

Raymond Allen James v Karen James, Serena Underwood, Sandra James

Case No: A30BS586

High Court of Justice Chancery Division Bristol District Registry

19 January 2018

[2018] EWHC 43 (Ch)

2018 WL 00490436

Before : HHJ Paul Matthews (sitting as a Judge of the High Court)

Date: 19 January 2018

Hearing dates: 18-21, 25-27 September 2017

Representation

Penelope Reed QC and Edward Hewitt (instructed by Wilsons Solicitors LLP) for the Claimant.

Steven Ball (instructed by Burges Salmon) for the Defendants.

Judgment Approved

HHJ Paul Matthews :

Introduction

1 This is my judgment on the trial of a claim arising out of the will of Charles Frederick Allen James. He was born on 25 May 1931 and died on 27 August 2012, aged 81 years, having made a will dated 16 September 2010. The claimant is his only son, Raymond Allen James, commonly called "Sam". The defendants are his two sisters, Karen James and Serena Underwood, and his mother, Sandra James. Without intending any disrespect, I shall refer to family members by their first names. The testator and Sandra were married in 1957. They have two daughters. Karen is not married and has no children. Serena has been married and is now divorced, and has three children.

2 The testator was in effect a self-made man. He built up a farming and haulage business in Dorset, acquiring a number of parcels of farmland along the way. In 2007 he gave away some of that land to Karen, and in 2009, on the dissolution of the farming partnership between himself, Sam, and Sandra, the testator transferred another parcel of land, and the haulage business, to Sam. By the will of 2010 he left the remaining land (and the residue of his estate) in the events that have happened to Sandra, Karen and Serena, but nothing to Sam. In outline, Sam says, firstly, that the will was invalid on the ground of the testator's lack of testamentary capacity, and secondly (and in any event) that he was entitled to the land left by the will and also the greater part of the land given to Karen, by virtue of a proprietary estoppel equity in his favour.

3 The claim was commenced by claim form issued on 22 May 2014 in the Chancery Division of the High Court in London. Statements of case were filed and served on both sides. On 30 September 2014 Master Bowles by order transferred the claim to the Bristol District Registry, where it has been case managed ever since. The claim has however been tried at the Rolls Building in London, as a result of the flood at the Bristol Civil and Family Justice Centre in June 2017, which caused a temporary lack of suitable courtroom space in Bristol itself. At the trial Penelope Reed QC and Edward Hewitt, instructed by Wilsons Solicitors LLP, appeared for Sam, and Steven Ball, instructed by Burges Salmon LLP, appeared for Karen, Serena and Sandra. I

am grateful to them all for their measured and helpful submissions.

The land

4 The land with which I am concerned lies on either side of the A30 road, between East Stour and Shaftesbury, south of Gillingham in Dorset. It comprises five parcels, of which four are contiguous. All were originally acquired by the testator in his own name. The one that is separate is called Chequers. It lies to the south of the A30, and is the most westerly parcel. It was acquired by the testator in spring 1961. In October 2009, as I have said, it was transferred to Sam and his wife Rachel, as part of the dissolution of the family partnership. They sold it to third parties in November 2016. The second parcel to be acquired was Pennymore Pitt Farm, in 1966, although a part of this land, called Miller's Field, was only acquired much later. Pennymore Pitt Farm is bisected by the A30. In November 2009 the testator executed the necessary form TR1 to transfer the title into the joint names of the testator and Sandra. It was registered at the Land Registry in January 2010.

5 Immediately adjacent to the east (but lying to the north of the A30) is a parcel known as Black Venn, or Hoskins, which was acquired by the testator in 1976. Adjacent to the east of that is Lox Lane, acquired by the testator in 1992. Adjacent on the north side of Hoskins is Framptons, or Lintern Lane, acquired in 2000. In 2007 Hoskins, Lox Lane and Framptons were transferred to Karen. Pennymore Pitt Farm, Hoskins, Lox Lane and Framptons were sometimes during the trial referred to collectively as "Pennymore". I make plain at this stage that Sam makes no claim to Framptons. He accepts that that was bought for, and given to, Karen by the testator. His claim is to the rest of Pennymore.

6 At the time of making the 2010 will, the testator and Sandra, being then joint tenants of Pennymore Pitt Farm, executed a notice of severance of joint tenancy. Thus, at the testator's death in 2012, the legal title remained in Sandra alone, but (if the severance was effective) on trust as to one half for the testator's estate and as to one half for herself. The will provided for the testator's interest in that part of Pennymore Pitt Farm *north* of the A30 to go to Karen (who already owned the other land north of the A30), and for his interest in that part to the *south* to be held on trust for Sandra for life, with remainder to Serena. The residue of the estate passes to Sandra as she survived the testator. Had she not done so, ninety per cent of the residue would have been shared between the three children equally, with the remaining ten per cent being shared amongst the grandchildren.

Witnesses

7 I heard evidence from the following witnesses: Raymond ("Sam") James, the claimant; Terry Huxter, Sam Baden Teversham, Leslie Burt, Gary Dunne, Andrew Mills, employees or business associates of the testator; Kelly James, Amanda Allard, Natalie Lewis and Samantha James, Sam's four daughters; Rachel James, Sam's wife; Karen James and Serena Underwood, Sam's sisters and first and second defendants; Sandra James, their mother and third defendant; Prof Robert Howard and Prof Robin Jacoby, expert witnesses for the claimant and the defendants respectively; Fiona Thomas and Roger Snowdon, both solicitors, and Ben Marshall, surveyor and land agent.

8 It may be helpful if I give my impression of the witnesses at this stage. I found Sam to be a slow but clear witness. He was not good at reading. He was dogmatic, sometimes rather contrary, and not good at following legal reasoning. His frequent response to questions from counsel was "if you say so". He said he did not remember a considerable number of meetings and other events which were stated in the written materials to have included him. I had the strong impression that this was often because he did not wish to do so. In relation to a number of documents, Sam interpreted what third-party professionals were saying in ways which they cannot have meant. For example, there is a letter from the accountant Mr Hardy dated 20 January 2003, where Mr Hardy referred to a meeting the previous week and reported on research he had promised to do, including on inheritance tax and capital tax planning. When it was put to Sam that this showed there was a possibility of the testator making gifts within his lifetime, Sam vehemently denied it. For him, this was just a suggestion by Mr Hardy, and there was no serious intention on the part of the testator to do any such thing.

9 For the most part, I think that Sam had convinced himself that he was in the right, and interpreted all the material available to him in a way which demonstrated that he was. In some cases, I am afraid I think he went further, and told me things that were simply not true. One was that he told me that he only found out at the beginning of 2009 that his parents had given land to Karen after he had signed the partnership agreement. Yet it is clear from letters and notes in the summer of 2008 from the solicitor Mr Snowden to the testator and to the accountant Mr Christopher, taken together with the evidence of Mr Snowden himself, that Sam was aware before then of the proposed transfer to his sister Karen. As a result, I found it difficult to place much reliance on what Sam said where it was not supported from an independent source.

10 Terry Huxter, Sam Baden Teversham, Leslie Burt, Gary Dunne, and Andrew Mills, the non-family lay witnesses, were all short, and subject to little or no cross-examination. They were all trying to assist the court and I have no doubt that they were telling the truth in what they said. But for the most part their evidence did not go to issues central to the case.

11 I turn to Sam's four daughters. Kelly James was quiet and calm. But she was unable to remember some points of detail. I saw no reason to doubt what she told me. Her sister Amanda Allard was also quiet and calm. Again I had no reason to doubt what she said. The third of the sisters, Natalie, gave evidence in a quiet tone. But she avoided eye contact and her body language suggested internal conflict. She rather doggedly insisted on answers to questions which supported her father, Sam. I am afraid that I harboured some doubts over her evidence. But her evidence is marginal. The last daughter to give evidence was Samantha James, who was rather shy, but clear and straightforward. I had no doubts about her evidence.

12 Their mother, Sam's wife, Rachel James, was also clear and straightforward in her evidence. But it was clear that, despite her loyalty to her husband, she was distressed by the litigation and wanted it to be over. I have no doubt that she was telling the truth, so far as she knew it.

13 Karen James, the first defendant, was a slow witness, with clear, trenchant views. She was not prepared to accept anything against what she perceived to be her interests, even where it was obviously correct. For example, she would not accept that the gift of Pennymore Pitt Farm to Sam was omitted from the first draft of the 2004 will by accident, despite the clear written evidence to that effect from disinterested third parties. When she had to answer a question she did not like, she would not answer it directly, but parry, with "What do you mean?" She would often answer "Not really" when the answer was more likely (in my view) Yes. I found it difficult to accept some of what she said. But this may just be because she has convinced herself that she is in the right, rather than deliberate deception.

14 Sandra James, her mother and the third defendant, although she often took her time to answer, was clear and decisive when she did. Despite her advancing years, she was generally very much on the ball. But she was confused as to whether there had been a formal diagnosis of the testator as having dementia in 2005. On the other hand, she had little or no trouble in following accounts. It is plain that she had a head for business. Sometimes her answer was that she could not remember things, though I noted that that was the answer more often given when the question was a difficult one, not susceptible of a simple answer in her side's favour. She also appeared confused about which draft will of her husband she had seen in early 2005. Her answers did not square with what she said in her witness statement. And she was unable to explain satisfactorily what had happened to the assets in her husband's estate, although I accept that Lloyd's Bank appear to have exercised discretion as to how to deal with the monies available for investment and she did not know the full details at the time. At all events she denied that they had been used to improve Serena's land. I have accepted her evidence without reserve where corroborated by other independent evidence, but otherwise with more caution.

15 Her second daughter Serena, the second defendant, was a quiet and careful witness. She had an eye for detail and readily accepted corrections. She gave her evidence so far as I could see without hesitation, and even when it ran counter to her own interests. I accept her evidence as truthful.

16 I heard from Fiona Thomas, the solicitor who drew up and witnessed the execution of the will which is now contested. She struck me as a highly competent, intelligent solicitor, experienced in dealing with (amongst other things) farmers and wills. There is a question as to why she did not think it desirable to have a doctor give an opinion on mental capacity, but I shall deal with that later. Nonetheless, she was plainly doing her best to assist the court, and I accept everything that

she told me as truthful.

17 I also heard from Roger Snowdon, another solicitor, engaged in his professional capacity to deal with certain transfers of land for the testator and Sandra during the testator's lifetime. He could not remember much beyond what the documents said, and perhaps in consequence he did not say a great deal, but the evidence which he did give was clear and concise. It was clear that he would not be pushed into saying anything that he did not believe. I accept his evidence as truthful.

18 Prof Robert Howard gave expert evidence on behalf of Sam, and Prof Robin Jacoby gave expert evidence on behalf of the defendants. As one would expect, each of them was highly professional, and obviously doing his best to assist the court, and I accept as truthful everything they said. I will obviously have to resolve the difference of opinion between them in due course.

19 Ben Marshall is a surveyor and land agent, engaged professionally at a certain point in the story. He was clear and straightforward in giving evidence, though many of his answers (quite properly) were that he could not remember details about which he was being asked. I accept his evidence as truthful.

20 Because of the reservations which I have expressed above about the evidence of some of the central characters in this story, the documents in the case and also the inherent probabilities play a larger role in my fact-finding than otherwise they would have done. I shall deal first with the claim in proprietary estoppel, and then turn to the challenge to the testator's will.

Proprietary estoppel

21 The law as to proprietary estoppel was not substantially disputed. In [Thorner v Major \[2009\] 1 WLR 776](#), HL, Lord Walker put the matter in this way:

"29. My Lords, this appeal is concerned with proprietary estoppel. An academic authority (Simon Gardner, *An Introduction to Land Law* (2007), p 101) has recently commented: "There is no definition of proprietary estoppel that is both comprehensive and uncontroversial (and many attempts at one have been neither)." Nevertheless most scholars agree that the doctrine is based on three main elements, although they express them in slightly different terms: a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance: see *Megarry & Wade, The Law of Real Property*, 7th ed (2008), para 16–001; *Gray & Gray, Elements of Land Law*, 5th ed (2009), para 9.2.8; *Snell's Equity*, 31st ed (2005), paras 10–16 to 10–19; *Gardner, An Introduction to Land Law* (2007), para 7.1.1."

I address some further matters at appropriate points in the following discussion.

Promise or assurance

22 In relation to the proprietary estoppel claim, Sam was unable to give evidence of any *particular* promise or act creating an expectation, intended to be relied upon, that the testator would leave any particular property to him, let alone the whole of it. That is not fatal to his claim: see *eg* the decision of the House of Lords in [Thorner v Major \[2009\] 1 WLR 776](#). The court must look at the totality of the evidence of what passed between the parties and form a view as to whether it was intended, or whether a reasonable man would have taken it to have been intended, to amount to such an assurance.

23 There is a question as to how clear the assurance must be. In [Thorner v Major](#) itself, Lord Walker said:

"56. I would prefer to say (while conscious that it is a thoroughly question-begging formulation) that to establish a proprietary estoppel the relevant assurance must be clear enough. What amounts to sufficient clarity, in a case of this sort, is hugely dependent on context. I respectfully concur in the way Hoffmann LJ put it in *Walton v Walton* [1994] CA Transcript No 479 (in which the mother's 'stock phrase' to her son,

who had worked for low wages on her farm since he left school at 15, was 'You can't have more money and a farm one day'). Hoffmann LJ stated, at para 16:

'The promise must be unambiguous and must appear to have been intended to be taken seriously. Taken in its context, it must have been a promise which one might reasonably expect to be relied upon by the person to whom it was made.'

Lord Rodger expressly adopted Lord Walker's point about the need for an assurance to be clear enough: see at [26].

24 In my judgment there is nothing with a sufficient degree of clarity here to amount to such an assurance. There was the meeting with the testator in 2004 (see Sam's witness statement at [98]) where the testator told Sam what his testamentary intentions were. But a statement of *current intentions* as to future conduct is not a *promise* of that conduct, let alone a promise intended to be acted upon. Sam said (and I accept this evidence, which was confirmed by other witnesses) that the testator wanted to keep all the assets in his own name as long as possible, and, although he liked to make decisions, he would not make them until he was good and ready. He told me expressly that he did not accept that the testator would give away any of his land during his life. For this reason, however, he did not easily make promises to transfer property, let alone actually transfer any of it. To the testator, money was God.

25 This is supported by the contemporaneous documentation. For example, in a letter dated 5 April 2001, the accountant Nigel Hardy advised Sam, following "recent telephone conversations" between them, on what he should consider in making his own will. This included Sam's share of the partnership business. But it did not include any *land*, which was all then owned by the testator. Mr Hardy said in the letter that it all depended on the testator's wishes and whether he had made a will or not. There was no mention of any promises having been made to Sam by the testator that Sam would inherit the land. Mr Hardy said the best thing would be to have a family meeting to discuss inheritance issues. But he said that he understood

"that this is very unlikely in this case. If your father is not prepared to discuss his future intentions there is very little that you can do."

26 Similar statements – indeed, some of the very same phrases – are to be found in a letter from Mr Hardy dated 9 August 2002 (more than a year later) to Sandra, in response to her phone call that day to his office about her desire to make a will. He tells her that, since the land belonged to the testator, everything depended on him and whether he had made a will. Again he said that the best way forward was a round table meeting, but that if the testator

"is not prepared to discuss his future intentions there is very little that you can do."

27 I have already referred to the letter from Mr Hardy to the partners (the testator, Sam and Sandra) dated 20 January 2003, referring to a meeting the previous week. Mr Hardy had checked rates of agricultural property relief and taper relief on tax in relation to gifts of land. Since the land belonged to the testator alone, there must have been some discussion of possible gifts by him to others in the future. But there is no mention of any existing promises to do so.

28 There is a further letter of 27 February 2003, from Mr Hardy to the testator alone. It referred to a promise by Mr Hardy to revert to the testator with a list of the testator's assets, "to give you a starting point for the preparation and planning of your will before the end of the tax year on 5 April 2003". It says that at the meeting matters discussed included

"the advisability of you and Sandra making plans between you for the allocation of your assets in the event of your deaths, as it would be useful to Sam to know your intentions before he undertakes the planning of his own will."

Once more there is no reference in the letter to any promise by the testator to leave any land to Sam, despite a specific reference to Sam's needing to know the testator's intentions before he

could undertake his own will planning. If there really had been any earlier promise of the kind alleged by Sam, it would have been likely to be mentioned at this meeting, and thus to have found its way into one of more of these letters.

29 There is an attendance note dated 29 November 2004 in which Stephen Rutter, senior partner of Rutters Solicitors, sets out the testator's instructions to prepare a written partnership agreement to continue "an existing oral Partnership". It notes that there is no will, and that the testator "had not really thought it through very carefully". There is a curious reference to the fact that Sam was living at Chequers Farm "so he would have to move to Pennymoor Pit [sic] Farm under the terms of the Will..." This suggests that either there already was a will (but this is inconsistent with what the note said), or at least that they had discussed the terms of one to be prepared (but there is nothing further in the note on that; in particular, there is no record of any instructions to prepare one). Significantly, there is no mention of any existing promises to Sam, yet it *is* expressly recorded that the testator "has promised her [ie Karen] Framptons Land ... "

30 In his witness statement, Sam gave evidence as to his belief that Pennymore and the business would one day be his: see for example at [49], (when he had just left school), and [53] (when he was 19). He also gave evidence as to his father's intentions: see for example at [91]-[92]. I do not doubt that he believed that he would inherit the farm when his father died. I also accept that the defendants were aware, at least in general terms, of Sam's belief, even if they did not agree with it. But I am not satisfied that the testator ever made any promise or assurance to give or leave Pennymore to him. On the contrary, as Sam also said, the testator did not make promises to transfer property. The evidence of Sam's wife Rachel depends on Sam's evidence, and adds nothing to it. The evidence of their children (in particular about their being given a "hard time" by their cousins) is consistent with Sam's case, but also with the assumption that in a country farming family in the second half of the twentieth century the only son would inherit the land, rather than the daughters. It contains no evidence of any promise or assurance by the testator. In any event, Sandra said (and I accept) that the testator would say one thing to one person and another to another.

31 Nevertheless, I find that in the early 2000s the testator was persuaded by a number of different facts and matters to reconsider his position of keeping everything in his own name. One was that he had been advised that unless his wife was at least a co-owner of assets, he would be wasting an important inheritance tax allowance: see the letter from Rutters to the testator of 22 January 1997. That letter in itself appears not to have led to anything. But in 2003 the accountant Mr Hardy wrote to the partners of the farming partnership pointing to the possibility of the testator making gifts within his lifetime, in order to take advantage of inheritance and capital taxes allowances. Sam himself had a discussion with the testator about the merits of making a will and avoiding an intestacy.

32 There was also a further meeting at which the testator told Sam what he intended to do with his property in his will. This included leaving Chequers to Sandra, Framptons to Karen, money to Serena, and the rest of the land to Sam. This led to a draft will being prepared, which would have left Pennymore (except Framptons) to Sam. But it was never signed, presumably because Sandra found out about it and challenged the testator, on the basis that she had something to say about it too. Even if it had been signed, making a will in favour of someone is not the same as promising to leave property to that person. It is ambulatory, merely a statement of current intention, and can be changed at any time.

33 The high point of Sam's case in relation to an assurance was his evidence that, before buying further land (except for Framptons) the testator asked Sam whether he should buy it, because (as Sam put it) "I would be farming it one day". I accept that the testator said words to this effect to Sam, at least twice. But the meaning of words which are spoken (as opposed to written) is a question of fact: see *Carmichael v National Power plc* [1999] 1 WLR 2024 , 2048-49, per Lord Hoffmann; *Thorner v Major* [2009] 1 WLR 776 , [58], per Lord Walker. In the context in which it was made, and given the personalities of the two persons involved (the testator, reluctant to make any commitments, and Sam, keen to inherit his father's property as the only son), I do not find this phrase to amount to a promise or assurance to leave the property to Sam. As with making a will, saying that it is your *intention* to do a thing is not at all the same as *promising* to do it.

34 In my judgment, the use of this phrase by the testator in this context merely signified that he realised that one day he would die, and he would have to pass the property on to the next

generation, and – at the stage at which the testator was talking, at least – Sam was the obvious person to whom to leave the property on death. Sam Teversham made the same point in his witness statement that this was the "natural progression". Andrew Mills's evidence that the testator told him that Sam would "run the farm" at Pennymore is also entirely consistent with this. At best, such statements would, again, indicate the testator's current intention, but would not amount to anything like a promise intended to be acted upon.

35 In my judgment, Sam's eagerness to inherit the farmland from his father has caused him to persuade himself that he was being promised something when he was not. In my judgment, the testator did not intend his words in that way, and did not intend them to be relied upon subsequently by Sam. It is not consistent with the image of the testator as someone who kept everything in his own hands and did not confide in others. Moreover, a reasonable person would not have misinterpreted the testator's words and actions in this way.

36 I note the evidence that there was no need for a licence in order for Sam to be able to use Pennymore for his haulage business. Sam was his son: "he is going to do right by him". This however is an odd way for someone to make a promise to give the land concerned to his son. In my judgment, looking at the evidence taken together, it is more likely that the testator was intending to operate informally, within the family, as so many farming families do, and this family had already done in the past.

37 I have said I can find nothing in the evidence, judged item by item, to amount to a promise or assurance, whether in word or conduct, of the kind that Sam alleges, or anything which a reasonable man would have taken to have been intended to amount to such a promise or assurance. I should record that, even standing back and looking at the situation as a whole, and over a period of years, from Sam's teen years to the testator's death, I still do not find the substance of an appropriate promise or assurance, or anything which so taken could have been so intended by the testator, in the whole of it. That was not his character. As Sam himself recognised and admitted, he wanted to preserve his freedom of action as long as he possibly could. And, in my judgment, on the totality of the evidence before me, he succeeded.

38 In my judgment, there is a sufficient place in our legal system for a landowner to be able to express a *present intention* to leave property by will to another person but without making any *promise* to do so, such that he or she is not then bound so to leave the property even if that other, misunderstanding what the landowner has done, purports to rely to his or her detriment on a supposed promise. In my opinion the present case occupies exactly that place.

Reliance and detriment

39 A second aspect of the proprietary estoppel claim is the need to show that the promisee has relied on the promise or expectation created to his detriment. There must be a sufficient (though not necessarily exclusive) causative link between the promise relied on and the detriment. However, where promises are made, and there is conduct from which inducement to act in reliance may be inferred, there will be an evidential burden on the landowner to show that there was no reliance.

40 In my judgment, Sam fails on this aspect too. His case appears to be that he was paid very little for the work that he put in over the years after he left school. Yet it appears, not only that he was paid regularly at the same rate as every other farmworker (indeed, at some times, slightly more), but also that his father bought him cars, the cost of which were recorded in the account as (very large) bonuses amounting to several times his annual salary. I accept that he contributed to his keep during those early years, but I do not think that this makes any difference.

41 He also complains that the testator financed the further purchases of land out of the profits of the business. Yet it is clear, from the accounts which have been shown to the court, that in almost every case where land has been bought using partnership funds, the cost of the purchase has been debited to the testator's capital account, meaning that in essence the testator has borrowed from the partnership in order to make personal purchases. Accordingly, they became his property, and not that of the partnership. The same point was made in relation to other personal expenditure, such as money paid for the wedding present given to Sam's eldest daughter Samantha. In cross-examination these points were put to Sam, and he accepted that he made no complaint in relation to them.

42 The case for Sam on reliance which was made by the end of the case was this. First, Sam was a very hard worker for more than three decades, working long hours, often seven days a week. I accept that he did work hard. It was in his nature to do so. Secondly, however, Sam was paid only "around the same as the other farmworkers", or perhaps a little bit more. Yet, even without taking into account the cars (or bonuses) which he received, Sam was in fact paid the going rate, or even slightly more, for farmworkers. This is not the usual proprietary estoppel case where the claimant works for nothing, or very little, on the basis of a supposed assurance to be left the farm. Here, Sam was properly paid. The underlying (but largely irrelevant) point is that farmworkers are not well paid compared to others in society. So it is not surprising that money was always short at home. But on the other hand Sam and his family did live rent-free at Chequers. And, in 1991, he became a partner in the family business, including both farming and haulage. He was an equal partner with the testator and Sandra until 2003, when he became entitled to 50% of the business, the testator and Sandra reducing to 25% each.

43 A further difficulty with the argument on reliance is that there is no evidence to show that Sam would have done anything different if it had been made clear to him that in due course he would receive Chequers and the haulage business (which he did) but not Pennymore (which he did not). There is no evidence that Sam ever thought seriously about going away to make his fortune in some other industry or occupation. In his witness statement (at [114]) he said that he "allowed" his father to amass land and investments, while he had nothing. I am afraid that this is wishful thinking. Sam had no power to stop his father doing what he did. He had the power to go elsewhere, but chose not to do so. And it is not true that he had nothing, as he had become a partner in 1991. This was worth something, as is shown by what happened on the dissolution of the partnership.

44 In early 2009 Sam asked for Chequers Farm, as he felt he had no security, and Karen had been given some land. This started a course of discussions about the future of the partnership, which led to its dissolution later the same year. When the partnership was dissolved, Sam received Chequers, the haulage business (which had produced most of the profits for years), a tractor, a number of other vehicles and trailers, a licence to use Pennymore as an operating site for the haulage business, and associated cash of about £200,000. The testator and Sandra kept the farming business, some tractors and trailers, other machinery and vehicles, sheep and cattle, single farm payment, grass keep and maize keep.

45 In any event, I hold that he would not have acted differently. I find that Sam did what he did, not in reliance on any supposed assurances from the testator, but on the basis that he was the kind of man who always did work hard at things he enjoyed doing, and who did not want to leave the family farm, where he had a job he enjoyed and some security, meanwhile hoping (and even believing) that it would work out well for him in due course as the only son. I only add that I am not impressed with the fact that in [Suggitt v Suggitt \[2012\] WTLR 1607](#), [\[2012\] EWCA Civ 1140](#), there was no evidence that the promisee would have pursued another career, and yet his claim succeeded. The judge in that case was satisfied that the promisee had relied on the promise found to have been made. In the present case (on the hypothesis that I had found a promise) I am not.

46 Ms Reed QC for Sam relied further on [Suggitt v Suggitt](#). In written closing submissions (at [9]), she said that he had

"positioned his whole life on the basis of the assurances given to him and reasonably believed by him that he would inherit Pennymore, as was the case with the successful claimant son in [Suggitt v Suggitt](#). However, in distinction with that case, Sam has worked extremely hard to develop and make successful the farming and haulage businesses."

47 I have already held that there were no such assurances intended to be relied upon, and that in any event Sam did not act in reliance on any such supposed assurances. But I must address some other aspects of the submission. In my judgment, although he worked hard in relation to the haulage business, the same cannot be said of the farming business. As both Sandra and Karen said (and I accept), he was never as interested in farming as he was in lorries, and although he started farming ventures of his own they failed because he did not look after them. His interest was in lorries and haulage, and his father recognised that. The testator made him a

partner in the family business and let him run the haulage side, remaining in control of the farming side himself. After the BSE crisis, cattle farming became less profitable. After 2000, the cattle were sold off and although the family still kept sheep the main income came from the haulage business and renting off fields. Sandra's evidence (which I accept) was that, when Sam was offered the opportunity to farm 65 acres available to the north of the A30, he said it was too far away, and the journey would get in the way of his other work.

48 But in any event, subject to one point, the Court of Appeal's decision in [Suggitt v Suggitt](#) was not a decision involving any principle. It was an appeal (by the successor in title to the deceased landowner) against various findings of fact by the judge at first instance, and more particularly against their consequences, leading to the conclusion that there was a proprietary estoppel in that case. These included whether the deceased had made unconditional assurances to the claimant that he would have the land in question, whether the claimant had relied on them to his detriment, and whether it would be unconscionable to deprive the claimant of "his reasonable expectations based on the assurances". The Court of Appeal held that the judge's findings on the evidence before him were unassailable, and dismissed the appeal.

49 The one possible point of principle to which I referred above was whether there needs to be a relationship of proportionality between the level of detriment and the relief awarded. In [Davies v Davies \[2016\] EWCA Civ 463, \[2016\] P & CR 10](#), Lewison LJ had referred with apparent approval to counsel's suggestion that there might be a "sliding scale" approach, giving greater weight to the expectation in cases of clearer expectation, greater detriment and longer passage of time during which it was held.

50 In [Suggitt](#) (which was cited in [Davies](#)), at [43] Arden LJ referred to paragraph 50 of the judgment of Robert Walker LJ in [Jennings v Rice \[2002\] EWCA Civ 159, \[2002\] WTLR 367](#), where he had said that

"if the claimant's expectations are uncertain, or extravagant, or out of all proportion to the detriment which the claimant has suffered, the court can and should recognise that the claimant's equity should be satisfied in another (and generally more limited) way"

rather than simply

"to fulfil the claimant's expectations".

Then, at [44], Arden LJ said that this

"does not mean that there has to be a relationship of proportionality between the level of detriment and the relief awarded".

51 For what it may be worth, I agree with what Arden LJ said. Proprietary estoppel is a doctrine which, like the law of contract, focuses on expectations created rather than losses suffered. So if A promises B some property right, intending B to rely on this, and B does rely on it to B's detriment, the natural impulse is (as with contract law) to require A to make good the expectation. Making the remedy proportionate to the detriment suffered would be to focus more on what B has lost, rather than on what B expected to obtain.

52 But of course proprietary estoppel is not as strict as contract law. It is also an *equitable* doctrine, and therefore tempered by conscience. So there may be exceptional cases where (as Robert Walker LJ said) it is just not right to require A to go the whole length of satisfying the expectation created. In those cases, there may be another way to satisfy the equity raised, without however necessarily requiring the remedy to be proportionate to the detriment. For myself I respectfully doubt how far a "sliding scale" approach would be useful. Just as a contract is either made and broken or not, either the promisor has created an expectation, on which the promisee has relied to his or her detriment, or not. But on the facts of this case the point does not arise, and I will say no more about it.

Effects on third parties

53 The next question is the effect of any proprietary estoppel equity on the voluntary transfers to

Karen in 2007 of Lox Lane and Hoskins, and to Sandra in 2009 of Pennymore Pitt Farm jointly with the testator. Given the facts which I have found, this issue does not strictly arise. But it does matter if I am wrong, and it was debated before me. So I will deal with it briefly. First of all I remind myself that all this land (except Lox Lane) was unregistered until after the transfers to Karen in 2007 and to the testator and Sandra jointly in 2009. So the relevant rules of priority are those applicable to unregistered land. However, Lox Lane was first registered in July 2002, and so the relevant rules of priority for that parcel of land as from that date are those for registered land.

54 Sam argues that he has a proprietary estoppel equity, which arose before the 2007 transfers to Karen (and therefore before the transfer to the testator and Sandra jointly in 2009). He relies on [Voyce v Voyce \(1991\) 62 P & CR 290](#). That was a simple case, where a mother made an informal gift of land consisting of a cottage, to her elder son on condition that he did it up (as it was agreed he had), and then subsequently purported to make a second gift of the same land by formal deed to her younger son. It was held, both at first instance and in the Court of Appeal, that the elder son had an equitable interest by way of proprietary estoppel which was binding on his brother, now the legal owner. This was because the latter was a volunteer and also was aware of his brother's occupation of the land (thereby having at least constructive notice of the elder brother's rights).

55 Dillon LJ (with whom Nicholls and Russell LJJ agreed) said (at 294):

"The court of equity has habitually sought to protect a purchaser for value without notice of an equitable interest, but I do not find any indication that the court has sought to protect a volunteer successor in title from a donor who has notice of the circumstances from which an equity has arisen and notice that the claimant to an equity is, and was at the time of the deed of gift to him, in occupation of the property."

In other words, a proprietary estoppel equity prevails over a volunteer successor in title of the legal estate, at any rate if the successor has notice of the circumstances and notice that the other party is in occupation. For myself I do not quite understand why it is necessary for anything more than being a volunteer. If the successor is not a purchaser of the legal estate for value, on unregistered land principles any equity attaching to the property binds the successor, even if the successor has no notice of the equity. No authority for such a proposition was referred to at the trial, but perhaps *Eyre v Burmester* (1862) 10 HLC 90, 104, 111, will do.

56 Whilst [Voyce v Voyce](#) may exemplify the guiding principle, this case is factually more complicated than was that one. There are the positions of both Karen and Sandra to take into account. Karen is a donee of the legal and beneficial interest in Lox Lane and Hoskins (and Framptons, though Sam makes no claim to that). She also claims her own proprietary estoppel equity by reason of action she claims to have taken in reliance on the gift. Sandra claims to benefit under a constructive trust of the rest of Pennymore, but also as a joint tenant with the testator of that land from 2009. I deal with the position of Karen first.

57 First of all, Karen claims a countervailing equity through proprietary estoppel arising out of her own expenditure on the land given to her (but mostly Framptons). Paragraph 23 of the Amended Defence and Counterclaim alleges that Karen

"has materially altered her position in reliance upon and in consequence of the said gift and in ignorance of the facts and matters relied upon by the claimant, no admissions as to the same hereby being made and whereby his position in equity is subordinate to hers. In particular, [Karen]

- i. spent money and time improving the land which was in a poor state and in need of work such as resowing and spraying against weeds;
- ii. obtained planning permission and erected a large covered yard on the land;
- iii. had an electricity supply brought across four fields from the main road;
- iv. had water brought across four fields from the main road and supplied into each field and the sheds and tanks provided and fitted;

- v. employed workmen to remove overgrown hedges and have hedges laid;
- vi. employed workmen to erect a ring fence around the land as there was no fencing;
- vii. fenced and continues to fence the fields within the ring fence;
- viii. erected bridges across a pond to an island in the middle and planted trees and shrubs and other plants thereon;
- ix. built up a successful business reliant upon the land and including 220 beef cattle a herd of suckler cows, 120 breeding ewes and sales of hay.

In total [Karen] has spent in the region of £350,000 developing and improving the land."

58 It is to be noted that, although in evidence Karen said she spent money and did work on some of the land before it was given to her, relying (as she said) on the testator's promise to give it to her, in fact there is no pleading that Karen relied on any promise by the testator made to her *before* the 2007 gift. Moreover, there was no application to amend her statement of case. This means that her claim (so far as necessary) is to an equity arising at the earliest only *after* that gift was made. I cannot properly and fairly consider this case on any other basis.

59 Paragraph 7 of the Reply to Defence and Counterclaim says:

"Paragraph 23 is denied and in respect of the sub paragraphs thereof: –

- i. Save that it is admitted that [Karen] may have reseeded some of the land as it was previously used to grow maize no admissions are made in respect of subparagraph i.
- ii. Subparagraph ii is admitted but averred that the barn was erected on the 60 acres of land at Frampton which it was always intended [Karen] should have.
- iii. Sub paragraphs iii and iv are admitted although no admissions are made as to the need for the works, the way in which they were carried out or the costs thereof;
- iv. Subparagraph v is admitted but the works were carried out on the 50 acres of land at Frampton which it was always intended [Karen] should have and no admissions are made as to the need for the works, the way in which they were carried out or the costs thereof.
- v. It is admitted that fencing works were carried out as alleged in subparagraph vi but the need for those works is not admitted;
- vi. Subparagraph vii is not admitted.
- vii. No admissions are made as to subparagraph viii and [Karen] is put to strict proof thereof.
- viii. As to subparagraph ix [Sam] admits that [Karen] keeps cattle on the land but no admissions are made as to the number or quality thereof or as to the success or otherwise of the business carried on by [Karen].
- ix. No admissions are made as to the amounts alleged to have been spent on the land and [Karen] is put to strict proof thereof."

60 At the trial Karen gave evidence as to the extent to which she had indeed relied, in the ways alleged, on the gift to her by the testator (see her witness statement at [23]-[26]), and she was cross-examined on that statement and on the documents in the bundle. In closing submissions, Sam's counsel argued that

"Of course any equity [of Karen's] would postdate Sam's equity but in any event factually Karen has not established her case on this".

61 In particular, it is argued by Sam that: (a) some of the expenditure appears to predate the 2007 transfer to her, and (b) much of it dates from after the claim was first intimated in July 2012. Further, (c) almost all of the expenditure has been on Framptons, in relation to which Sam makes no claim. In addition, (d) Karen was unable to establish how she paid for the works.

62 I find that most of the work done and money spent by Karen after the gift was in relation to Framptons. However, as set out in the schedule compiled by Sam's solicitors, some (more than trivial) work was done and some (albeit modest) amounts of money were spent on other parts of the land given to her by the testator. As to the first point, in my judgment her claim to an equity is to be judged in relation to her land as a *whole*. The fact that Sam now does not claim any rights in relation to Framptons should not mean that her claim to an equity has to be treated in separate compartments in relation to separate parts of her land. Secondly, the fact that the amount spent and the work done is not very great does not in my judgment matter. Proprietary estoppel is not about compensating for losses, it is about fulfilling expectations: see [52] above, and [cf Pascoe v Turner \[1979\] 1 WLR 431](#), CA. Lastly, I do not consider that it is significant how exactly Karen financed the works that she did. In my judgment, if it were necessary, Karen would have established an equity here.

63 But there is also a point of law about priorities. This is whether, as Sam argues, "any equity [of Karen] would postdate Sam's equity". Although a decision as to whether a proprietary estoppel equity has arisen can only be made retrospectively (see Hoffmann LJ in *Walton v Walton*, unreported, 14 April 1994, cited with approval in [Thorner v Major \[2009\] 1 WLR 776](#), [57], [101], and [Davies v Davies \[2016\] EWCA Civ 463](#), [38]), there is still a point in time to be found. In accordance with [Voyce v Voyce](#) and other decisions it is clear that a proprietary estoppel equity arises at a certain point, *ie* when it becomes unconscionable for the landowner not to give effect to his promise or assurance. This will be only once the reliance has taken place and the detriment incurred. Although the court has to decide this question retrospectively, it decides what was the position at that point in time. The same idea is incidentally now reflected in the wording of [s 116 of the Land Registration Act 2002](#) that each of what the section calls "an equity by estoppel" and a "mere equity" takes effect "from the time the equity arises."

64 If I had held that the testator had made a promise or assurance to Sam, intended to be relied on, to leave him Pennymore, and Sam had before the transfer to Karen in 2007 relied on that promise or assurance to his detriment (as was his case), in principle an equity would have arisen in Sam's favour before any equity or other rights could have arisen in favour of Karen. As I have already said above ([53]), any equity attaching to the property in favour of Sam would bind a successor (*ie* Karen) who was not a good faith purchaser of the legal estate without notice.

65 The question would then arise whether, if Karen were able to establish a proprietary estoppel equity of her own after the gift in 2007, this would make her not only a purchaser of the legal estate (by virtue of the deed of gift) but also one *for value*. There is a *dictum* of Wynn-Parry J to this effect in [Re Diplock \[1947\] Ch 716](#), 784. But the matter was not fully argued before me, and on the facts that I have found this question (which I regard as a difficult one) does not in fact arise. So I prefer to express no view. In any event, I make clear that, although Karen was aware of Sam's belief that he would inherit Pennymore, she had no notice of any facts from which an equity in his favour could arise.

66 As to Sandra, Sam says that she had no interest in Pennymore Pitt before the transfer into joint names in late 2009. In her witness statement, Sandra says that the testator and she "had lived at Pennymore for 37 years and had always treated it as our home that we had made together". But there is certainly no evidence of any express trust for her, or of a contribution to the purchase price giving rise to a presumed resulting trust. So on the face of it the only way she could have had an interest at that stage would have been by way of constructive trust. Paragraph 12 of the Amended Defence and Counterclaim does in fact make a claim to a constructive trust in favour of Sandra, but in one particular circumstance only. That is that the testator is held not to have had testamentary capacity, but that Sandra nevertheless validly signed the notice of severance of the joint tenancy between herself and the testator. However, as will be seen below, that narrow circumstance does not arise. Accordingly, there is no effective claim made by Sandra to a beneficial interest in the land before the transfer to the testator and herself jointly in 2009.

67 As to that, Sandra's position as a legal and beneficial co-owner of the land conveyed into joint names from 2009 is at least as strong as that of Karen as legal and beneficial donee of *her* land, already discussed. But if Sam's claim to an equity arising before 2007 had been made good on

the facts, that equity would have bound Sandra taking a beneficially co-owned interest in 2009.

Testamentary capacity

Law

68 There is a preliminary question of law as to the test to be applied for testamentary capacity in a case like this, where the testator has made a will, died, and then the question of capacity has arisen. The traditional test for such a case is that laid down in [Banks v Goodfellow \(1870\) LR 5 QB 549](#), 565, per Cockburn CJ:

"It is essential ... that a testator shall understand the nature of his act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect, and, with a view to the latter object, that no disorder of the mind shall poison his affections, avert his sense of right, or prevent the exercise of his natural faculties, that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if his mind had been sound, would not have been made."

This test has been applied consistently in such cases well into the 21st century: see eg *Sharp v Adam* [2005] EWCA Civ 449, [2006] WTLR 1059, [68]; [Simon v Byford \[2014\] EWCA Civ 280](#), [34], [39].

69 More recently the [Mental Capacity Act 2005](#) has made fresh provision for the law of mental capacity in certain situations. What is unfortunately not made express in that legislation is the extent to which this fresh provision affects the test for capacity to make a will when that question is being judged retrospectively (typically, though not necessarily, *post mortem*).

70 That Act relevantly provides:

- (1) The following principles apply for the purposes of this Act.
- (2) A person must be assumed to have capacity unless it is established that he lacks capacity.
- (3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.

[...]

(1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

(2) It does not matter whether the impairment or disturbance is permanent or temporary.

[...]

(1) For the purposes of [section 2](#), a person is unable to make a decision for himself if he is unable—

- (a) to understand the information relevant to the decision,
- (b) to retain that information,
- (c) to use or weigh that information as part of the process of making the decision, or

(d) to communicate his decision (whether by talking, using sign language or any other means).

[...]

(4) The information relevant to a decision includes information about the reasonably foreseeable consequences of–

(a) deciding one way or another, or

(b) failing to make the decision.

[...]

(1) The court may make declarations as to–

(a) whether a person has or lacks capacity to make a decision specified in the declaration;

(b) whether a person has or lacks capacity to make decisions on such matters as are described in the declaration;

(c) the lawfulness or otherwise of any act done, or yet to be done, in relation to that person.

(2) "Act" includes an omission and a course of conduct.

[...]

(1) This section applies if a person ("P") lacks capacity in relation to a matter or matters concerning –

[...]

(b) P's property and affairs.

[...]

(2) The court may–

(a) by making an order, make the decision or decisions on P's behalf in relation to the matter or matters [...]

(3) The powers of the court under this section are subject to the provisions of this Act and, in particular, to [sections 1](#) (the principles) and 4 (best interests).

[...]

(1) The powers under [section 16](#) as respects P's property and affairs extend in particular to–

[...]

(i) the execution for P of a will;

[...]"

71 In their skeleton arguments lodged pre-trial, all parties submitted that the correct test was that in [Banks v Goodfellow](#); see Sam's skeleton at [23]-[24], and the defendants' at [80]. By the time of the closing submissions, however, Sam's position had changed. His concluding submission on the point was that

"It cannot be regarded as in any way satisfactory that the Court of Protection applies a different test as to whether someone has testamentary capacity during [his] lifetime from the test applied by the court when looking back. Logically the test ought to be the same" (see at [43]).

I must therefore consider the matter for myself.

72 In [Perrins v Holland \[2009\] EWHC 1945 \(Ch\)](#), [40], Lewison J in passing expressed the view that the 2005 Act had superseded the common law test. However, there appears to have been no argument on the point, and the judge was not referred to at least one relevant authority by then in existence, [Scammell v Farmer \[2009\] EWHC 1100 \(Ch\)](#). Moreover, that statement was necessarily *obiter*, because (as the judge himself said) the events in that case predated the coming into force of the Act, and it was not suggested that the Act was retrospective. (As to retrospectivity see also Lewison LJ in [Simon v Byford \[2014\] EWCA Civ 280](#), [39]).

73 In [Fischer v Diffley \[2013\] EWHC 4567 \(Ch\)](#), a case of wills executed after the 2005 Act had come into force, HHJ Dight said that the law was "not in dispute" ([24]), and that [Banks v Goodfellow](#) had

"recently been supplemented by statute [ie the 2005 Act], to which ... I am entitled to have regard as a starting point in connection with the question of capacity" ([25]).

It is to be noted that he did not say – as Lewison J had done – that the 2005 Act had *superseded* the old law. Instead, the judge went on to describe the terms of the 2005 Act as a

"modern statement of the principles relating to the assessment of capacity in a court of law",

and noted that the expert witnesses in the case had these principles in mind in giving their evidence ([34]). It is however fair to say that in that case only one side was professionally represented, namely the claimants who successfully argued that the testatrix lacked capacity. It is clear that there was no real argument on the point.

74 In [Gorjat v Gorjat \[2010\] EWHC 1537 \(Ch\)](#) [130]-[132] Sarah Asplin QC (as she then was), and in [Bray v Pearce](#), unreported, 6 March 2014, [87]-[90], Murray Rosen QC, in each case sitting as a deputy judge, appear to have taken a similar view. But in [Gorjat](#) and in respect of one of the three wills impugned in [Bray](#), the events preceded the coming into force of the 2005 Act in April 2007. In [Bray](#) there were however two wills made after April 2007.

75 In [Bray v Pearce](#), Mr Rosen QC said:

"87. Finally on this topic, I ought to mention first, that Mr Bray submitted, by reference to paragraph 25 of [Scammell v Farmer](#) ... that the 2005 Act did not apply to probate claims about testamentary capacity because that was outwith the 2005 Act's purposes as referred to in [sections 1 to 4](#); and secondly, that in that case the learned deputy judge also stated (in paragraph 24) that the onus of proof of incapacity under [section 1\(2\)](#) of the 2005 Act "is from the outset and remains on the complainant."

88 The meaning and reasoning in the judgment in [Scammell](#) on these points is not entirely obvious to me. I cannot and do not say that it was wrong, and these issues are not decisive for this present judgment.

89 As regards the first aspect, whether the 2005 Act applies, I note that in the recent case of [Fischer v Diffley](#) ... HHJ Marc Dight referred to the 2005 Act as supplementing the common law test and as being the starting point in connection with capacity – which in context must have meant testamentary capacity on a probate challenge. This is in line with the Mental Capacity Code of Practice, paragraphs 4.31 to 4.33 of which suggest that the 2005 Act's definition of capacity is in line with common law and does not replace it, such that judges can adopt the new definition if they think appropriate.

90 If I was left to my own devices as regards the first aspect, I would follow that flexible approach. Indeed:

(a) I myself do not readily see why the "purposes" of the 2005 Act should be narrowly construed and why it should not be applied at least by analogy to a "matter" such as testamentary capacity to execute a valid will on or after 1 April 2007, which is closely connected to other matters turning on capacity as expressly dealt with by the 2005 Act;

(b) I might have been tempted to approve of the views (expressed by the editors of *Theobald on Wills* (17th edition 2010, at paras 3–001 to 3–010, first supplement up-to-date as at 1 October 2013) – if different from Scammell, which they do not cite."

76 On the other side, there is [Walker v Badmin \[2014\] EWHC 71 \(Ch\), \[2015\] WTLR 493](#). Unlike the earlier cases referred to above, this was a case where all the relevant events arose after the coming into force of the 2005 Act. Nicholas Strauss QC, sitting as a deputy judge, heard full argument, reviewed all the available caselaw, and held that the test in [Banks v Goodfellow](#) not only *had* survived the enactment of the 2005 Act, but that it, rather than anything in the Act, was still the sole test of capacity for judging will-making capacity in retrospect.

77 His reasons included the following. First, the tests under the earlier caselaw and the Act were not the same: there were significant differences between them. These included (i) the incidence of the burden of proof, (ii) the degree of understanding of relevant information at the time, and (iii) the degree of understanding of the consequences of making the will. As to (i), under the test at common law, the burden of proving capacity lay on the propounder of the will, whereas under the Act capacity was to be presumed: see at [21]. As to (ii), the common law does not require in all cases that he is able to remember and understand all relevant information, whereas under the Act this is a requirement: see at [23]. As to (iii), the common law does not require the testator in all cases to understand, use or weigh information as to the reasonably foreseeable consequences of the choices open to him, whereas under the Act it does: see at [24]. Thus in the deputy judge's view it was wrong to suggest that the Act merely restated the [Banks v Goodfellow](#) test. Whilst the tests overlapped, and would often produce the same result, this would not always be the case.

78 Second, the 2005 Act sets out the test for mental capacity "for the purposes of this Act" ([ss1\(1\)](#) , [2\(1\)](#)). In the deputy judge's judgment these purposes were "to define the circumstances in which living persons are able to take decisions or, where they are not, when and how decisions can be made on their behalf" ([27]). Although [ss 16\(2\)](#) and [18\(1\)](#) of the Act enable the court to make a will for a person lacking capacity, this relates to *living persons* who lack capacity, and "[t]here is nothing in the Act which explicitly or impliedly provides that one of its purposes is to govern or in any way affect the decision of a court, after his death, as to the validity of a will which has been executed by the testator himself" ([28]). (See also, to the same effect, *Scammell v Farmer* [2009] EWHC 1100 Ch), [25], *per* Stephen Smith QC.)

79 Third, it was *not* unsatisfactory not to have a single test for capacity applying to both "the prospective task of the Court of Protection of deciding that a living person does not have capacity" (so that a will can be made for him) and "the retrospective task of the Chancery Division of assessing whether a will made by the testator himself was valid" ([29]). The two situations arose at different times and the nature of the two decisions was quite different. As the deputy judge put it, the 2005 Act provided "no machinery for taking a decision, during the testator's lifetime, as to whether a will he has executed is valid" ([30]-[31]).

80 Fourth, the traditional threshold for testamentary capacity has been low, so as not to deprive

elderly persons of the particular ability to make wills in their declining years (see also [Banks v Goodfellow](#) at 566). It was thus "unlikely that the legislature intended the detailed caselaw on testamentary capacity in relation to the testator's own dispositions to be replaced by a single definition applicable to a wide variety of decisions which might be taken on behalf of living persons" ([34]). He might have added that there was no *a priori* reason why as a matter of policy the threshold to be reached before *the court* could intervene and make a will for the testator (possibly well aware of what was going on) should be the same as the low threshold applicable to the testator himself.

81 The deputy judge accepted that two different tests could lead to a situation in which there were two competing wills. However, he also observed that this could arise even if the two tests were the same, as a person for whom the court has made a will may thereafter make his own, and if he had capacity at the time of the second will (whatever the test) it would prevail ([35]).

82 Accordingly, Mr Strauss QC held that the correct test to apply in considering retrospectively whether a testator had had capacity to make a will was the test in [Banks v Goodfellow](#) rather than that in the 2005 Act. I add that in *Kicks v Leigh* [2014] EWHC 3926 (Ch) , Stephen Morris QC (as he then was), sitting as a deputy high court judge, expressed a similar view to Mr Strauss QC. However, that was a case of an *inter vivos* gift challenged after death, rather than a will. I am not aware of any other decision bearing on the matter.

83 The general rule of precedent, as applied in the High Court, is that that court is not strictly bound by decisions of co-ordinate jurisdiction, but will follow them as a matter of comity unless convinced they are wrong: see [Police Authority for Yorkshire v Watson](#) [1947] KB 842 ; [Lornamead Acquisitions Ltd v Kaupthing Bank HF](#) [2013] 1 BCLC 73 , [52], [56]. [Walker v Badmin](#) is a decision of co-ordinate jurisdiction, whereas the authorities to the opposite effect referred to above (with one exception) are not *decisions* but *obiter dicta* . *Bray v Pearce* however is a *decision* in relation to the second and third wills. However, [Walker v Badmin](#) is a subsequent decision, reached with full consideration of the earlier decision. Accordingly, I should follow it in preference to *Bray* , to the extent that they differ: [Colchester Estates \(Cardiff\) v Carlton Industries plc](#) [1986] Ch 80 , 84-85, seemingly approved by the Court of Appeal in [Jarvis v Harris](#) [1996] Ch 195 , 202. As it happens, I think the decision in [Walker v Badmin](#) is right, and for the reasons given by the deputy judge. I add the following observations by way of small supplement.

84 The long title of the 2005 Act is

"An Act to make new provision relating to persons who lack capacity; to establish a superior court of record called the Court of Protection in place of the office of the Supreme Court called by that name; to make provision in connection with the Convention on the International Protection of Adults signed at The Hague on 13th January 2000; and for connected purposes."

It is to be noted that no part of this long title refers to the question of judging capacity to make wills once they have been made.

85 The individual provisions of the Act are concerned with assessing the mental capacity of *living* persons, and the manner of making decisions *thereafter* on their behalf when, judged by the terms of the Act, they lack such capacity. It is solely in pursuing *that* purpose that it deals with (amongst other things) the arising of the power of the court to make a will for a living person who has been found not to possess capacity. It does not follow from this that the test for judging capacity retrospectively in relation to a will already made must also be governed by the same principles. The two things are different, and the latter does not obviously fall within the scope of the Act as expressed through its provisions.

86 Moreover, the test in [Banks v Goodfellow](#) is not a recent innovation of the common law, even though, as Lewison J said in [Perrins](#) , at [40], it has been influenced by contemporary attitudes over the years, and as a result has been refined. The basic test was already old when that case was decided in 1870, being founded on decisions going back the best part of three centuries before that. It is a principle of statutory interpretation that Parliament is assumed not to intend to overrule well-established rules of the common law without clear words, or at least necessary implication: see eg [Black-Clawson International Ltd v Papierwerke-Aschaffenburg AG](#) [1975] AC 591 , 614; R ([Rottman](#)) v [Commissioner of Police for the Metropolis](#) [2002] 2 AC 692 , [75]; [Islington LBC v UKCAC](#) [2006] 1 WLR 1303 , [28].

87 If it wished to, Parliament could have said clearly that the Act was to apply to retrospective decisions on capacity too, but it did not. In those circumstances the courts must construe the words used, to see if an implied intention so to legislate can be spelled out. I have looked hard, but I am satisfied, as Mr Strauss QC was satisfied, that it cannot. Whilst it is a complication to have two tests for mental capacity in making wills, one prospective and the other retrospective, it is a complication created by the decision of Parliament to legislate as it has, a decision that the courts must respect.

Facts

88 In relation to the claim that the testator lacked capacity to make his will on 16 September 2010, and on the basis of the evidence before me, I find as follows. In November 2004, the testator, accompanied by Sarah Miller, his bookkeeper, gave instructions to Rutters solicitors to draft a will. This was to include a gift of Pennymore Pitt Farm to Sam. However, the draft will did not do so, and when the testator received it in the post he noticed the omission and telephoned Rutters, who sent a redrafted version. This gave Pennymore Pitt Farm to Sam, Chequers Farm to Sandra, Framptons to Karen and £80,000 in cash to Serena. That redrafted version was seen by Sandra. As I have already said, she challenged the testator over it, on the basis that it was not fair to her daughters. She wanted a more even distribution of family assets. Presumably as a result, it was never signed. But it is clear that the instructions for it were given by the testator without reference to Sandra.

89 Sandra's evidence (which I accept) was that the testator was "not as formidable as he had once been" from 2004 onwards. In January 2005 she and Serena went to see the testator's GP about his symptoms of memory loss. At that stage certainly, despite what Sandra said in evidence, there was no diagnosis of dementia. It appears from what is later stated that a full biochemical screen was carried out but everything was found to be within normal limits. On 21 September 2007 the GP records that the testator on attending the surgery "repeated himself several times today but says memory not causing him a problem". Again there was no diagnosis of dementia. In the same year the testator transferred Framptons, Hoskins and Lox Lane to Karen. This amounted to about 200 acres in all. Subsequently, when the testator was asked about this by Sam, he insisted that he had transferred only 60 acres to Karen. The testator also transferred his bank accounts that were in his sole name to the joint names of himself and Sandra.

90 In March 2009 the testator, Sandra and Sam met their solicitor Roger Snowdon and their accountant Simon Christopher to discuss the future of the partnership. Their advice was to dissolve it. This was agreed in principle, with the testator and Sandra keeping the farming business, and Sam having the haulage business, but with the right to keep lorries at Pennymore. In addition, Sam would be given Chequers (though it was not a partnership asset). Sam took independent legal advice, a formal agreement was negotiated and drafted, and it was signed on 7 August 2009. There was no suggestion at any time that the testator did not have capacity to enter into this agreement, or to make the transfer of Chequers to Sam.

91 In October 2009 the testator's GP referred him to the Community Mental Health Team for older people. The referral letter says that the testator

"for some years now has been suffering from short-term memory loss and spells of quite profound confusion".

In November 2009 a Community Mental Health Nurse visited the testator at home and subsequently wrote to the GP that

"problems with [the testator's] memory were noticed over the last 3 years and he is no longer able to manage the farm or drive a car although he will occasionally drive a tractor".

92 Nevertheless, Sandra felt adequately supported by her family and did not see the need for mental health services to be involved then. A risk assessment made on the same day said that the testator was

"verbally hostile towards wife. Relies upon wife. Becomes restless and searches/follows her around the house."

At about the same time, but at the instigation of Sandra, the testator was taken to see the solicitor Roger Snowdon again, when he gave instructions to transfer the title to Pennymore Pitt from his sole name into the joint names of himself and Sandra. It is evident that Mr Snowdon had some concerns as to whether the testator was doing this of his own free will. Nevertheless the transfer of Pennymore Pitt to joint names was executed by the testator in November 2009, and subsequently registered at the Land Registry on 20 January 2010.

93 Also in January 2010, the testator was treated in hospital for an injury to his shoulder. The patient record states under "PMH" (which I assume means "previous medical history") "dementia/Alzheimer's". It is not clear whether the member of staff who filled out the form was medically qualified or not. A note made at the top of a page in his patient records says simply "has dementia". There is no evidence of who wrote these words, although on their face they appear to be in a different handwriting to the rest of the form, and nothing to show whether there was a formal diagnosis by a qualified medical practitioner, rather than a comment by an accompanying relative which was recorded on the form.

94 On 20 May 2010, Fiona Thomas took instructions from the testator and Sandra (who were both present) for the making of wills for each of them. She had not acted for either of them before. Her attendance note makes no mention of any consideration being given to the question of the testator's capacity to make a will. Later the same day Sandra telephoned Ms Thomas and made an appointment to see her on 26 May. At that second meeting Sandra gave further instructions as to disposing by her own will of her interest in the land still co-owned with the testator, *ie* Pennymore Pitt Farm. She wanted to ensure that it passed to Serena. Ms Thomas explained the disadvantages of this if the testator survived her, and Sandra accepted her suggestion of a life interest for the testator with the remainder passing to Serena. She also explained that as the testator and Sandra held the land as joint tenants the joint tenancy would have to be severed in order for the life interest gift to work.

95 In contrast to the first note, the attendance note for the second meeting records that Ms Thomas

"was confident that at the end of the [previous] meeting [the testator] did understand everything that [she] had discussed with him and [Sandra] agreed. [Sandra] explaining that it is really only his short term memory which is not particularly good."

It also records (i) that Sandra told Ms Thomas that she thought the testator "might be under [Sam's] influence", and (ii) that they agreed that Ms Thomas would telephone before sending the draft documentation as otherwise the testator might open the post and file it in a "mysterious place."

96 A file note records that Ms Thomas drafted the wills and power of attorney, together with a covering letter, on 28 May 2010. Ben Marshall telephoned on 8 June to ask how she was getting on with her clients. She said she had received instructions for wills and lasting powers of attorney. They also discussed financial advisors. There was no mention of any doubts as to the testator's capacity. On 11 June Ms Thomas telephoned Sandra to tell her to expect the drafts in next day's post, and to make an arrangement to see the testator and Sandra the following Thursday. The draft wills and powers were sent under cover of a detailed letter, extending to more than three pages of single-spaced typing, dated the same day, 11 June. This was accompanied by a separate "customer care" letter addressed to both clients, setting out information and terms of the retainer. Although the terms of the retainer letter suggest that it should have been sent out after the initial interview on 20 May, and not with the drafts themselves, there is nothing in either letter to indicate any question as to the testator's testamentary capacity.

97 On 16 June 2010 there was a further meeting at Pennymore Pitt Farm between Ms Thomas and her clients, at which a financial advisor from Lloyds TSB Private Banking was also present. According to Ms Thomas's attendance note of the meeting, although much of it was taken up with financial rather than legal matters, the wills were briefly discussed. Sandra (in the presence of the testator) confirmed that all of the land to the north of the A30 was to pass to Karen under the

terms of the wills. It was agreed that the testator and Sandra would consider the draft wills while Ms Thomas was away on holiday, and would make contact with her on her return to discuss them.

98 Ms Thomas telephoned Sandra after her holiday, on 14 July. But the testator was not well then, and Sandra said she would telephone the following week to make an appointment. Ms Thomas called again on 9 August, when Sandra told her she was trying to obtain all the necessary information to complete the documents, and would be in touch "in the next day or two". In fact it was 1 September before they spoke again. Sandra expressed a concern as to whether Sam would inherit enough on their deaths, but after discussion concluded that he would, and decided that she was happy with the wills as they were. Some of the details which Ms Thomas needed to finalise the wills were supplied in this call, and in a further call later the same day. An appointment was made for the testator and Sandra to sign their wills on 9 September.

99 However, on 3 September Ms Thomas spoke again to Sandra, as there were "still several 'blanks' yet to fill with regard to the will". But even at this late stage Sandra was still unsure whether Karen should have all the land to the north of the A30, or whether Serena should have some of it. She and Ms Thomas discussed the values of the various parcels that would belong to the three children after the deaths of the testator and herself, but ultimately she was satisfied that it did not make sense to give Serena any of the land to the north of the A30. She also confirmed the appointment for 9 September.

100 Lastly, there is an email recording a telephone call from Sandra to Ms Thomas's secretary on 7 September, in which a final address was supplied, and a change was conveyed in the identity of the person to be informed under the terms of the powers of attorney.

101 Three things are notable about the conversations of 14 July, 9 August and 1, 3 and 7 September. The first is that the testator takes no part in them. They are between Sandra and Ms Thomas (or her secretary). The second is that, to the extent they discuss instructions for the wills, they are expressed to be what *Sandra* wants. There is no reference to the wishes of the testator. The third thing is that there is again no reference in any of them to any question of the testator's capacity to make a will. It appears that the drafts of the wills and powers were finalised on 7 September.

102 In a case like the present, where there is clearly a deterioration of the testator's faculties over time, and there is no medical evidence of his condition and capacity on or about the time of the execution of the will, the most important evidence of capacity available is that of what actually happened on that day. In the present case I have had the benefit not only of a *Larke v Nugus* statement made by the drafting solicitor, Ms Thomas, but also of a lengthy and detailed attendance note of the signing meeting made shortly afterwards. She was also cross-examined on it during her evidence. My findings of what happened on that occasion are as follows.

103 On 16 (rather than 9) September, Ms Thomas went to Pennymore for the execution of the wills and other documents. However there was confusion over the time of the meeting, and she found that, although the testator was at home, Sandra was out. Having returned to the office, Ms Thomas was told Sandra had called to say she was now home. By the time Ms Thomas returned to the farm, the testator had himself gone out. Sandra told her that her husband "does not want to sign anything". In his absence, they discussed the effects of the testator's executing the notice of severance but not his will, and his not executing either. Sandra said in that case she would prefer not to execute the present draft will, but to have it redrafted so as to leave her own free estate to Serena. But she was happy to sign (and did sign) her own power of attorney in favour of the testator and the first and second defendants jointly and severally.

104 Sandra subsequently went to find the testator and brought him into the meeting. He was told that Sandra had just signed her power of attorney and was asked to sign it to show that he was happy to act. He said he was and duly did so. Ms Thomas then raised the question of the testator's will with him. He said he "could see little point in making a Will as circumstances change so quickly". But he asked to see the draft will prepared by Ms Thomas. She asked Sandra to leave the room while she discussed the will with the testator. Ms Thomas went through the individual clauses of the will with the testator. He "appeared happy with the contents of the Will but could not see the point in signing the Will. [He] appeared to be concerned that if he signed the Will that this would mean that he would die..."

105 Ms Thomas discussed the matter further with him. He asked if Sandra had signed her will, and on being told that she had not appeared reluctant to sign his own. Again he said that he "could see little point in making a Will when circumstances change so frequently." But he asked Ms Thomas to go through the contents once more. Although he was happy with the contents he still had a problem with signing it. Ms Thomas did not press the matter. She went out to explain the situation to Sandra. They discussed the procedure for the registration of the power of attorney, and Sandra signed two other forms.

106 They then rejoined the testator. Sandra asked him if he thought it "sensible to redress the balance between the children," indicating that Sam had had Chequers and the business and its cash, and Karen had some of the land to the north of the A30, but that Serena had so far had little. The testator said that she must be provided for. However, shortly after that he went on to say that "all he wants to provide for is for [Sandra] and to make sure that she is provided for, has a roof over her head and wants for nothing." He asked Ms Thomas to go through the will again, which she did, although this time Sandra was present. He then asked Sandra if she was happy with the will. She said that she was. He said he wanted "to make sure that Sandra was provided for and that she could have the lot but appreciated that the balance needed to be redressed between their 3 children." Ms Thomas told him the values of the assets which Sam and Karen appeared already to have received and also the value of Pennymore Pitt Farm as set out on the Land Registry title. Ms Thomas again explained that under the terms of the 2 wills the part of the farm to the north of the A30 would pass to Karen and the part to the south, including the farmhouse, would be subject to a life interest for the survivor of the testator and Sandra, after which it would pass to Serena.

107 The testator told Ms Thomas that he could see that the balance needed to be redressed and was therefore happy with the will, and if Sandra was happy with it then he would sign it. The testator and Sandra then signed their wills. Ms Thomas records in her attendance note that she was "confident that [the testator] was happy to sign his will and had not been forced in any way to sign his will but appeared to be far more comfortable with [Sandra] present discussing the will, rather than with [Ms Thomas] alone". The testator and Sandra then signed the notice of severance. There was then further discussion of the testator's Lasting Power of Attorney. The testator said he could not see the point of having a power of attorney, or, if there was one, why his daughters needed to be involved. He would be happy for Sandra alone to be his attorney. Ultimately it was agreed that Ms Thomas would prepare a new draft power appointing Sandra alone as attorney and would return in "a month or so". The whole meeting had lasted some two hours.

108 At the trial Ms Thomas was challenged as to why she did not seek a medical opinion on the testator's capacity to make a will at the time it was signed in September 2010. She said she met the testator on three occasions, namely, the original instructions meeting, the meeting with the financial adviser (important for gauging how far the testator was aware of his estate) and the signing meeting. The testator was interactive at each of them and showed no signs of confusion or ill-health. Ms Thomas was taken to various documents evidencing confusion or short-term memory loss, but insisted that they did not take away capacity. Nor did they necessarily mean that the solicitor drafting a will for an elderly client should get a medical opinion. She did however accept that some of the events and circumstances of which she was aware suggested that the testator was not behaving completely rationally and was at least "a little out of the ordinary". She accepted that it was unusual to find at a signing meeting that one of two testators was initially unwilling to sign at all. The testator's statement that if he signed his will he would die struck Ms Thomas as "slightly peculiar". But she had seen other examples of this phenomenon, and the testator was happy with the terms of the will themselves.

109 Finally, after further discussion, the testator was prepared to sign. For her part, Ms Thomas was happy that he had sufficient capacity to do so. The terms of the wills did not change much from the time of giving instructions to the time of signing. The one thing that she would have preferred was for Sandra not to be present, but she acknowledged that the testator had felt comforted by her presence. Overall, she saw no need for a medical opinion. That was her judgment.

110 The so-called "golden rule" is that in the case of an aged testator, or one who has suffered a serious illness, the making of the will "ought to be witnessed or approved by a medical practitioner who satisfied himself of the capacity and understanding of the testator, and records and preserves this examination and finding": see *Re Simpson* (1977) 127 New LJ 487 , per

Templeman J. It is not a rule of *law* such that (i) if it is not followed, the will is not valid, but (ii) if it is followed then the will is valid. Instead, it is a rule of *practice*, the following of which generally has a prophylactic effect, in that it is then much less likely that there will be a (long and expensive) dispute as to testamentary capacity: [Re Key deceased \[2010\] EWHC 408 \(Ch\), \[2010\] WTLR 623](#), [8], per Briggs J. In the light of what has happened subsequently in this case, it is obviously regrettable that a medical opinion was not obtained. There were a number of indications that this was not an ordinary case. I accept that Ms Thomas said in evidence that the golden rule is often difficult to implement today. But there was no evidence before me as to how difficult it would have been in this case, and I am not aware of any scientific studies of the problem. But none of that matters now. I must go on and determine the question as to testamentary capacity, in the light of the evidence available to me, but without the benefit of any contemporaneous medical opinion following examination.

111 In May 2011 the testator was referred to The Older Person's Mental Health Team at the Westminster Memorial Hospital in Shaftesbury. Dr Andrew Pallett, a doctor specialised in old age psychiatry in a letter dated 12 May 2011 gave a diagnosis of "probable moderate dementia with frontal lobe impairment" and expressed the opinion that

"I do not feel that he has the basic capacity to make decisions about his health care, where he lives or his finances."

112 The evidence of both Prof Howard (for Sam) and Prof Jacoby (for the defendants) was based on an examination of records and other documents, including witness statements. Neither of them had the opportunity to examine the testator during his life. However, on this basis, both agreed that the testator at the time of making his will was suffering from Alzheimer's disease, resulting in moderate dementia. Both agreed that the testator had the capacity to make the transfers of land in 2009. They also agreed that, in relation to the making of the will in 2010, the first two limbs of the well-known test set out in the decision in [Banks v Goodfellow \(1870\) LR 5 QB 549](#), 565, were satisfied. That is, the testator had the capacity to understand the nature and consequences of the testamentary act, and he sufficiently appreciated the nature of the estate of which he was to dispose. They disagreed as to the third limb, that is whether the testator had the capacity to appreciate the claims of his children on his inheritance. Prof Howard said that he did not, whereas Prof Jacoby said that he did. However, they also agreed that the situation was not clear-cut, the case was "one of very fine judgment", and it was no surprise to each that the other was on the other side of the line.

Discussion

113 In light of the evidence before me, the agreement between the experts, and in all the circumstances, I hold that the testator indeed had capacity to make the transfers of land and other property in 2009, and at the time of making his will in September 2010 satisfied the first two limbs of the rule in [Banks v Goodfellow](#). He plainly appreciated that he was making a will on 16 September 2010, as his comments to Ms Thomas at the meeting show. He was also aware of the estate he had to dispose of. Indeed, Ms Thomas reminded him of it. In any event, I remind myself that it is not required that a person *actually* understand the extent of his property, only that he have the *capacity* to do so: [Simon v Byford \[2014\] EWCA Civ 280](#), [40]. In my judgment, on the evidence before me, he did.

114 That leaves the third limb. I am therefore concerned to consider whether or not at the time of signing his will the testator was able to appreciate the claims of his children on his inheritance. In this respect, I am not concerned with questions of pressure or undue influence in themselves, or indeed any other vitiating factor. And, in relation to the question of ability to appreciate claims upon his inheritance, it is not necessary to understand the collateral, rather than immediate, consequences of a disposition: [Simon v Byford \[2014\] EWCA Civ 280](#), [45].

115 The burden of proving capacity as a matter of law lies on those who propound the will. In this case that is the defendants. Although capacity will be presumed in cases where a duly executed will is put forward, apparently rational on the face of it, nevertheless it is only a presumption, and if a real doubt is raised about capacity, then it will be for the propounder to prove on the balance of probabilities that the maker of the will indeed had capacity: see [Re Key deceased \[2010\] EWHC 408 \(Ch\), \[2010\] WTLR 623](#), [97]. In this case such a doubt has been raised. It follows

that, unless the defendants demonstrate, on the balance of probabilities, that the testator satisfied all three limbs of the test in [Banks v Goodfellow](#), I must hold that the will is invalid.

116 I have taken into account all the evidence before me, including that of the experts. I accept that the testator suffered from memory loss and confusion from time to time, and even some irrational behaviour. But there is also considerable evidence of normal behaviour and rational thought. I am particularly struck by the evidence of Ms Thomas (which I accept) that immediately before signing his will the testator "appreciated that the balance needed to be redressed between their three children", and that she explained to the testator the values of property which the children had already had and might expect to have under the wills as drafted. It is also a fact of some importance that the terms of the wills as executed corresponded closely to the terms of the instructions for the wills originally given by the testator some months before, in May 2010. I also bear in mind that, compared to some cases, this testator had relatively few claims upon his inheritance to consider, namely those of his wife and his three adult and emancipated children, and a fairly straightforward (if nevertheless valuable) estate to dispose of, largely consisting of land close by to him which he had worked on during his life and knew well, and some cash or cash-equivalent investments. The simpler the estate and the fewer claimants, the less difficult it is to dispose of, and accordingly the less acute the faculties required to do so successfully.

117 In my judgment, apart from Sam's claim in proprietary estoppel (in relation to which different considerations arise, and with which I have already dealt above), the will which the testator instructed to be drafted and which in substantially the same form he executed demonstrates a rational and balanced approach to the disposal of the testator's estate, bearing in mind the transfers that had already been made in 2007 to Karen and in 2009 to Sam (following the dissolution of the partnership) and later to Sandra. Of course, if it had been shown that the testator promised to give particular land to Sam then, whether or not Sam relied to his detriment on that promise, that would be a matter to be taken into account in assessing how far the testator had capacity to appreciate the claims on his inheritance. But, as I have already held, there was no such promise or assurance given to Sam.

118 As a result, I conclude that the testator at the time of executing his will on 16 September 2010 had the capacity to appreciate the claims made by others on his estate, and therefore (taken with my earlier findings) had capacity to make that will.

Notice of severance

119 Since the testator had capacity to make the will, which is a more complex matter to understand and decide than the execution of a notice of severance of joint tenancy, I find that he had capacity to sign the notice at the same time.

Conclusion

120 For the reasons given above, I hold that the claim in proprietary estoppel and the challenge to the will of September 2010 both fail, and the claim as a whole must be dismissed.

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