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IN THE HIGH COURT OF JUSTICE — Claim No HC 11 C 03679

CHANCERY DIVISION

Royal Courts of Justice

The Rolls Building

110 Fetter Lane EC4A 1ES

Thursday 26 September 2013

BEFORE MARK HERBERT QC SITTING AS A DEPUTY JUDGE OF THE CHANCERY DIVISION

IN THE ESTATE OF FRANÇOIS ANTHIME DEVILLEBICHOT DECEASED

BETWEEN : —

CHLOE BRENNAN — Claimant

– and –

(1) ANTHONY FRANCIS PRIOR

(2) ANDREW GEORGE PRIOR

(3) ANNE LILIANE DEVILLEBICHOT

(4) JACQUELINE CECILE DEVILLEBICHOT

(5) LUCILE SIMONE NOBLE

(6) PHILIPPE GEORGES DEVILLEBICHOT — Defendants

The Claimant in person

Mr Edward Hicks (instructed by Gregsons) for the 1st and 2nd Defendants

Mr Luke Harris (instructed by Russell-Cooke) for the 3rd to 6th Defendants

Hearing dates 11–14 June 2013

Approved Judgment

I direct that pursuant to CPR 39A para 6.1 no official shorthand note shall be taken of this judgment and that copies of this version may be treated as authentic

Mark Herbert

Mark Herbert QC

Introduction

1. This is a probate action. It relates to the estate of François Anthime Devillebichot, whom I shall call François and who died on 3 March 2011. There is only one potential will in dispute, dated 19 February 2011, less than two weeks before François's death. The proceedings are somewhat back-to-front, because the proponents of the disputed will are not claimants but four of the defendants, two others of the defendants are the nominated executors but are not seeking positively to propound the disputed will, and the claimant Mrs Chloe Brennan ('Chloe'), who is 40 years of age, is the deceased's only daughter and sole next-of-kin. Since this is entirely a family dispute I shall, without any intended disrespect, refer to all the principal individuals by their Christian names.

2. If the disputed will is valid, its beneficiaries are Chloe herself and François's four siblings Anne, Jacqueline, Lucile and Philippe, who are the 3rd to 6th defendants and whom I shall call collectively the siblings. Jacqueline died a few weeks before the hearing, and I made an order on the first day for her estate to be represented by Anne. The 1st and 2nd defendants are Anthony and Andrew Prior, who are brothers, and first cousins of François, apparently nominated as executors of the disputed will.

3. Chloe appeared before me in person, being assisted by her brother-in-law as a McKenzie friend. The defendants were represented by counsel, Anthony and Andrew Prior by Edward Hicks, and the siblings by Luke Harris.

4. In a nutshell Chloe's case about François's testamentary intentions is that he was content to die intestate so that she would inherit his entire estate. Until his final illness this was borne out by the known facts, at least up to a point, seeing that for 60-odd years before mid-February 2011 François had not executed a will. Chloe has in these circumstances formed the view that the disputed will must have been improperly procured by the siblings. Implicitly or explicitly she denounces the evidence in opposition to her claim as untrue and perjured. As I shall recount in more detail later, she claims in her pleadings that the disputed will was not duly executed, that François did not have capacity to make a will, that he did not have knowledge and approval of the disputed will's contents, or that it was procured by undue influence. All these claims are resisted. Anthony and Andrew Prior are included in the accusations of perjury and dishonesty, and this has been a reason for them appearing before me by separate counsel, even though they are careful not to present a positive case to propound the disputed will.

5. Ill health has been and evidently still is a severe burden for this family. François himself died young. I have mentioned that his sister Jacqueline died only weeks before the hearing. Chloe herself has, since about 2003 suffered from cervical cancer, for which she has undergone surgery, and perhaps from about the same time has suffered from a progressive form of multiple sclerosis. Her husband Jerry, she said, was too ill to help her to present her case before me, either as an advocate or as a McKenzie friend or even as a witness. Other members of the family revealed that they had diagnoses of cancer. This has had an effect on the evidence adduced in the case. I have mentioned

that Jerry could not give evidence, and his witness statement was not relied on. A notice under the Civil Evidence Act 1968 had been obtained in respect of Jacqueline's witness statement before she died, and Mr Harris correctly acknowledged the weakness that her evidence could not, in the event, be subjected to cross-examination.

6. In the result I have seen witness statements from Chloe herself and from a neighbour of François, Mrs Josie McGoldrick, in support of Chloe's claim, and from Anthony and Andrew Prior, Anne and Jacqueline on the side of the siblings, as well as Mr Michael Abramov, who had been François's financial adviser, Dr Caroline Oliver and Dr Srikanth Nimmagadda. Some of these also gave evidence in person but, for reasons which I shall explain, Dr Nimmagadda did not.

Background facts

7. François was born on 29 June 1948. His father was a French diplomat and his mother English. The father died in 2005 and the mother died in October 2010, only a few months before François himself. François was one of five children, his four siblings being the defendants whom I have mentioned.

8. By all accounts François was intelligent, numerate and meticulous. He studied physics at Imperial College, taught physics for a while at Salesian School, and then worked at IBM. He never married. In his younger days he was seen, by some, as something of a hippy. He formed a relationship with Chloe's mother Vivienne Adaway, and Chloe was their only child born in October 1972. François and Vivienne separated only a few years after Chloe's birth. François has no other known children. Chloe believes that her status as what used to be called illegitimate resulted in the siblings declining to accept her as part of their family. The siblings described this estrangement as François's decision, but at all event it seems now sadly to be mutual.

9. It does seem to be the case that François's parents and siblings did not visit him at his house in Harrow, or at best not often, and that it was instead François who visited them at the family home in Putney, and I am inclined to accept Chloe's account of the estrangement and its origins. This is also borne out by Chloe's account, which is itself borne out by correspondence and which I accept as broadly true, of the events after François's death when her claim to be his daughter was resisted, ostensibly by Anthony Prior as executor but in substance also by some at least of the siblings. Chloe had to obtain a ruling from the court. This involved a DNA test, and Chloe was reduced to using trace material from François's wristwatch, which Jacqueline had given to her on the day of the funeral, because her requests to visit the Harrow property and to obtain better DNA evidence had been resisted.

10. Consistently with the continued rift between Chloe and the siblings, their accounts of the background history are different without either version being necessarily untrue. Chloe says that her relationship with her father was always good. He acknowledged her as his daughter, though he is apparently not recorded on her birth certificate as her father. She was brought up mostly by her mother, but she lived with François in Harrow during her student years when she was between about 16 and 20 years of age. She says that they had the normal relationship of father and daughter, and I accept that

evidence as true. Later François took pride in giving her away, as his only daughter, when she was married to her husband Jerry in March 2003, and he was also proud of his two grandsons.

11. François was significantly generous towards Chloe during his lifetime, as she acknowledges. He gave her an allowance when she was living at his house during her late teens and early 20s. Then in 1994 he gave her £15,000 as the deposit on a house which Chloe and Jerry bought before they were married. Chloe's financial situation became worse when she became seriously ill soon after her second son was born in 2003, and when the diagnosis of multiple sclerosis was confirmed in 2007. Her illness meant that she could no longer work, and Jerry also lost his job when he spent more time looking after her. François took to paying mortgage instalments and council tax payments on her behalf.

12. By October 2006 Chloe and her husband were in debt, and François mortgaged his house for £40,000 and paid off all or most of their unsecured debts. Chloe was receiving disability living allowance by this time, and she then received a significant sum by way of critical illness insurance. She used this to pay off most of her mortgage debt, and François then no longer contributed to mortgage instalments. Chloe did not discharge the whole of the mortgage debt, however, using some of the insurance money on living expenses and improvements to their house. After about 2008 François does not seem to have made significant gifts to her. As a result she has borrowed anew on the security of the house, and her debts have risen again, though she now declines to reveal how much they are. She claims that François reassured her about her finances, saying that she could expect to inherit his estate at his death. She claims in particular that François had made a trust in her favour, and that he had shown her a sheaf of documents on her wedding day, including a trust document in her favour signed by Anne, which she believed applied to the Harrow property. However, no completed trust deed has been found, and there is no evidence that the Harrow property was ever transferred to trustees or to anyone else. There was another trust deed which François showed Chloe on her wedding day, but this was the document associated with a Standard Life policy which in the event was not taken out. I shall need to mention that policy again.

13. On the side of the siblings, meanwhile, Anne and Jacqueline say that François was always close to them and other members of the family, so far as their circumstances permitted. He lived in Harrow, and his parents, Anne and Jacqueline lived in Putney. Lucile and her husband lived towards Oxford, and Philippe and his family have lived in the United States for some time. Much of the regular burden of looking after their father, and then their mother, fell on Jacqueline. When François broke his leg in July 2009 he came to stay with Jacqueline and their mother at the family home in Putney, and Jacqueline looked after him then for about 4 months. This was at the same time that she was looking after their mother, who was in her 90s and suffering from arthritis and dementia. Sometimes, if Anne could not come round to sit with their mother, Jacqueline found herself taking her mother in her wheelchair, together with François, to appointments with his consultant. As will appear, François stayed with Jacqueline again, after their mother had died, between periods in hospital during the last few weeks of his life.

14. In short I accept that François was always on good and close terms with his siblings, as well as with Chloe and Jerry, though he kept them almost completely separate from each other. It was apparently only once that François brought Chloe to the family home, and it was not a success.

The disputed will

15. I have said that François had not made a will before 2011, but the documents in evidence show that he did at least consider making wills from time to time, or to make other dispositions to have effect on his death. The events in question were these : —

(a) In 1999 François evidently gave instructions to a solicitor to draft a will for him, and a first draft has been disclosed. It would have appointed Jacqueline and the solicitor as executors, but François seems to have deleted the solicitor's name from the draft. 50 per cent of the net estate would have been bequeathed to Chloe, 48 per cent to the siblings equally (except that Lucile's name was omitted, probably by mistake) and one per cent each to Anthony and Andrew. That will was not executed.

(b) In 2003 François took advice from a financial adviser Mr Michael Abramov, who gave evidence before me at the trial. Mr Abramov had observed that François's estate was of sufficient value to attract inheritance tax on his death, calculating the amount to be £93,002, and advised him to effect a policy of life insurance in that exact sum with Standard Life. He filled in a Standard Life trust form in favour of the same beneficiaries as under the draft 1999 will, namely Chloe 50 per cent, Philippe, Jacqueline, Anne and Lucile 12 per cent each and Anthony and Andrew one per cent each. In the event the policy was declined for medical reasons, and the trust was never effected.

(c) In 2006 a further draft will was prepared, appointing Jacqueline as executrix and having the same dispositive provisions, with one-half of the estate bequeathed to Chloe. This too was not executed.

16. François's own state of health is important. He was a heavy smoker. He also drank a good deal of red wine regularly, and some have said that he was dependent on alcohol. He suffered from cirrhosis of the liver. In mid-January 2009 he was diagnosed as having cancer of the larynx, and in December 2009 he underwent a laryngectomy, having his voice box removed. After this it was only with difficulty that he communicated orally at all. To do so he had to close the stoma through which he breathed, normally by putting his finger over it, while he said a few words. Long sentences seem to have been impossible. Often therefore he communicated in writing, using a succession of notebooks, one of which is extant and in evidence, and also from time to time using a felt-tip pen on a whiteboard. One of the hospital notes suggested that his hearing was 'impaired', but generally the witnesses claim that his hearing was adequate. Everyone agrees that he was intelligent and lucid, and that he did not suffer from insanity or delusions.

17. The disputed will bears the date 19 February 2011. The terms are relatively simple. There is a pecuniary legacy of £100,000 for Chloe, a specific gift of a studio flat in Cannes in France to Jacqueline, and a gift of residue to the four siblings in equal shares absolutely.

18. François's assets at this time consisted of the house in Harrow, the property in Cannes, some ISAs and other investments and savings, some insurance policies and a beneficial share in his mother's estate, who had died in October 2010. In round numbers the combined gross value of the estate appears to have been about £630,000, of which the house in Harrow represented £240,000, the property in Cannes about £70,000 and the inheritance from mother about £120,000. The assets were reduced by liabilities, including the mortgage on the Harrow property, leading to a net estate worth about £580,000 before inheritance tax and about £450,000 after inheritance tax.

19. Moving more specifically to François's testamentary intentions, Anne took the lead in opening discussions with him. From about August 2008, when she herself was diagnosed as having cancer, she began to speak to him about this. She was aware of his unexecuted draft will of 2006 and had suggested that he might go round to his neighbours' house to execute it. Earlier François had been reluctant to make a will but had not said why. She described him as sometimes inclined to procrastinate.

20. Following the diagnosis of his own cancer in January 2009, and when in December 2009 he was about to go into hospital, his surgeon is said to have advised him to put his affairs in order. Anne says that she asked him again whether he had made a will, which he had not, but she says that he told her that he wanted to include Jacqueline, perhaps by giving her the studio flat in Cannes. In June 2010 Anne took it upon herself to buy three will packs from a stationer's, one to update her own will, one for Jacqueline and one for François. She says that all three were in good health at that time, with herself clear of cancer, and without any signs that François's cancer would return. In October 2010 François's mother died, and Anne discussed the question of a will with him again. François said that he had not made one yet, which did not surprise her, but she says that he also said that he would now do so.

21. On 24 December 2010 François went into hospital again for further tests, and it was soon after that, according to Anne, that François himself brought up the subject of a will. Anne says that she and he discussed the difference between leaving shares or proportions to different beneficiaries as opposed to leaving specific assets to them. This had become a little more complicated by the idea of leaving the studio flat in Cannes to Jacqueline and also with the expected inheritance from their mother. She says they also discussed executors, and that François asked her to see whether Anthony would accept the executorship, which she did. The discussion at this time led, according to Anne, to François telling her that he would give the inheritance from their mother to the siblings, as part of his residue, and that Chloe would receive a specific amount.

22. On 7 January 2011 François received news that his cancer had returned and that it was now terminal. To begin with he went back home to Harrow, but in early February Anne and Jacqueline persuaded François to stay with Jacqueline at Putney, and Anne suggested that the will could be effected over the next few days. Anthony and Andrew

were coming over to the house on 20 February for Anne's birthday (which was in fact a few days later), and that it could be done then. She says that François asked her to write down the text. She says that she asked him whether he still wanted the studio flat to go to Jacqueline, and that he replied that he did. She asked him whether he still wanted to give money to Chloe, and again he said that he did. When asked how much, she says that he shrugged. Anne suggested leaving it blank to be filled in later. She says that she asked him whether the will should mention Chloe's children, and that he indicated not, with some emphasis by making a sharp gesture to the side with his right hand. She says she asked him what he wanted to do with the rest of his property, and he made a circular gesture towards her. She says that she asked him whether he meant Philippe, Jacqueline, Lucile and herself, and he said yes. In a similar way, with questions followed by nods and short oral answers, he indicated that he wished to be cremated with his ashes scattered on Wimbledon Common. She says that she went home, read the notes on the will form, filled it in as François had indicated, leaving blank the amount of Chloe's legacy.

23. This account appears to be borne out by contemporary documents, at least to the extent that Chloe's legacy in the disputed will appears to have been written at a different time from most of the other text. On the other hand it is impossible otherwise to check the accuracy of the account in any objective way.

Evidence of execution of the disputed will

24. On Friday 18 February 2011 François was admitted to hospital again as an emergency. The birthday gathering was cancelled, and instead Anne suggested to François that Anthony and Andrew could be asked to come to the hospital a day earlier than planned, and go through the will. She says that he agreed.

25. It was therefore at about 3.45 pm on Saturday 19 February 2011, according to all the witnesses on the side of the siblings, that Jacqueline and Anne, and then Anthony and Andrew, all went to the hospital. To begin with, all four of them say that all of them were there together in mid-afternoon, with François, around his bed. After a while, during a lull in the conversation, they say that Anne gave Anthony the will form and suggested that he should go through it with François, pointing out that the amount of the legacy was still blank. At this point all four witnesses agree that, at Anthony's suggestion, Anne and Jacqueline left Anthony and Andrew alone with François, and that Anthony pulled the curtains around the bed.

26. Anthony's evidence is that in this meeting he and François were both sitting facing each other in chairs next to the hospital bed, and that Andrew sat in another chair by the foot of the bed. Andrew's description was slightly different, saying that François was sitting up in bed as opposed to sitting in a chair, and that he himself was slightly to the left of the bed, not directly at the foot of it. Be that as it may, both witnesses say that Anthony went through the text of the will with François, that François read the text himself, and that he and Anthony talked about all the main provisions in it, the main features being, in Anne's text, a legacy for Chloe, the flat in Cannes, and residue. As for the flat in Cannes, Anthony said in evidence that François explained that he wanted to do something for Jacqueline, who had often looked after him. Both witnesses also say that

Anthony explained that the inheritance from François's mother would form part of residue and would go to the four siblings equally.

27. The conversation then turned to the legacy for Chloe. It was only then, apparently, that Andrew came to know of Chloe's existence or that François had a child. Anthony and Andrew both say that François wanted the legacy to be half the net value of the house in Harrow. They discussed the value, including the somewhat dilapidated condition of the house, and the amount of the mortgage debt.

28. This discussion about the value of the house in Harrow was important, especially since the amount of Chloe's legacy under the disputed will is said to have been an estimate of half its net value, and this compares with previous draft wills under which she might have inherited 50 per cent of the whole net estate. Answering questions from the bench, Anthony's evidence was that the conversation about value, like most of the conversation, comprised a mixture of words spoken with difficulty by blocking the stoma, gestures with head and hand, and words written on an A5-sized whiteboard with a felt-tip pen. He said that François mentioned a nearby house which had sold for £270,000, but indicated that it was modernised, unlike his own, writing 'modernised' on the whiteboard. Anthony said that he asked about double-glazing, and that François shook his head. He said that François then waved his hand downwards, by which he was taken to mean that the value was lower than the figure mentioned. He said that François said or wrote 'back door', and at this point Andrew intervened to ask whether this was a reference to some damage to the back door which had been sustained when François was previously in hospital, and which they knew about already, and he nodded. Anthony said that he asked François whether there was a mortgage, and that François nodded and wrote the numeral 40.

29. According to the witnesses this led to François arriving at the sum of £100,000 for the legacy. Anthony says that François said, with his hand on the stoma, 'hundred'. He says that he asked whether he meant £100,000 and that François, again covering the stoma, said 'enough'. Andrew did not hear the word 'enough' but says that François nodded.

30. After this Anthony took the will form back to Anne and Jacqueline, who had not been within earshot during his meeting with François, and told Anne that François was happy with the terms of the will, with £100,000 as the amount of Chloe's legacy. The witnesses all say that Anne filled in that blank space. Anthony, again without Anne and Jacqueline, then went back to François's bedside, where Andrew had remained, and François went through the will again and signed it in their presence, and they signed it there and then as witnesses.

Chloe's pleaded case

31. Chloe's claim attacks the validity of the disputed will on grounds of (1) lack of due execution, (2) lack of capacity, (3) lack of knowledge and approval and (4) undue influence. I shall approach them in that order.

32. I mention at this point that in virtually all of this attack Chloe does not rely on positive evidence of her own in regard to the circumstances in which the disputed will was or was not made. Necessarily so, because she was at home in Oxfordshire during the relevant period, while François was moving between his home at Harrow, Jacqueline's house at Putney and the hospital in Tooting. She relies instead on inference and some circumstantial evidence. The Priors and two of the siblings have given positive evidence in regard to all of these issues. It is therefore implicit in the nature of Chloe's attack that she regards the other side's evidence as concocted and therefore perjured as part of a fraudulent conspiracy. By contrast she has not produced positive evidence to demonstrate this dishonesty and, when subjected to cross-examination herself, she said that her accusations were an expression of her own beliefs and suspicions. In the event she did not take up the opportunity, when cross-examining the defence witnesses herself, of facing them with her accusations of dishonesty or with facts which may have justified those accusations or her own suspicions.

33. I dare say that the siblings and Anthony Prior have contributed to Chloe's suspicions. There is evidence of colossal distrust between the two sides, and it is evident that the siblings, for good reasons or none, treated Chloe with less consideration and respect than would normally be expected towards their elder brother's only child. During his final illness they did not initially inform Chloe of his perilous condition or of his whereabouts (despite the known limits on his ability readily to communicate personally himself), though they say that this was at his request; they did not include her in any debate about the contents or motivations for the disputed will; they told her only after the disputed will is said to have been executed that François was in hospital; they did not tell her about the contents of the will until after his death; some of what she was told at that time, for instance on the day of the funeral, was not identical to the evidence later produced to the court; there are some small differences between the evidence of witnesses who did give evidence; importantly they did not initially accept her status and identity as François's child (Lucile being, according to the correspondence, the one most definite in her objections) until she obtained a court ruling to that effect. The distrust exists in both directions.

34. The nature of Chloe's allegations, coupled with a lack of anything like the rigorous cross-examination of defence witnesses which might have been expected in consequence, leaves me, as the judge of fact, in an unexpected position. One approach might have been unquestioningly to accept assertions made in defence evidence which have not been challenged, or even seriously explored, in cross-examination. But ultimately the burden of proof lies with the defendant siblings to establish the validity of the disputed will, and I make allowance for Chloe's lack of legal experience or representation. I have therefore tried to apply my own scrutiny to the defence evidence even where it was not specifically challenged.

35. Even so, I have to say that the evidence which I did hear from Anne and from the Priors, and the evidence of Jacqueline which I have read, did not appear to me to be the evidence of dishonest witnesses. I am critical of some of their actions, as has already appeared and will appear again. But, in regard to the relevant facts about the circumstances in which they say that the disputed will came to be executed, the witnesses were in my judgment attempting to tell the truth. There were inconsistencies,

as I shall mention, but these were relatively unimportant and were given reasonable explanations which I have found myself able to accept. In short the defence witnesses succeeded in persuading me that their evidence was not the result of a fraudulent conspiracy to uphold the disputed will by giving perjured evidence. I shall now turn to the individual claims.

Due execution

36. The requirements of section 37 of the Wills Act 1837 are well known : —

> 'Signing and attestation of wills
>
> 9. No will shall be valid unless –
>
> (a) it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and
>
> (b) it appears that the testator intended by his signature to give effect to the will; and
>
> (c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
>
> (d) each witness either –
>
> (i) attests and signs the will; or
>
> (ii) acknowledges his signature,
>
> in the presence of the testator (but not necessarily in the presence of any other witness),
>
> but no form of attestation shall be necessary.'

37. The disputed will is written on a stationer's will form and contains a standard-form attestation clause. It has a signature which purports to be that of François, and it professes to be witnessed by Anthony and Andrew, neither of whom is a beneficiary, though they are appointed executors.

38. Anthony and Andrew Prior have each provided an affidavit of due execution, and also a witness statement. They were cross-examined by Mr Harris (naturally not aggressively) and Chloe had the opportunity of cross-examining them as well. She did not do so at length. Neither did she adduce expert handwriting evidence. Anthony and Andrew confirmed their evidence in the witness box that François signed the disputed will as his will, that they were both present when he did so, and that they signed it in his presence to attest his signature. Their evidence is that all this took place on 19 February 2011, the date which the will itself bears, at the hospital where François was being treated.

39. In this part of Chloe's skeleton argument she mentions a number of reasons to challenge, or at least suspect, the due execution of the disputed will. Most of these have nothing to do with the precise question of due execution, but the following four could be relevant : –

(a) The disputed will contains a gift of the studio flat in Cannes, despite François's knowledge, according to Chloe, that under French law he could not effectively give more than half of his immovable property in that country to anyone other than Chloe herself.

(b) The evidence of Anthony and Andrew suggests that François may not have appreciated the full extent of his estate.

(c) Chloe has referred me to the case of *Marley v Rawlings* [2012] EWCA Civ 61.

(d) She claims or suspects that the two witnesses were not in fact present on 19 February 2011 when the will was made.

40. Looking in turn at the points mentioned in the previous paragraph my analysis is as follows : –

(a) This point would be relevant to due execution if it cast doubt on the identity of the testator. There is evidence, which I accept, that François had some practical exposure to French succession law, principally by buying off his siblings' claims to the Cannes property when he acquired it from their father, and by being heavily involved in the devolution of the father's estate. But there was no convincing evidence that he knew, or that he did not know, the consequences, in terms of French law or English conflict of laws, of leaving the Cannes property to Jacqueline and a pecuniary legacy to Chloe. (I am told that Chloe can elect to claim half the Cannes property, in which case she would suffer an equivalent deduction from her pecuniary legacy.) This is not enough to cause me to doubt the evidence of Anne, Jacqueline and the Priors that it was François himself who signed the disputed will. Otherwise this point is relevant only to want of knowledge and approval or, possibly, testamentary capacity.

(b) Something similar is true of this point. There is evidence, which again I accept, that Anthony Prior initially underestimated the value of François's estate, and for that reason there is no direct evidence that on 19 February 2011 François appreciated the true value of his estate. That is a point to which I shall return. But it does not cause me to doubt the positive evidence that it was François who signed the disputed will.

(c) In *Marley v Rawlings* a husband and wife executed each other's intended wills by mistake. It has no impact on the present case.

(d) The fourth point, if I had any doubt about it, would be decisive, and I shall comment on it at somewhat greater length in the following few paragraphs.

41. Chloe produced no credible evidence to lead me to suspect the veracity of the factual account presented by Anthony and Andrew. Under cross-examination, when challenged about the strong assertions made in her pleadings, her only answer was that she was suspicious of the evidence provided by the defendants. She appeared to be unaware of the difference between her own suspicions and doubts on the one hand (which I understand) and assertions in her pleadings on the other, which would need to be backed up by some evidence to support them. She seemed unconcerned that she was effectively making assertions of dishonesty against nearly all of the defence witnesses without providing anything sufficient to justify those assertions.

42. Chloe has pointed to a discrepancy in Anthony Prior's accounts of the day. On the day of the funeral he told Chloe that he had discussed the estate with François on his own in the hospital on the day of the will, but he and Andrew have later given evidence that they were both present at the events on 19 February 2001, though Andrew took the less prominent role. I accept Anthony's explanation that his informal description of the meeting, on the day of the funeral, had been mistaken and an oversight, that the evidence in his witness statement and that given on oath in his affidavit evidence and before me was true, and that the discrepancy is of limited significance.

43. There was also a discrepancy between the oral evidence of Anthony and Andrew Prior. Anthony described the meeting with François in terms of them sitting in chairs knee to knee. By contrast Andrew spoke of François sitting in or on the bed. The hospital notes, as will appear, record him as 'sitting up in a chair . . . surrounded by family members'. I think that the probable explanation of the discrepancy, though this was not explored in cross-examination, is that the first stage of the meeting was as Anthony described it, with François sitting in a chair, but that when it came to signing the disputed will he sat in or on the bed so as to rest the paper on the movable tray-table.

44. Chloe has suggested that there is no independent evidence that Anthony and Andrew visited the hospital on 19 February 2011, and that appears to be true. But that is simply not enough itself to cast significant doubt on the evidence of François's sisters and the Priors themselves. I add that on 10 October 2011 Chloe's husband Jerry, in correspondence with Anthony, stated that –

> 'We have viewed CCTV footage taken at the St. Georges Hospital on Saturday the 19th February 2011, Anne and Jacqueline Devillebichot can be seen entering the said hospital on that said Saturday, however, neither you nor your said brother are recorded as entering the said hospital on that same said Saturday, this evidence is in addition to the fact that no member of hospital staff can recall ever seeing you or your said brother at the said hospital on that said Saturday, but the members of hospital staff from the Marnham ward thereof do indeed recall Anne and Jacqueline Devillebichot being at the bed side of the deceased in the Marnham ward of the St. Georges Hospital on that Saturday the 19th February 2011. How do you intend on explaining the above facts Mr Prior to the High Court against yours and your brother Mr Andrew G Prior's said affidavits? The said evidence proves beyond any reasonable doubt that neither you or your said brother were anywhere near the said hospital on Saturday the 19th February

2011 and therefore you clearly did not witness the alleged execution of the alleged Will.'

45. That is a specific accusation of giving false evidence, and yet in reality the boot is on the other foot. In the witness box Chloe admitted that this claim about CCTV footage was entirely untrue, though as far as I can see it had not previously been disavowed. I realise that Jerry is not Chloe, but this is her case and it is she who is responsible for its presentation. She struck me as unrepentant, apparently prepared to condone her husband's deliberate lie, evidently made with the intention of extracting an admission on a false basis.

46. In conclusion on this point I accept the evidence of the Priors that they were present on 19 February 2011 and, for what it is worth, this is given some small support by the reference to François being surrounded by 'family members' (in the doctor's note which I have mentioned), which may suggest more people being present with François than his two sisters only. Taking all the evidence together, I find on the balance of probabilities that François executed the disputed will in accordance with section 9.

Testamentary capacity

47. Chloe referred me to the well-known authority of *Banks v Goodfellow* (1869–70) LR 5 QB 549 in which Cockburn CJ, giving the judgment of the Court in a case which dealt mainly with the effect of specific delusions but contained a comprehensive juridical discussion of testamentary capacity, said at page 565 : —

> 'It is essential to the exercise of such a power [*sc* that of testamentary disposition] that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his 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 the mind had been signed, would not have been made.'

There are no assertions of insanity or insane delusions in the present case, and Chloe's attack has concentrated on the earlier parts of this passage.

48. The defendants adduced evidence from two doctors, first Dr Caroline Oliver and second Dr Srikanth Nimmagadda. Both provided witness statements and Dr Oliver confirmed her evidence in person.

49. Dr Oliver's written report was short and to the point, taking the form of a letter, not much more than a page long, in reply to a letter of instructions from the siblings' solicitors, which itself came with several relevant enclosures. Dr Oliver was not François's normal GP in Harrow. She was in fact Jacqueline's GP, and she visited François only once, on 10 February 2011, while he was staying at Jacqueline's house, though François had been a temporary patient of the practice for some time before that.

The purpose of the visit was a request by François to discuss his resuscitation status. He had previously decided that he would not wish to be resuscitated with the palliative care team. Having reflected, Dr Oliver records that he had decided that he now wanted the form to be changed. They did not, however, discuss the making of a will. Even so Dr Oliver's letter included the following paragraph : —

> 'I can confirm that when I saw Mr Devillebichot on the 10th February 2011 he appeared to have capacity i.e., he was capable of understanding the nature of his complex illness and it's (sic) consequences. We also discussed his resuscitation status and its practical implications. As a result of these conversations, I conclude that in my opinion he had capacity on the 10th February 2011 and would have understood the act of making a will and the effect of making a will.'

50. With my permission Dr Oliver added briefly to her written evidence in the witness box. In regard to François's voice prosthesis she said that he found it tiring to speak, so that he sometimes used his notepad to communicate. But she said that he could be understood, he was lucid in what he did communicate, and she was not aware of any misunderstandings between them. As to his hearing, she said that she had not had to raise her voice when speaking to him.

51. The status of Dr Nimmagadda's evidence is problematic. I was led to understand during most of the hearing that this doctor's evidence was unchallenged and that his statement could be taken as his evidence. In closing speeches however it emerged that Chloe had misunderstood the position and had not realised that, if she wished to challenge his evidence, she could have insisted on the witness attending for cross-examination. Mr Harris had by this time already cross-examined Chloe about her written objections to the doctor's report, which consisted principally in his having omitted certain facts about François which she claims to have been important. This position is unsatisfactory, though I accept Mr Harris's statement that he had not intended to mislead Chloe about the status of this evidence, and I have decided to disregard Dr Nimmagadda's report in its entirety.

52. Chloe did not cross-examine Dr Oliver either, and she adduced no medical evidence of her own. Dr Oliver is not a psychiatrist and did not claim to have special expertise in assessing testamentary capacity. Her evidence was therefore of limited value for my present purposes. But she has no financial interest in the outcome of the case, and she gave her evidence thoughtfully and fairly and I have no difficulty in accepting it as true. I add that her evidence that François was lucid is consistent with the evidence of nearly all other witnesses and documentary evidence, namely that he was not insane nor suffering from delusions (which no one claimed to be the case), that he was intelligent, numerate, sophisticated, had adequate hearing, and was capable of communicating despite his undoubted physical difficulties.

53. I was also shown hospital records relating to some of the periods when François was in hospital towards the end of his life, including the period which included 19 February 2011. There are numerous entries made by doctors and nurses to the effect that

François was 'alert', though there were naturally other references to his physical frailty. On 18 February 2011 there is an entry by a Dr S Laing timed at 15.30, recording : –

> 'Currently – sat up in bed – awake, alert, orientated – communicating by writing on paper. Main complaint is of generalised weakness in limbs, fatigue/exhaustion.'

At 18.40 on the same day there seems to have been some deterioration, because the consultant Dr Patel notes : –

> 'confused – liver flap – unable to draw a 5point star.'

There was some dispute whether the word 'confused' was really 'contused', which was possible because François had recently suffered a fall. But even accepting that the word was 'confused', as I do, I do not regard this entry as casting significant doubt on the rest of the hospital evidence. The inability to draw a five-point star, which is sometimes used as a basic test of mental function, could equally be explained by the patient's physical weakness and liver-flap. At 20.30 there was evidently a change in the nursing staff, and a nurse wrote : –

> 'Alert, no apparent signs of confusion.'

54. On the following day, the day of the disputed will, at 11.00 there is a note reading : –

> 'Palliative care – On assessment Francois sitting out in chair, explains feeling tired today. . . Nursing staff report Francois requesting red wine – note not on chlordeazepoxide. Should this be prescribed?'

The next note is timed at 4.00 pm. It includes this : –

> 'Sitting up on a chair; Not confused; Writing on paper surrounded by family members.'

That note appears to describe the beginning of the period when the disputed will is said to have been executed.

55. The next note is timed at 18.55 : –

> 'Patients family had brought him a small bottle of red wine to drink. Patient had some and then proceeded to get sick. Family advised not to bring in alcohol. They were under the impression that it was documented by palliative care team that he could drink alcohol.'

It is not clear from this whether the wine was consumed before, during or after the alleged signing of the disputed will. I imagine that Anne and Jacqueline brought the wine with them when they arrived. Chloe suggests that this affected Francois's capacity. The defendants, in their evidence, are defensive on this point without being notably apologetic, and suggest (wrongly) that the wine was not given until 7.30 pm. I am inclined to think that the sickness occurred shortly before the note of 18.55 was

written, and that the drink was taken not long before that, probably after the signing of the disputed will. But even if I am wrong about that, there is no evidence that drinking from a small bottle of wine would have impaired the brain of a man, like François, who was accustomed in his better days to drink one or two bottles a day. At 19.30 a nursing note reads 'Pt [meaning Patient] alert when received.' And at 22.50 the Night SHO wrote : –

> 'Currently – alert, not obviously confused (following commands, communication difficult) . . . No liver flap, no tremor.'

The word 'alert' appears elsewhere in the notes. My judgment is that the hospital evidence as a whole provides good support for the defence witnesses who have testified to François's full mental capacity.

56. I have previously mentioned Chloe's claim that her father was familiar with French law, and that his attempt to leave the whole of the Cannes property to Jacqueline is evidence of incapacity. I do not accept that. I have already pointed out that there was no convincing evidence either that François did know, or that he did not know, the legal ramifications of leaving French immoveable property away from his heir. Besides the requirement to prove testamentary capacity does not in my judgment extend to a requirement for knowledge of the comparative law of succession.

57. Taking this and the other evidence together, I find on the balance of probabilities that on 19 February 2011 (and indeed on earlier occasions when he was discussing instructions for a will, mainly with Anne) François was capable of understanding that he was making a will, the extent and nature of his estate, and the persons having claims on his bounty, namely Chloe, Jacqueline and all his other siblings, all of whom he mentioned in the disputed will. In my judgment the evidence which I have mentioned satisfies the requirement for the siblings to show that François had testamentary capacity at the material times, both when he gave instructions for the disputed will and when he executed it.

Want of knowledge and approval

58. In her skeleton argument Chloe referred me to the well-known statement of Parke B in *Barry v Butlin* (1838) 2 Moo PC 480 at pages 482–483, after recording a first rule that the burden of those propounding a will is to satisfy the court that the instrument is the last will of a free and capable testator : –

> 'The second is, that if a party writes or prepares a Will, under which he takes a benefit, that is a circumstances that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true Will of the deceased.'

This is obviously important, given the clear fact that Anne drafted the disputed will, as she has admitted, and that it was she, and to some extent Jacqueline, who encouraged François (to put it no higher at this point) to overcome his habit of procrastination.

59. Much has been written over the years about some apparently confusing principles in this part of the law, not only in terms of the suspicion of the court being excited, but in terms also of a presumption of knowledge and approval derived from proof of due execution and testamentary capacity. There is also the overall burden on those who propound any alleged will as valid. I am, however, fortunate that a recent summary of the current position, with which I respectfully agree, has been provided by Norris J in *Wharton v Bancroft* [2012] WTLR 693 at paragraph 28 : –

(1) The assertion that [the testator] did not 'know and approve' of the will requires the court, before admitting it to proof, to be satisfied that [he] understood what he was doing and its effect (that is to say that he was making a will containing certain dispositive provisions) so that the document represents his testamentary intentions.

(2) The burden lies on [the propounder] to show that [the testator] knew and approved of the . . . will in that sense.

(3) The court can infer knowledge and approval from proof of capacity and proof of due execution . . .

(4) . . . The Court of Appeal observed in *Gill v Woodall* [2011] Ch 380 at paragraph 14, that, as a matter of common sense and authority, the fact that a will has been properly executed, after being prepared by a solicitor and read over to the testator, raises a very strong presumption that it represents the testator's intentions at the relevant time.

(5) But proof of the reading over of a will does not *necessarily* establish 'knowledge and approval'. Whether more is required in a particular case depends upon the circumstances in which the vigilance of the court is aroused and the terms (including the complexity) of the will itself.

(6) So the [party challenging the will] must produce evidence of circumstances which arouse the suspicion of the court as to whether the usual strong inference arising from the manner of signature may properly be drawn.

(7) It is not for [that party] positively to prove that the testator had some other specific testamentary intention : but only to lead such evidence as leaves the court not satisfied on the balance of probabilities that the testator understood the nature and effect of and sanctioned the dispositions in the will he actually made. This evidence itself must usually be of weight, because in general the court is cautious about accepting a contention that a will executed in the circumstances described is open to challenge.

(8) Attention to the legal and evidential burden can be decisive where the evidence is in short supply. But in other circumstances identifying the legal and evidential burden is simply a tool to enable the probate judge to identify and weigh the relevant elements within the evidence, the ultimate task being to consider all the relevant evidence available and, drawing such inferences as the judge can from the totality of that material, to come to a conclusion as to whether or not those propounding the will have discharged the burden of establishing that the document represents the testamentary intentions of the testator.

60. Not all of that applies directly to the present case. But the existence of the draft 1999 and 2006 wills shows that François knew in general terms the nature and effect of a will. I also accept Anne's and Jacqueline's evidence that François knew and understood that he was giving instructions for the making of a will, and that on 19 February 2011 he was finalizing and giving effect to those instructions. To be clear, I accept that he knew and understood that he was making a disposition of property which belonged to him and which he wished to give away formally at his death. I have also already found that the disputed will was duly executed and that François enjoyed testamentary capacity.

61. But the will was not drawn up by a solicitor, and it was instead encouraged and drawn up by members of the family who stand to benefit under it. This undoubtedly raises the suspicion of the court. In the circumstances part (8) of Norris J's analysis is the most pertinent, so that my task it to identify and weigh all the relevant evidence available and, drawing such inferences as I can from the totality of that material, to decide whether or not the siblings have discharged the burden of establishing that the disputed will represents François's testamentary intentions.

62. In this context Mr Harris, for the siblings, referred me to the judgment of Lord Neuberger MR (as he then was) in *Gill v Woodall* [2011] Ch 380, where having referred in paragraph 15 to the strong presumption of due execution which arises where a will has been read over to and executed by a competent testator, and then said at paragraph 16 : –

> 'There is also a policy argument, rightly mentioned by [counsel for the charity propounding the disputed will], which reinforces the position that a court should be very cautious about accepting a contention that a will executed in such circumstances is open to challenge. Wills frequently give rise to feelings of disappointment or worse on the part of relatives and other would-be beneficiaries. Human nature being what it is, such people will often be able to find evidence, or to persuade themselves that evidence exists, which shows that the will did not, could not, or was unlikely to, represent the intention of the testatrix, or that the testatrix was in some way mentally affected so as to cast doubt on the will. If judges were too ready to accept such contentions, it would risk undermining what may be regarded as a fundamental principle of English law, namely that people should in general be free to leave their property as they choose, and it would run the danger of encouraging people to contest wills, which could result in many estates being diminished by substantial legal costs.'

63. I bear that warning firmly in mind. But on the facts this is the strongest part of Chloe's case. The fact is that François had never made a will before 19 February 2011, less than a fortnight before his death, and that until that moment Chloe had been, from birth, his sole next-of-kin. No doubt François had considered making wills in 1999 and 2006, and it is evident that such wills, if executed, would have included his siblings as major beneficiaries. But he had never made those wills, and at least one possible inference is or was that he was content to die intestate, effectively allowing Chloe to inherit the entirety of his estate.

64. Chloe has also relied on various statements said to have been made to her by François throughout his life, to the effect that her financial position would be eased after his death, specifically that she would be free of debt, and she may have assumed or even been told that she would be his sole beneficiary. In that situation she discovered, after her father had died, that his estate had been largely left to other people, namely François's siblings, at a time when they were at least capable of influencing his decision, without any reference to her at the time. There was no affection between her and them. It turned out, moreover, that neither Anthony nor Andrew knew Chloe personally, nor did they know anything about her circumstances, her illness, or her financial situation. They did not know, and as a result there is no direct evidence that François realised, the extent to which the proposed will would defeat Chloe's expectations.

65. Evidently neither Andrew nor Anthony knew anything about the so-called 'golden rule' for dealing with elderly or vulnerable testators. Add to this that the terms of the will were, by Anne's own admission, drafted by her, and that it was she and Jacqueline who had been influential in persuading François to make the will and in seeing that it was executed. None of the family seems to have thought of seeking advice for François from a solicitor.

66. In all of this story Anthony Prior has little with which to congratulate himself. I realise that he was asked to participate at short notice, but he had served as a magistrate for 20 years, and it is in my view surprising that he thought it right to participate in this will-making exercise without suggesting the engagement of a solicitor experienced in taking instructions for a will or without going through the process himself of ascertaining Chloe's existing expectations and making sure that François understood the extent to which his will would defeat those expectations.

67. On the other hand the golden rule, though representing best practice, is not a rule of law. Moreover the fact that the circumstances are suspicious does not, on the modern statement of the law as set out above, truly change the nature of the task facing a party wishing to propound a will, though it makes that task harder. The party propounding a will, in this case the siblings as a group, have the burden of showing on the balance of probabilities that the testator knew and approved the contents of his will, despite the undoubtedly suspicious circumstances which I have mentioned. That is a question of fact which I must decide on the evidence presented to the court. In doing so I must naturally bear in mind those circumstances which I have mentioned, the significant suspicion which these circumstances engendered, and I also bear in mind the practice of the court as demonstrated in other cases of a similar type. I repeat, my task is to decide

on the balance of probabilities and on the evidence before me whether François knew and approved the contents of his will.

68. I have summarised the evidence in question, including the background facts relating to François and his life, Chloe and her life, the medical and financial history of both of them, François's relations with her and with his siblings, the terms of previous draft wills (bearing strongly in mind the fact that François did not execute them, perhaps deliberately), and the detailed evidence from Anthony and Andrew, and also of Anne and Jacqueline, about François's testamentary intentions. I have also taken into account Chloe's own account of François's testamentary intentions.

69. I also take into account that the structure and contents of the will do not raise any particular suspicion, contrary to Chloe's own view. Some may think it suspicious for a father in François's position, knowing his only daughter's medical condition and precarious financial position, not to make more substantial provision for her. I am careful to say nothing which might prejudice the operation of the family provision legislation, but in regard to probate it is enough for me to say that the court does not regard it as intrinsically irrational for a testator who had already acted with generosity towards his adult daughter but had stopped making significant gifts to her some years before, to divide his property between his daughter and his siblings, giving priority to a sister who spent time and trouble looking after him in his later years. In other words I do not regard it as irrational or suspicious that François had divided loyalties all his adult life, and recognised them at the last.

70. Looking at that evidence carefully, and with what I hope is adequate scrutiny, I have come to the clear conclusion that François did know and approve the contents of this will. He knew in particular that his estate included his house in Harrow, that it was subject to a mortgage, that its net value was approximately £200,000, that his motive was to give Chloe about half that value, and that he decided to express that in the form of a cash sum of £100,000, which he regarded as enough, that he also possessed the studio flat in Cannes and wanted to give it to his sister Jacqueline to recognise the special care which she had provided for him in recent years, that he had also inherited a share in his mother's estate which he wanted to go to his four siblings in equal shares, and that he had other assets which he wanted to go in the same direction. In my judgment that satisfies the requirement.

71. The highest that Chloe can genuinely put this part of her case is that there is no positive evidence that François appreciated, on 19 February 2011 or when he was giving instructions to Anne about the contents of his will, that he truly appreciated the effect that his will would have on Chloe herself. That effect is huge, especially now that she has attacked the will in the way that she has done. But in my judgment the law does not require a testator to be shown to have knowledge and approval of every effect and consequence of his will. All that is required is satisfactory evidence that he knew and approved the contents of his will. In the present case this means that he understood that he owned his house in Harrow, the property in Cannes, his share of the inheritance from his mother, and his other savings and investments, that he was giving £100,000 to Chloe, the Cannes property to Jacqueline, and his inheritance and other assets to the four siblings equally.

72. I raised this point in the course of closing speeches, and was referred to paragraph 3–016 of the well-known textbook Theobald on Wills (17th edition) which provides as follows : –

> 'The testator must know and approve of the contents of his will but he need not understand its legal effect. Thus if the testator does know and approve of the contents of his will, it is immaterial that he, or the draftsman employed by him, is mistaken as to its legal effect. Moreover a testator cannot approve the words used in his will subject to a condition that they have the legal effect he desires.'

73. That comes close to the distinction to which I have referred. In fact it goes further and confirms my view that it is unnecessary for the siblings to show that François fully understood the ramifications of his testamentary dispositions. My criticism of Anthony stands, but his failure to observe what I regard as best practice has not in the end prevented the siblings from persuading me that François knew and approved the contents of this will.

Undue influence

74. It is clear that the execution of a will as a result of undue influence must be proved, as a fact, by those who assert that influence. They must establish that there was coercion, pressure that has overpowered the freedom of action of the testator without having convinced his mind. If the evidence establishes only persuasion, then a case of undue influence will not be made out. That is a summary of part of Norris J's judgment in *Wharton v Bancroft* (above) at paragraph 30. Norris J went on to refer to *Cowderoy v Cranfield* [2011] EWHC 1616 at paragraph 141 where Morgan J had said : —

> 'The requisite standard is proof on the balance of probabilities but as the allegation of undue influence is a serious one, the evidence required must be sufficiently cogent to persuade the court that the explanation for what has occurred is that the testator's will has been over borne by coercion rather than there being some other explanation.'

I accept those helpful summaries of the legal position.

75. In my judgment there is plenty of evidence that Anne and Jacqueline had the opportunity to influence François in the making of his will, and indeed that they did so. However, I find no evidence of coercion or pressure such as to have overpowered his freedom of action. In other words I find persuasion but not coercion.

76. Although Chloe's pleading and skeleton argument contain damaging assertions that undue influence was exerted over François in the making of his will, she did not press this in oral argument. The closest she came was to assert, under cross-examination, that she had reasonable suspicions that the siblings, or Anthony and Andrew, had had or may have had some influence over the terms of François's will. That is insufficient.

Conclusion

77. I have therefore reached the conclusion that Chloe's claim must be dismissed in its entirety, and I shall accordingly pronounce in favour of what I have called the disputed will in solemn form.