or a bus with people around, if I see a man who looks suspicious to me this can give me a panic attack as I would fear that the man may have a knife and would want to stab me if I give him a wrong look. If this happens I have a panic attack and I collapse to the floor".

108. So far as the codicils are concerned he went on to say:

"I could not remember any of it. With reference to the document dated 21st March 2002, I do not remember any of it. Did I, must I, I cannot remember any of it. With reference to the document dated 6th February 2004 I do not recall her telephoning me and any part of the document. I do not recall one word of it. With reference to the document dated 18th November 2005, I do remember turning up at the birthday party of Vera Gale but I do not remember signing anything.

Someone might say that I have forgotten because of the drugs I was on at the time, but there are lots of occasions I can remember with Vera Gale being in the room with me, and with me taking her out, but I have no recollection whatsoever of signing documents or being witness to documents with Vera Gale present in the room at the same time.

I can remember taking her out and teas and coffees so I cannot understand why these three documents are not in my memory and I am hoping that I did not sign them when Janice Gale used to come round here to my home and when I used to be lying in bed unwell. That is why I retract my witness statement dated 20th October 2009 and my Affidavit sworn on the 16th July 2008 as they may be unsafe.

109. He then wrote to the court and sent a letter from Dr. S A Malik at the Kent Elms Health Centre, who said that Mr. Migliorini has been a known NHS patient of his practice since April 2000 and that he suffered stab wound injuries in May 2004 and thereafter suffered with Depressive Disorder, mixed anxiety and mood swings. He added:

"He has asked me to do a letter for him that he has fears and panics if he has to travel by himself and cannot go on busses and tubes. This is the residue to Post Trauma Effect since the stab wound injury.
In spite of the trouble that Mr. Migliorini finds with travelling in public, I believe he is willing to travel in a one-to-one in a private car, in order to help the matter by attending the court".

I treated this as an application to set aside the witness summons and got the listing office to warn Mr. Migliorini that he may have to attend on the 9th June. On the morning of the 8th June, on the resumed hearing, I asked the Claimant what she wanted to do. It was plain that she did not want Mr. Migliorini to come to court and did not resist setting aside the witness summons. It was plain that she was not in any event prepared to pay the considerable cost of arranging for a taxi to ferry Mr. Migliorini to and from the court. He lives in Westcliffe-on-sea. I asked Mr. John whether he wished to have Mr. Migliorini in court and he said that he did not. Although I would have liked to have heard from Mr. Migliorini in the witness box, I thought it right, in all the circumstances, to set aside the witness summons and that is what I did. Of course, not having heard from Mr. Migliorini in the witness box I am unable to rely on anything he has said in either of his statements or in his affidavit evidence. He comes very close to saying in his recent statement that he simply signed whatever was put in front of him by the Claimant. His statement was put to the Claimant who was recalled to the witness box to deal with the allegation of forgery. She was asked whether she remembered taking documents round to Mr Migliorini and getting him to sign them. Her answer was that she never did this. In the absence of Mr. Migliorini from the witness box, I cannot be confident as to how his signature came to be on each of the three codicils, but I am clear about one thing and that is that in the light of his recent statement, I cannot rely on anything Mr. Migliorini has said either in his affidavit or in his witness statements.

The handwriting evidence

110. As I indicated early on in this judgment, the Defence, in essence, put the Claimant to proof that the 2002 and 2004 codicils were signed on the dates

alleged but reserved the right to call handwriting evidence as to the Testatrix's signature. In my judgment, this was inappropriate. If the Defendant was going to make a positive case that the Testatrix's signature was a forgery or that the document was a false document because it was not executed on the date it purported to have been executed, it was incumbent upon him to make that allegation clearly. He could have had the three original codicils, which were produced to the District Judge in the Principal Registry at the hearing on the 16th July 2008, forensically examined and then decided on the basis of that examination whether he would make the allegation of forgery or fraud. This was not done. It was decided to approach the matter, at least in the first instance, by raising and investigating an issue as to the testamentary capacity of the Testatrix on the dates of the codicils. In the event, the handwriting evidence was served upon the Claimant some two to three weeks before the trial and then only on the basis of an examination of photocopies and not the originals.

111. It was evident from Mr. Handy's report at that time that, on the basis of the available reference signatures of the Testatrix in or about March 2002, his opinion was that the Testatrix was not responsible for the signature on the 2002 codicil if that signature was created on 21 March 2002. This left open the possibility that it was her signature but that it was signed in a later period of time when her signature had deteriorated. Having now seen many signatures of the Testatrix in the period from 2004 onwards, it seemed obvious to my untrained eye that the signature of the Testatrix on the 2002 codicil bore considerable similarities to her deteriorated signature in this later period and almost no similarity to her known signatures in or about 2002. Mr. Handy expressed his view that there was "very strong evidence" that the Testatrix did not sign the 2002 codicil in March 2002. I enclose at appendix 1 to this judgment page 262 of the agreed bundle. This document was prepared by Mr. Handy to show the "questioned" and " reference" signatures of the Testatrix on which Mr. Handy based his first report. The first signature in the left hand column is the signature on the 2002 codicil. The second signature is the signature on the 2004 codicil. As for the reference (i.e. known) signatures of the Testatrix, no.5 is a signature on a letter to Britannic Assurance, dated 2/2/2002; no.6 is the signature on a letter to the Co-operative Insurance, also dated 2/2/2002; no. 7 is the Testatrix's signature on a Community Care Review Form, dated 13/2/2002; no.8 is her signature on a Prevention Strategy Grant Adaptation Request dated 27/4/2002; no. 9 is her signature on the Enduring Power of Attorney referred to earlier in this judgment and dated 29/7/2003; no. 10 is her signature on a Community Care Review Form dated 21/10/2003; and no. 11 is her signature on the settlement of 2005, which has been referred to earlier in this judgment.

112. One can readily see that the signature on the 2002 codicil is nothing like the fluent reference signatures nos. 5 to 10. Mr. Handy noted the deterioration in the Testatrix's signature by February 2004. Having read Professor Howard's report, Mr. Handy attributed this deterioration, in part, to the Testatrix's medical condition. He noted that the signature on the 2002 codicil was not consistent with the available contemporary reference material and this material provided "very strong evidence" that the Testatrix did not sign the 2002 codicil, at least not at that time.

113. On the second day of the trial I suggested to Mr. John that if he was making a case that the 2002 codicil was signed by the Testatrix in the later period, by which time her signature had deteriorated, he should put the point to the Claimant and her witnesses and consider amending the Defence to plead it. He duly applied to amend the Defence to allege that the Testatrix was not responsible for signing the 2002 codicil on the 21st March 2002. Although this possible case had been implicit in the Defence in its original form, I indicated to the Claimant that I would be disposed to grant her an adjournment if she wished to have one. This would have given her an opportunity to obtain handwriting evidence of her own and enable her to call witnesses she had not arranged to be in court. She said that she did not want an adjournment. On the fourth day of the trial, Mr. Handy put in a supplemental report, having had the opportunity the day before to examine, for the first time, the originals of the 2002, 2004 and November 2005 codicils. In his report with reference to these 3 codicils he said,

> ***"Within ink lines I noted locations where the pen has been raised and replaced in close proximity. This observation was evidence of good pen control in comparison with the poor pen control suggested by the signatures' overall appearance.***
> ***Parts of the tremor in pen lines appear 'unnatural' comprising of relatively small pen movements, particularly on document 2. The 'M' on this document contained a number of very light pen lines."***

And he concluded

> ***"The signatures on the 3 Codicils were not made by a person who lacked pen control due to age/infirmity as suggested by their overall appearance".***

114. He explained to me in his oral evidence that he had done a microscopic examination of the originals and that it was plain that during the course of the making of the signature on the 2002 codicil there were 6 occasions when the pen had been lifted from the paper and then replaced in such close proximity to the point at which it had been raised that, to the naked eye, the pen line appears to be continuous. However, under the microscope, he told me, a discontinuity can be observed. The replacement of the pen so accurately so as not to disturb the pen line visible to the naked eye required, Mr. Handy told me, good pen control and good eye sight. This conflicted with the overall appearance of the signature which evidenced poor pen control. In short, the signature was made by someone whose pen control was superior to that suggested by the overall appearance. This was true, Mr. Handy said, of the Testatrix's signature on each of the three original codicils he was able to examine. His opinion was that these three signatures were forgeries and he regarded the evidence supporting that conclusion as "conclusive".

115. As a result of this evidence, which was given on the fourth day of the trial, it was obvious that the Claimant would want to have an adjournment in order to obtain her own handwriting evidence. In the light, in particular, of what had now become a positive allegation that the Testatrix's signature on all these original codicils was forged, I granted that adjournment against the objection

of Mr. John, who insisted on being provided with a formal judgment. At the resumed hearing on the 8th June Mr. John applied to amend the Defendant's amended Defence to allege forgery. I granted that amendment.

116. The Claimant called Mrs. Fiona Marsh as her handwriting expert. I have already mentioned Mrs. Marsh in connection with the ESDA evidence. She first wrote a report without having had the benefit of the originals of the codicils. She had before her the same reference signatures as were before Mr Handy plus a number of additional known signatures of the Testatrix. These were as follows: first, the Testatrix had a disabled badge which bore her signature. A copy of that badge was included in the agreed bundle. A copy is contained in Appendix 2 to this judgment. Reference to this badge played an important part in Mrs Marsh's evidence. As will be seen, the signature on the badge shows some deterioration in the "ale" component of the Testatrix's surname. I shall return to the disabled badge in a moment. Mrs Marsh had in addition two signatures of the Testatrix included in a deed of appointment of additional trustees of a life policy, which the Testatrix signed on the 11th October 2004. She also had the signatures of the Testatrix on the three additional documents referred to in paragraph 81 above. Finally, she had a " practice" signature of the Testatrix which, the evidence before me showed, was a signature which she practiced before signing the Enduring Power of Attorney, which she did before Mr Collin on the 29th July 2003. The signatures on the three additional documents referred to above and dating from 2004 and 2005 are all shaky and spidery and exhibit, what seems to me to be, similar deteriorated features which we find in the signatures of the Testatrix on the 2004 and 2002 codicils. I have used the word "deteriorated" because that is the word used by the experts to describe the Testatrix's signature in 2004 and 2005, and to distinguish that from the fluent signature of the Testatrix in and around 2002. The most important of these additional signatures was that on the disabled badge. The only one which Mr. Handy had not seen before was the practice signature signed on the 29th July 2003. I shall come back to those below.

117. Mrs Marsh's evidence was that the amount of variation within the sample of reference signatures of the Testatrix is unlikely to be truly representative of the full range of material variation that can be found in her signature. The sample is not large enough to encompass the full range of such variation. As to the questioned signatures, she said that they are not typical of an individual's attempt to copy, although, as she was unable to match exactly all the features within the questioned and known signatures, she was unable to determine with any degree of certainty whether or not the Testatrix wrote the questioned signatures. She concluded: "The result of my examination is, therefore, inconclusive.

118. After she had had the opportunity of examining the originals she produced a further report and then gave oral evidence. It became quite clear under cross-examination that Mrs Marsh's view was mainly founded on the disabled badge. She regarded this signature as evidencing an extended range of the natural variations in the Testatrix's signature in or about 2002. This badge had been put to Mr Handy in cross examination when he first gave evidence on the

fourth day of the trial. He acknowledged then that if the signature on the badge was indeed signed in 2002 this would cause him to downgrade somewhat the strength of his view in his first report that the Testatrix could not have signed the 2002 codicil in March 2002. Instead of his conclusion that there was "very strong evidence" to support his original view, he would have said that there was "strong evidence" to support that view. The disabled badge would not have caused him to alter his conclusion. When he was recalled to the witness box after Mrs Marsh gave evidence, he acknowledged that the signature on the badge showed evidence of inferior pen control to that shown in the majority of the reference signatures he saw, but the fluency of the signature on the disabled badge was superior to the signature on the 2002 codicil and the deterioration in the signature on the disabled badge was nowhere near the degree of deterioration on the 2005 examples of the Testatrix's signature.

119. Mrs Marsh plainly thought that the signature on the disabled badge was very important. She suggested that the Defendant's team should have gone and obtained evidence as to when it was signed. I have only seen a photocopy which is at page 574 (3) of the agreed bundle (and is Appendix 2 to this judgment) and two letters to the Claimant from Southend-on-Sea Borough Council. The first, dated 16th June 2008, says that they had received the Testatrix's application for a Blue Badge on the 28th November 2001 and issued it on the 2nd January 2002, and that the badge expired on the 2nd January 2005. The second was included in the bundle of additional papers handed up by the Claimant on the last day of the trial. It was an email, to be precise, dated 4th June, which confirmed that the Testatrix had "one Blue Badge with us which was issued on 02-01-2002 and expired 02-01-2005." It looks as though there was only one badge but I would have liked to have seen the original if so much weight was going to be placed on it in these proceedings.

120. However, I assume, in the Claimant's favour, that the signature on the badge does indeed date from early 2002. It shows some deterioration at that time. It does not seem to me that this signature undermines Mr Handy's conclusion in his first report that the signature of the Testatrix on the 2002 codicil was not signed by her at that time (if it was ever signed by her at all). Even on the assumption that the signature on the badge was one of her known signatures at the time, I would have concluded that the signature on the 2002 codicil belongs to the later period in 2004 and 2005, assuming it was signed by the Testatrix at all. I would have concluded that the 2002 document was a false document as not having been executed on the date it bore.

121. However that possibility was overtaken by the evidence of outright forgery which Mr Handy gave on the fourth day of the trial. I need to turn to that evidence but, before I do so, and in the interests of completeness, I should mention two other parts of the evidence that did not seem to me to greatly assist the resolution of this case. I mention these matters to show that I have not overlooked them. They both relate to the range of variations in the Testatrix's signature round about the time of the 2002 codicil. Mrs. Marsh put forward the "practice" signature I have referred to above to show that the Testatrix sometimes formed the "G" in her surname with a loop or tail (as on

all the contemporary reference signatures Mr. Handy considered) as opposed to a flat stroke. The practice signature on the 29th July is formed with a flat stroke. The actual Enduring Power signed on the same day, presumably immediately after the practice signature, is formed with a loop. However, I do not think this helps me either way in deciding whether or not the signature on the 2002 codicil is consistent with the known signatures of the Testatrix at the time. The other matter is that there was a great deal of evidence put in by the Claimant, which she put to Mr. Handy and Mrs. Marsh, of ordinary writing of the Testatrix in the years leading up to 2002, designed to show shaky or spidery writing evidencing that deterioration of the kind that is obvious in the signature on the 2002 codicil had already set in by the time of that codicil. The evidence was of limited value. A signature is automatic. Non-signature writing is very different. Nonetheless, the evidence in this regard did show some signs of shakiness to be within the range of variations of the Testatrix's non-signature writing at the time, but in my view nowhere near sufficient to disturb a very clear view that I formed that the signature on the 2002 codicil was infinitely more consistent with the deteriorated signature in the later years than with her known signatures in or about 2002. It would unduly burden this lengthy judgment to attempt to record all the detailed evidence in this respect.

122. I turn to consider the evidence relating to the pen lifts. Mrs Marsh said that the pen lifts were entirely consistent with the signatures having been produced by a writer with poor pen control. It was put to her that there would be a gap in the pen line if the pen control was poor. Mrs Marsh said that this was not necessarily so. She pointed to what she called the "feathering" on the M and the G which is evident in the blow up of the Testatrix's signature on the 2002 codicil that was produced by Mr. Handy. This feathering appears as a slight spraying of ink which occurs when a writer with poor pen control hovers over or touches the paper with very light pressure. A proper contact is made and as the writer continues the pressure is heavier. On a change in direction a writer with a tremor will struggle with pen control but continue on the same spot. " I am not saying that that is what happened here" said Mrs. Marsh. It is one explanation. Another explanation is that if the writer is conscious that her writing is poor, she may go back and touch up parts of what she has already written". "Wouldn't that require a high level of pen control?" she was asked. Mrs Marsh answered: "This writing is what I would expect of a person with poor pen control."

123. Mrs Marsh said that all three signatures under scrutiny here exhibited variations in pen pressure which are occasioned by changes in direction. With a forgery you are more likely to get bold, consistent pressure. The variation in pressure with a change in direction and the feathering are difficult to reproduce.

124. Mr Handy was recalled to deal with Mrs Marsh's evidence. He said that he had heard nothing from Mrs Marsh to alter his own views. There were pen lifts and he would not expect someone with poor pen control to continue without some interruption to the pen line. In some instances he accepted that there may have been some hesitation, and in some cases, as Mrs Marsh said, some of the pen lifts may have occurred where there was a change of

direction. Even so, Mr. Handy would have expected to find some deviation from the general path. On the V in the signature on the 2002 codicil, although there is a slight hiatus in the pen line, the ink line is continuous. There has been a pen lift and the pen has been replaced without deviation from what appears as a continuous ink line. He contrasted this with the M in the signature of the 2004 codicil where he identified (and one can see with the naked eye) at least four pen strokes, which you might expect from the signature of a person with poor pen control. This conflicts with the accurate pen replacement found elsewhere in that signature on the 2004 codicil. On that codicil he found 3 to 4 lifts and on the November 2005 codicil he found 6 to 7. On the 2002 codicil he found 6 pen lifts. If accurate replacement occurred once, that might be coincidence. If, as here, it occurred many times, that was evidence, Mr Handy thought, of good pen control and that was quite inconsistent with the obvious poor pen control of the writer (had these signatures been genuine).

125. As to the feathering, he said that he also noted the feathering on the M and the G in the 2002 codicil signature and that is consistent with poor pen control, but then he would have expected this feature later on in the signature when pen lifts are identified and he did not find it elsewhere in the signature. He said that there was no reason why the feathering could not have been simulated.

126. Mrs Marsh pointed out the obvious fact that if the forger (with good pen control) was intent on simulating the signature of the Testatrix so as to create a codicil that appeared to date from 2002, one would expect the forger to have been provided with the genuine and fluent signatures of the Testatrix in and around 2002. Why copy a deteriorated signature from the later period if you were trying to produce a document whose date is March 2002? That point is well made. However, I simply do not know when and for what purpose the various simulations were made. I have already inferred that they were made after the 2005 settlement. Perhaps all were made at or about the same time, with genuine deteriorated signatures available from which to copy. Perhaps it was just too complicated or thought too unsafe to bring into being at the same time both simulated deteriorated signatures as well as a simulated fluent signature. Perhaps it was thought that a simulation of a deteriorated signature was less easy to fault, spidery as it was, than a simulated fluent signature. I do not and cannot know. My task is simply to decide whether forgery has been proved.

127. Mrs Marsh's evidence is encapsulated in the following interchange with counsel on the question whether the signatures were forged. "Are you saying, you can't say yes and you can't say no?" Her answer was: "Yes. You shouldn't come out of "the inconclusive category" unless you're sure". I asked Mr Handy whether it was possible that the signature on the 2002 codicil was the Testatrix's but from a later period, that is to say that the 2002 codicil was backdated. Mr Handy responded that the signatures on the codicils were "definitely not hers" and that the possibility that she made them is so remote that it can effectively be ignored. He added that their similarity in appearance

to the signatures of the later period can be explained by being copies of her later signatures rather than copies of her signature in and about 2002.

128. I have considered the evidence of the handwriting experts. Where they conflict I prefer the evidence of Mr Handy. I find that theTestatrix's signature on the 2002 codicil is a forgery. I find the same in relation to her signature on the 2004 codicil and the November 2005 codicil but, in the circumstances, nothing turns on that because the Testatrix lacked testamentary capacity at the times those documents purported to come into existence.

129. I am conscious that I cannot know with certainty that the signature on the 2002 or 2004 codicils or the November 2005 codicil were forged. Although I have come to the conclusion that the signatures were forged and, in doing so, have been acutely aware of the need to be much more sure of this conclusion than I would have to be in testing the probabilities of less serious allegations, Mr Handy's evidence in connection with the pen lifts was dependent on his observations in his laboratory. I asked him if this could be depicted in a blown up photograph but he said that it would lose definition. Accordingly, I am conscious that I am entirely reliant on the expert evidence and do not have the comfort of exercising my own observations as well. For this reason, it seemed to me, I should consider and record what I would have held had I not had the evidence associated with the pen lifts or not been sufficiently satisfied on that evidence that the Testatrix's signature was forged. In that event I would have held that the 2002 and 2004 codicils were fraudulently backdated. From my own observations, and this was confirmed to me by both Mr Handy and Mrs Marsh, the signature on the 2002 codicil was obviously very similar to the deteriorated signature of the Testatrix in the later years when she lacked testamentary capacity. Having regard to all the other evidence that I have dealt with in this judgment and my rejection of the evidence of the Claimant and the attesting witnesses, my conclusion would have been that a fraud was perpetrated by backdating the 2002 and 2004 codicils to a time when it was hoped that the Testatrix could be shown to have had testamentary capacity. In reaching this conclusion I would have taken into account the evidence of both handwriting experts who were in agreement that it was likely that the 2004 codicil was created after the document at 574(9) was created.

The Law

130. The law can be dealt with rather shortly. The Claimant seeks to prove the 2002 codicil and the 2004 codicil. I have held that both are forgeries. That, plainly, marks the end of her claim. Her claim must be rejected. As to the 2004 codicil, there is an additional reason why the codicil must fail and that is that the Testatrix did not have testamentary capacity at the time of its execution. If my finding of forgery were wrong, the codicil would fail on this ground in any event. The same is not true of the 2002 codicil as I have held that testamentary capacity did exist on the 21st March 2002. As to both of these codicils, however, if my finding of forgery were wrong, I would have held that neither was signed on the date it purported to be signed but was backdated from a time when the Testatrix did not retain testamentary capacity. Of course I cannot be sure, in these circumstances, when the signing would have taken

place, but I infer from all the evidence I have set out that such signing would have taken place sometime after the execution of the 2005 settlement. I have the ESDA test evidence to guide me in dating the signing of the 2004 codicil in the late summer of 2004 at the earliest, when the Claimant admits the Testatrix lacked testamentary capacity. I do not have the same assistance in relation to the 2002 codicil. However, in the light of the fraudulent backdating of the 2004 codicil and the execution of the 2005 settlement, I have more than enough to infer that the signing would have taken place some period of time after January 2005. At all events, once fraud is established, all presumptions of due execution (and knowledge and approval) would cease to have any sway and the Claimant would not be able to establish that the codicil was executed at a time when the Testatrix had testamentary capacity and knew and approved its contents.

Voluminous documentation received today

131. The last day of the trial was the 14th June. Throughout the trial I gave the Claimant every proper indulgence in helping her to put whatever evidence she wanted before me. At every turn in the case I gave her the time she wanted to say whatever she wanted and I made it clear that it was inappropriate to keep on producing more and more documentation after her last opportunity to do so had gone by. It was made clear to the Claimant that the 14th June was the last opportunity for her to make submissions. She came to court with a large bundle of new material on that occasion. I informed the parties then that this judgment was to be handed down on Monday 28th June. It was practically finished when I received today, 23rd June, by email to my clerk yet further voluminous evidence and submissions. There has to come a time when this must stop. This new material has been copied to Mr. John, so I am told, in a further email from the Claimant to my clerk received this afternoon. I have read this new material (at some speed) with a view to avoiding a further hearing. The volume is daunting. In so far as it falls within the realm of submission, I have taken it as such. In so far as it is new evidence (which is its main content) I will not take it into account but I emphasise that, like so much of the additional material produced by the Claimant at the last minute, had this additional evidence been before me, it would have made no difference to this judgment. I shall hear counsel on the hand down of this judgment as to whether he wishes to say anything about this new material.

132. I am going to release this judgment in draft in the usual way mainly to give the parties what they may need to address me on costs. The parties should be prepared to deal with this on the 28th immediately after the hand down of this judgment.

133. There follows two photocopied pages, the first, which is Appendix 1, being the page of Mr. Handy's report containing the questioned and reference signatures of the Testatrix and the second, which is Appendix 2, being the copy of the disabled badge which is in the agreed bundle.