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SUPREME COURT OF SOUTH AUSTRALIA

(Civil)

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MOLONEY v HAYWARD & ORS

[2022] SASC 79

Judgment of the Honourable Auxiliary Justice McMillan

29 July 2022

SUCCESSION - MAKING OF A WILL - TESTAMENTARY CAPACITY

SUCCESSION - MAKING OF A WILL - TESTAMENTARY INSTRUMENTS - UNDUE INFLUENCE - CIRCUMSTANCES AROUSING SUSPICION

SUCCESSION - MAKING OF A WILL - STATUTORY POWER OF RECTIFICATION

WILLS — Testamentary capacity — Whether deceased had testamentary capacity to give instructions for a will — Whether deceased had testamentary capacity to execute a will — Insufficient evidence that the deceased had testamentary capacity.

WILLS — Knowledge and approval — Onus of proof to be applied — Suspicious circumstances — Insufficient evidence that the deceased knew and approved of contents of will.

WILLS — Undue influence — Standard of proof — Court satisfied that instructions not the genuine instructions of the deceased and deceased unduly influenced.

WILLS — Rectification — s 25AA *Wills Act 1936* (SA).

Wills Act 1936 (SA) ss 8, 25AA, referred to.
Banks v Goodfellow (1870) LR 5 QB 549; *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705; *Roche v Roche* [2017] SASC 8; *Hawes v Burgess* [2013] EWCA Civ 74; *Zorbas v Sidiropoulous (No 2)* [2009] NSWCA 197; *Thomas v Nash* (2010) 107 SASR 309; *Estate of Budniak; NSW Trustee & Guardian v Budniak* [2015] NSWSC 934; *Carr v Homersham* (2018) 97 NSWLR 328; *Re Sue* [2016] NSWSC 721; *Petrovski v Nasev; Estate of Janakievska* [2011] NSWSC 1275; *Fradgley v Pocklington (No 2)* [2011] QSC 355; *Ryan v Dalton* [2017] NSWSC 1007; *Loosley v Powell* [2018] 2 NZLR 618; *Veall v Veall* (2015) 46 VR 23; *Tobin v Ezekiel* (2012) 83 NSWLR 757; *Nock v Austin* (1918) 25 CLR 519; *Barry v Butlin* (1838) 2 Moo PC 480;

Applicant: EUGENE JOSEPH MOLONEY Counsel: MR T COX QC WITH MR I THOMAS - Solicitor: SCALES & PARTNERS

Respondents: MARY ELIZABETH HAYWARD, KATHRYN MARY HUMPHRIES, CAROLYN ANNE TOOLIS, MARGARET WINIFRED LEHMANN, BRIGID MARY BOYLAN, JOSEPH THOMAS BOYLAN, ESTHER NELLIE TURNER, IGNATIUS PATRICK BOYLAN Counsel: MR S OWER QC WITH MS L GAVRANICH - Solicitor: DBH LAWYERS

Hearing Date/s: 30/08/2021 to 06/09/2021, 09/09/2021

File No/s: SCCIV-18-1320

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12 ER 1089; *Fulton v Andrew* (1875) LR 7 HL 448; *Baker v Batt* (1838) 2 Moo PC 317; 12 ER 1026; *Tyrrell v Painton* (1894) P 151; *Shama Churn Kundu v Khettromoni Dasi* (1899) LR 27 Ind App 10; *Low v Guthrie* (1909) AC 278; *In the Estate of Osment* [1914] P 129; *Worth v Clasohm* (1952) 86 CLR 439; *Kantor v Vosahlo* [2004] VSCA 235; *Briginshaw v Briginshaw* (1938) 60 CLR 336; *Mekail v Hana; Mekail v Hana* [2019] NSWCA 197; *Starr v Miller* [2021] NSWSC 426; *Perrins v Holland* [2011] Ch 270; *Perera v Perera* (1901) AC 354; *Parker v Felgate* (1883) 8 PD 171; *Bridgewater v Leahy* (1998) 194 CLR 457; *Wingrove v Wingrove* (1885) 11 PD 81; *Bailey v Bailey* (1924) 34 CLR 558; *Hall v Hall* (1868) LR 1 P & D 481; *Boyse v Rossborough* (1857) 6 HL Cas 2; 10 ER 1192; *McKinnon v Voigt* [1998] 3 VR 543; *Williams v Goude* (1828) 1 Hag Ecc 577; 162 ER 682; *Apotex Pty Ltd v Sanofi-Aventis Australia Pty Ltd* (2013) 253 CLR 284; *PGA v The Queen* (2012) 245 CLR 355; *Trustee for the Salvation Army (NSW) Property Trust v Becker* [2007] NSWCA 136, considered.

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MOLONEY v HAYWARD & ORS
[2022] SASC 79

Civil

McMILLAN AJ.

Introduction

1 Eugene Patrick Moloney ('the deceased') died on 7 April 2018, aged 95 years. The deceased and his wife, Mona Brigid Moloney ('Mona') had six children. In order of birth, they are Margaret Winifred Lehmann ('Margaret'); Kathryn Mary Humphries ('Kate'); Carolyn Anne Toolis ('Carolyn'); Mary Elizabeth Hayward ('Libby'); Eugene Joseph Moloney ('the applicant'); and Helen Christine Boylan ('Helen'), who predeceased the deceased.

2 The deceased's last will was executed on 15 February 2018 ('the 2018 will'). The applicant seeks that the 2018 will be admitted to probate. He contends that the 2018 will embodies the last expression of the deceased's testamentary wishes, and that the deceased knew and understood what he was doing both when he gave instructions for its preparation and when he signed the document.

3 Margaret, Kate, Carolyn and Libby ('the respondents')[1] oppose the admission of the 2018 will to probate. They contend that at the time the deceased gave instructions for the 2018 will, he lacked testamentary capacity and, in any event, did not know and understand its contents. Further, they contend that the 2018 will should not otherwise be admitted to probate on the ground of undue influence which the applicant brought to bear over the will of the deceased. The respondents contend that the will of the deceased that should be admitted to probate is a will that was executed on 10 September 2012 ('the 2012 will'), subject to the issue of rectification, which is agreed by them.

4 The deceased was a farmer on land generally referred to as the Moloney farm. At the heart of the dispute between the siblings is the disposition by the deceased in the 2018 will of a particular part of the Moloney farm known within the family as 'Brewers'. Brewers comprises approximately one sixth of the arable land of the Moloney farm. Brewers had been farmed by the deceased and the applicant during the deceased's lifetime. It is now farmed by the applicant and his son, Thomas Eugene Moloney ('Tom').

5 The 2018 will provides for the applicant to acquire Brewers for the amount of $2 million, payable to the deceased's estate, in circumstances where the

[1] The surviving daughters are the first to fourth respondents. The fifth to eighth respondents are Helen's four children. They took no active role as parties in the proceeding.

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undisputed evidence was that the market value of Brewers at 15 February 2018 was $3,925,000.[2]

6 The respondents contend that at all material times, the deceased intended that Brewers or its market value would be inherited by the daughters of the deceased. This meant that the bulk of the Moloney farm would be inherited by the 'male line', while preserving some inheritance for the 'female line'. They contend that the 2018 will represents a substantial change to the deceased's testamentary intentions in his prior wills, such as to attract the suspicion of the Court.

7 The applicant denies that the deceased held a singly, unvarying intention regarding Brewers and says that the deceased's wills and other documentary evidence prior to 2018 demonstrate that the deceased instead had varying testamentary intentions with respect to Brewers. Those varying intentions can be understood in the context of the deceased attempting to reconcile his objectives of maintaining the family farm in the hands of the applicant while making provision for his daughters, in circumstances where the value of Brewers was increasing.

The legal issues

8 The parties filed an agreed statement identifying the relevant legal issues to be determined as follows:

(a) Should the 2018 will be admitted to probate?

(b) Did the deceased have testamentary capacity to make the 2018 will on 15 February 2018?

(c) If the deceased did not have testamentary capacity on 15 February 2018, did he have testamentary capacity to give instructions for the making of the 2018 will on 18 August 2017?

(d) Did the deceased know and approve the contents of the 2018 will when he executed it on 15 February 2018?

(e) If the deceased had testamentary capacity and knew of and approved the contents of the 2018 will, was the making of the 2018 will procured by undue influence?

(f) If the 2018 will is not to be admitted to probate, should the 2012 will be rectified and admitted to probate as the last true will of the deceased?[3]

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[2] Brewers' market value at 18 August 2017 — when instructions were given for the 2018 will — was $3.65 million.

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9 The agreed statement of legal issues does not identify any issue of due execution of the 2018 will. Notwithstanding some suggestions to the contrary by the respondents that arose as a result of certain evidence given,[4] the respondents do not seriously contend that the Court should determine whether the 2018 will was duly executed in accordance with s 8 of the *Wills Act 1936* (SA).

General comments on the evidence

10 Limited evidence was given by four witnesses: Eugene Justin Moloney, whose father was a first cousin of the deceased, Malcolm McCauley, who was a neighbour of the deceased and the applicant, Andrew Chambers, who is a pastor at the residential village where the deceased resided for the last four years of his life; and William Robert Moloney, who is a nephew of the deceased. Their evidence consisted mainly of brief or sporadic observations of the deceased, or general and broad observations that were of limited or no utility and insufficient to ground any meaningful conclusions. Some of the applicant's evidence was also of limited utility, for example, details of his labour on the farm and payment for such labour since he left school. This appeared to be given more by way of background as to his role in the farming enterprise with his parents and is not relevant to the determination of the issues in the proceeding.

11 The applicant submits that all witnesses gave honest evidence to the best of their abilities and recollections, and while recollections vary on some topics, it is not possible to remember details of conversations or events that occurred over many years. The respondents submit that the applicant's evidence was highly suspect and unreliable.

12 The evidence covered events going back to 2005, however, the evidence relevant to the 2018 will is relatively more recent. Evidence that is given orally and later in time than the date of making a witness statement can be more susceptible to difficulties arising from fading memories and a tendency of witnesses to tailor the evidence to suit their case. Where there are uncontentious contemporaneous records that support the oral evidence, it is likely to be the most reliable evidence. The consequences of the findings to be made and the inability to hear any evidence from the deceased as to his actual intentions means that the evaluation of all the evidence must be approached with care.

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[3] The statement of legal issues identifies as an alternative to the matters recorded in sub-para (f) whether a will dated 18 January 2016 should be admitted to probate as the last true will of the deceased, however, this was not pressed by either party.

[4] See, eg, the written closing submissions of the respondents at para [2], where it states: 'While the … respondents do not contest that the deceased signed the 2018 will, the lack of reliability of the three witnesses [that gave evidence as to the due execution of the 2018 will] must cause a doubt as to the sequence in which the document was signed'. See also paras [46]–[47] where the respondents submit that while on its face the 2018 will appears to be duly executed, there may not be a sufficient basis for the Court to be satisfied that it was duly executed.

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Summary of findings

13 The Court has determined that the deceased did not have testamentary capacity on 18 August 2017 when he gave instructions for the 2018 will or when he signed the 2018 will on 15 February 2018. It has also determined the applicant's claims of knowledge and approval and undue influence in favour of the respondents. The parties had agreed that following such a determination the respondents would seek rectification of the 2012 will to include an option for the applicant to purchase Brewers at market value and that the 2012 will, as rectified, be admitted to probate.

Factual background

The Moloney family and brewers

14 The Moloney family have for generations been farmers on land near Maitland, South Australia. From time to time, members of the family have owned various parcels of land located near Maitland.

15 The deceased was born on 10 February 1923.

16 In 1936, the deceased's sister, Patricia Sheila Moloney ('Sheila') became the registered proprietor of land comprising 636.9 acres, which had previously been owned by the Brewer family.[5] Within the Moloney family, this land was known as Brewers. The deceased and his father farmed Brewers for Sheila's benefit and, following the death of the deceased's father, the deceased farmed it on Sheila's behalf.

17 Sheila died in 1986. She had no children. Pursuant to her last will, 40 per cent of Brewers was inherited by the deceased and the remaining 60 per cent was inherited equally by the deceased's three other siblings. In 1988 the deceased acquired the remaining 60 per cent share of Brewers from his siblings. Brewers then became part of the Moloney farm and was farmed by the deceased and the applicant.

18 Of the children of the deceased and Mona, the applicant is the only child who took up farming as an occupation. In 1969 when the applicant was aged 16 years and still at school, he became a partner in the farming enterprise with his parents, known as EP Moloney & Co., apparently for taxation purposes. In 1972 the applicant commenced full-time work on the farm and shared the work with the deceased and other farm workers. In 1982 the applicant's wife, Deirdre, also became a partner for taxation purposes. As time passed, the deceased became less active in the day-to-day farming operation, particularly towards the end of the 1980s.[6]

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5 That land is now described in Certificate of Title Register Book Volume 5660 Folio 15, being Section 242, Hundred of Maitland in the Area of Maitland.

6 This evidence was not contradicted by the respondents.

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19 The parties agreed that at all material times it was the wish and intention of the deceased's father and the deceased that the Moloney farm be maintained for the next generation of the family and beyond, such wish and intention being common to farmers.

20 The land comprising the Moloney farm consists of 1,504.45 hectares. Of that holding, three properties with a total land area of 635 hectares were owned by the deceased, one of which was Brewers comprising 257.78 hectares. Brewers was said to have a market value of $3,925,000 as at 15 February 2018 and $4,075,000 as at 1 May 2019. The values of the deceased's other two properties were said to be $370,000 for the property of 19.5 hectares and $6,475,000 for the property of 357.72 hectares. The balance of the land comprising the Maloney farm is owned by the applicant and comprises four properties totalling 869.45 hectares.

21 Other assets in the deceased's name include a unit in Grant Avenue, Toorak Gardens ('Grant Avenue') valued at $500,000 to $550,000 and approximately $2 million on term deposit. Otherwise, the deceased had a share in the farming partnership, an asset of which was a bank account called the 'harvest account', shares valued at approximately $35,000, a personal bank account with minimal funds and a motor vehicle worth around $20,000. In general terms the overall value of the deceased's assets at the date of the 2018 will was in the vicinity of $13,325,000 to $13,375,000, although the value of the deceased's farming partnership is unknown and not included in this calculation.[7]

22 The applicant contends there were certain key elements and key variables of the 2018 will that had been established for over 10 years and did not vary. The key elements did not vary in that the applicant was always to receive the farm land, other than Brewers, and he was always to receive an option to purchase Brewers on terms and the girls were always to receive Grant Avenue. The key variables in the last period of the deceased's life concerned the terms on which the applicant was to have the right to purchase Brewers and how the term deposit was to be split.

23 Of the key variables, under the 2018 will the applicant was to receive $1 million of the term deposit and was to be able to purchase Brewers for $2 million with that payment being partly funded by his share of the term deposit. The applicant was to fund the balance by way of a bank loan of $1 million. This then meant the girls would each receive $700,000 or together a total of $3.5 million.

24 On the respondents' case, the girls were to receive the market value of Brewers being $3,925,000; the term deposit of $2 million; and Grant Avenue valued between $500,000 and $550,000. This meant the girls were each to

[7] Comprising real property valued at $10,770,000 and personal estate worth between $2,555,000 and $2,605,000.

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receive between $917,857,000 to $1,295,000 or together a total of between $6,425,000 to $6,475,000.

25 In both scenarios, the applicant was to receive the two other farming properties valued at $6,845,000, shares valued at $35,000 and a motor vehicle worth around $20,000 plus the share in the farming partnership and the personal bank account.

The deceased's testamentary intentions 1995-2008

26 After the transfer of Brewers to the deceased in 1988, the deceased made wills on 24 March 1995 ('the 1995 will'), 5 April 2005 ('the 2005 will') and 15 July 2008 ('the 2008 will'). Mona made mirror wills. Each of these wills was prepared by Paul Ignatius Boylan ('Paul'), who was married to Helen during her lifetime, and with whom Helen had four children, Brigid Mary Boylan ('Brigid'), Joseph Thomas Boylan, Esther Nellie Boylan and Ignatius Patrick Boylan.

27 Paul is a solicitor and has practised under the firm name of Boylan Lawyers. Since 1987 he has undertaken wills and conveyancing work for the deceased.

28 The 1995, 2005 and 2008 wills provide background to the deceased's testamentary intention with respect to Brewers at those points in time. In each will, the deceased's estate was left to Mona, providing she survived the deceased for 28 days. If Mona failed to survive the deceased for that period of time, all of the deceased's farming land was devised to the applicant, with the disposition of Brewers subject to certain conditions. The applicant was also to receive the deceased's interest in the farming partnership. Subject to some specific bequests, the respondents and Helen were to receive the residue of the deceased's estate in equal shares.

29 Pursuant to the 1995 will, Brewers was devised to the applicant, subject to a payment by the applicant of $50,000 to each of the respondents and Helen, a total of $250,000.

30 The electronic file notes of Paul's conferences with the deceased and Mona commencing 15 April 2004 in respect of their wills, were in evidence. From around 2003, Paul took very brief written notes during the conferences, then after the conference he would dictate a file note. This was then typed by someone other than Paul, presumably a secretary or similar.

31 A file note dated 15 April 2004 records that Mona and the deceased were not sure of 'what will be left', presumably in the residuary estate for 'the girls', but 'can be sure of the $500,000 coming from [the applicant] from Brewers'. At that stage, the 1995 will provided for the applicant to pay $250,000 to the respondents and Helen. This appears to be a reference to what would later appear in the 2005 will.

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32 It appears to have been the deceased's practice, which was understood and adopted by other members of the family, to refer to the respondents and Helen as 'the girls'. After Helen's death in 2010, that expression was also understood, in the context of testamentary dispositions, to encompass Paul and Helen's four children. The use of that expression in these reasons reflects the deceased's practice.

33 A file note dated 5 April 2005, on the same date the 2005 will was executed, records:

> [The deceased] was also concerned about [the applicant] selling Brewers not long after he buys it from the girls. We discussed this and agreed that it could happen if the price of Brewers is significantly higher than the amount [the applicant] has to pay the girls. At this date it is.
>
> As Mona and [the deceased] were keen to sign the Will today an alteration to make provision to prevent [the applicant] selling Brewers for a profit won't be made now. I will think about it and suggest a clause to [the deceased] and Mona.

34 Pursuant to the 2005 will, Brewers was to be devised to the applicant subject to a payment by the applicant of $100,000 to each of the respondents and Helen, a total of $500,000. The 2005 will provided for any private passenger vehicle owned by the deceased at his death to be given to Libby and for certain shares to be given to the applicant.

35 By 2005 the deceased's estate included Grant Avenue. The 2005 will left Grant Avenue, together with all furniture and articles of personal or domestic use contained within it, to Helen. In the 2005 will, the deceased ascribed a value of $200,000 to these gifts and directed his trustee take that value into account in ensuring that the gifts and the residuary estate were equally distributed between his daughters.

36 A file note dated 1 April 2007 records:

> Mona & [the deceased] are concerned about the provisions of their Wills and making sure that it is fair to all involved …
>
> We went through the Wills discussing as we went the provisions and what [the applicant] would inherit. [The deceased] is concerned that [the applicant] will not be saddled with too much debt and will still be able to farm profitably. After going through the Wills they were both satisfied that the provisions achieved their current aims.

37 A further conference took place on 13 May 2007. The relevant file note records:

> Mona would like to increase the amount that the girls will inherit by increasing the amount that [the applicant] has to pay for Brewers. [The deceased] is not inclined to make it any harder for [the applicant]. Brewers is valued at about [1.2] million dollars.

38 A file note dated 31 December 2007 records:

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> Brewer's to girls in its entirety
>
> Council rates capital value 2008 financial year $1,250,000.00
>
> …
>
> Option for [the applicant] to buyer [sic] Brewer's after farming years + 1 year and use it during that time. Price is Valuer General's value.

39 Pursuant to the 2008 will, Brewers was given to the respondents and Helen, with the applicant granted an option to purchase it at the value determined by the Valuer-General for the State of South Australia as at the date of the deceased's death. The gift to Libby of any private vehicle of the deceased and to the applicant of specific shares remained and the specific bequest of Grant Avenue was removed.

40 Paul was unable to recall any further detail of what was discussed with the deceased and Mona at these conferences beyond what was recorded in the file notes.

41 Mona died on 2 November 2008.

42 As at 1 July 2009, Brewers had been valued by the Valuer-General as having a capital value of $1,250,000 million.

The deceased's testamentary intentions 2010-12

43 Helen died on 12 April 2010.

44 On 22 September 2010, Paul and the deceased discussed changes to the deceased's 2008 will. The relevant file note records that, inter alia, the deceased wanted to change the valuation mechanism for Brewers from the Valuer-General's valuation to a value nominated by the executors. At that stage, as Mona had died, the executors were Margaret, Libby and the applicant. Paul could not recall why the deceased gave that instruction.

45 A draft will appears in the Boylan Lawyers' file which bears the date 2010 and which is unsigned ('the 2010 draft will'). In the 2010 draft will, a 20 per cent share of Brewers was devised on trust to each of the respondents with the remaining 20 per cent share on trust to the four children of Helen and Paul. That gift was subject to the provisions of cl 5, which provided that the applicant had an option, subject to certain conditions, to purchase Brewers at 'its market value as has been determined by a licensed valuer nominated by my trustee'. This differs from the instruction given by the deceased that Brewers be ascribed 'a value nominated by the executors' which is recorded in the 22 September 2010 file note. Paul agreed there was no evidence in his file that he took any steps in respect of the 2010 draft will.

46 The next attendance by Paul on the deceased evidenced by the electronic file notes is not until 4 January 2015. Notwithstanding this, on 10 September

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2012, the deceased executed the 2012 will. The 2012 will is witnessed by Paul and a person identified as 'clerk, Port Pirie'. Paul was unable to identify that person, but agreed it was likely to have been an employee of his firm. Paul could not recall, but accepted that it appeared that the deceased came to his office to execute the 2012 will.

47 The 2010 draft will and the 2012 will are identical, save for the following material distinction. In each document, cl 4(b) provides for the disposition of Brewers to the respondents and Helen's children, subject to cl 5. However, while in the 2010 draft will cl 5 grants an option to the applicant to purchase Brewers at market value on certain conditions, in the 2012 will, cl 5 declares that any passenger motor vehicle registered in the deceased's name at the date of his death does not form part of the vehicles of the partnership business.

48 In the event the 2018 will is not admitted to probate, the respondents seek rectification of, and admission of the 2012 will to probate. The respondents submit that what most likely occurred is that a mistake was made in the drafting of the 2012 will, so that the provision permitting the applicant to purchase Brewers at market value was not included. That mistake was not identified by either Paul or the deceased. The respondents do not suggest that the deceased's intention in 2012 was that they and Helen's children were to receive Brewers absolutely.

49 Paul's evidence was that he 'may very well've left [the applicant's right to acquire Brewers] out'. To the suggestion that, to the best of Paul's recollection, it was the deceased's intention in September 2012 for the acquisition of Brewers to occur at market value, Paul responded, 'I think so'.

50 Counsel for the applicant accepts that there is a mistake in the 2012 will and that, if the 2018 will is not to be admitted to probate, the 2012 will should be rectified so that it includes an option for the applicant to purchase Brewers at market value.

2013-14

Hospitalisation and move to residential care

51 A significant number of medical records were in evidence, particularly from 2013 onwards. At this stage of recounting the relevant background facts, it suffices to record chronologically the general and uncontroversial details of the deceased's health.

52 Prior to mid-2013, the deceased continued to reside at home, with assistance provided to him by way of cleaning, gardening and meal delivery. It appears that the deceased was functioning reasonably well, considering at this time he was 90 years old. There was some evidence that tasks Mona had previously undertaken, such as paying bills, were taken over by Carolyn. It was accepted by the parties that the deceased would, as he had throughout his adult

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life, from time to time, exhibit symptoms of agitation, anxiety and restlessness, including worrying about physical ailments and medical issues.

53 Commencing from August 2013, the deceased began to suffer a decline in health. It is not in dispute that the deceased suffered from ill health in this period and required an increase in care and support. The extent to which the deceased's cognitive functioning was impaired or affected is disputed.

54 The respondents' case is that from 2013 onwards, the deceased was suffering cognitive impairment in the form of an undiagnosed early stage dementia. The applicant contends that the ill health suffered by the deceased from this point forward did not adversely impact the deceased's cognitive function.

55 On 24 August 2013, the deceased, who was then aged 90 years, was taken from his home by ambulance and admitted to Maitland Hospital with pneumonia. Following treatment for his pneumonia, the deceased was transferred on 4 September 2013 to Calvary Rehabilitation Hospital in Walkerville ('Calvary Rehab'), as after prolonged bed rest he had 'deconditioned' and demonstrated poor mobility. On 16 September 2013, the deceased returned to Maitland Hospital. On 23 September 2013, while still in Maitland Hospital, the deceased's left hip spontaneously dislocated. It appears the deceased may have been suffering from an infection in the hip, which took some time to be diagnosed, and which made him seriously unwell. The applicant described the deceased at this time as frail. Carolyn's evidence was that the deceased was very unwell and suffering delirium. The deceased was transferred that day to Calvary Wakefield Hospital ('Calvary Wakefield'), and remained there until he was re-admitted to Maitland Hospital on 29 November 2013.

56 The parties agreed that during the deceased's admission to Calvary Rehab and Calvary Wakefield, he was prescribed and took a number of medications. He also exhibited confusion and short-term memory loss in September and October 2013; disorientation as to time in November 2013; a lack of insight into his continence problems; general short-term memory loss demonstrated by constantly asking the same questions of staff members; and general symptoms of anxiety and depression, being excessive worrying about many different things, together with feelings of agitation, fatigue and restlessness.

57 On 29 November 2013, the deceased was discharged from Calvary Wakefield and returned to Maitland Hospital to await a respite position in a residential aged care facility. On 20 December 2013, the deceased commenced residing at the Eldercare Village in Maitland ('the Village'). Although the deceased's stay at the Village was initially for respite, after being assessed for high level permanent residency by the York & Northern Aged Care Assessment team, he ultimately resided there until his death in 2018.

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58 Throughout the time the deceased lived at the Village, his children were regular visitors. The applicant generally saw the deceased two or three times a week. Carolyn visited once or twice a week, until her medical issues in 2016 limited her ability to do so, but from that point she spoke on the phone with the deceased every day. Libby and Margaret visited the deceased once every four to six weeks, and Kate saw the deceased every three to four weeks. In addition, the deceased's general practitioner since 1998, Dr Georgina Moore, attended on the deceased every four to six weeks.

59 The evidence of these witnesses as a whole suggests that after an initial period of unease and being unsettled, the deceased adjusted to living in the Village.

The deceased's testamentary intentions

60 On the evening of 27 September 2013, the applicant and Paul visited the deceased at Calvary Wakefield. In short, the respondents allege during this visit the applicant attempted to have the deceased change the terms of his will as it related to Brewers. Margaret and Carolyn, who had earlier visited the deceased, were sitting in the foyer at Calvary Wakefield around 7pm and saw the applicant and Paul, carrying a satchel or briefcase, headed in the direction of the deceased's room.[8]

61 The evidence of Paul and the applicant as to this visit is detailed below. In substance, however, the applicant's evidence was that he did not arrange for Paul to visit the deceased, rather Paul saw the deceased that night as Paul was visiting his mother who was also a patient at Calvary Wakefield. According to the applicant there was no discussion about the deceased's will during the visit. Paul's versions of events differed, although his recollection was not strong. He recalled being told by the applicant that the deceased was in the hospital and that the applicant may have said 'Dad might want to change his will'. Paul could not recall whether during his visit the deceased and the applicant discussed the deceased's will, but he was 'pretty sure' he was not involved in any discussion about the will.

The deceased's handwritten September 2013 note

62 Margaret visited the deceased on both 28 and 29 September 2013 at Calvary Wakefield. Her evidence was that early in the morning on 29 September 2013, she received a call from a doctor asking if Margaret could come into the hospital as the deceased wanted her to attend. She was there all day, and went home in the late afternoon. The deceased then phoned Margaret at home while she was half way through her dinner, and asked if she could return to the hospital. When Margaret said to the deceased that she had already been there with him all day, he said, 'I want you to come back in it's very important'.

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[8] The visit is also recorded in the applicant's diary as having occurred between 7:00pm and 8:30pm.

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63 According to Margaret, when she went back to Calvary Wakefield that evening to see the deceased, early in the conversation that followed, he said, 'I want the girls to have Brewers at market value'. There had been no discussion about Brewers earlier in the day when Margaret had been visiting him. Margaret said that she responded, 'Dad, if that's what you want you need to write it down'.

64 In evidence is a handwritten note that records

> I Eugene P. Moloney want Brewers to be left to my daughters at market value.
> Signed E.P. Moloney

65 Margaret's evidence was that the handwriting was that of the deceased. She saw the deceased write the note and he read it more than once, although she could not recall whether he read it out loud.

66 Underneath that statement and signature is different handwriting that records

> Witnessed by
>
> 28.9.2013

67 Margaret said she wrote this on the note, and then went to locate a witness, saying she wanted someone to know what the deceased had written. She spoke to a nurse, who declined to witness the deceased's signature as it would be against hospital policy. Although the date recorded on the note is 28 September 2013, which was a Saturday, Margaret's consistent evidence was that it was on Sunday, 29 September 2013 that the deceased called her back to the hospital and wrote the note.

68 The back of the note also bears the deceased's signature, but Margaret does not recall the deceased turning over the note and signing it.

69 Although not pleaded, the respondents appear to rely on this note as evidence of the long-held testamentary intentions of the deceased, particularly the deceased's intention as expressed in the absence of the applicant. The applicant's evidence was that he was not aware of the note until the commencement of this proceeding.

70 Around this time, Margaret was keeping a running diary. Margaret was taken to her entry dated Sunday, 29 September 2013:

> Over the [weekend] I had spoken to Libby re my concern about Paul Boylan in Friday night's meeting. Her response was that the only land that they could have been talking about was Brewers. The farm that according to Libby has been left to his daughters.

71 Margaret confirmed the content of this entry, and that she spoke to Libby on Saturday, 28 September 2013, after seeing Paul and the applicant at Calvary Wakefield the night before. Margaret denied that when she spoke to Libby on

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the Saturday, Libby had said that the sisters should be getting Brewers at market value, and encouraged Margaret to get something in writing from the deceased.

72 Libby initially emphatically denied that she was contacted by Margaret at this time. Libby denied telling Margaret to get a note signed by the deceased to the effect that Brewers was going to be left to the sisters at market value. After being shown Margaret's contemporaneous diary entry, however, Libby's evidence was that Margaret did call her, saying that she had seen the applicant and Paul visit the deceased with a briefcase. According to Libby, Margaret asked what the discussion could have been about and Libby responded, 'Well, the only thing that we've been left would be Brewers'. However she qualified her evidence by relying on the diary entry, stating she could not in fact remember.

73 Margaret took the note home and likely discussed it with her husband. In evidence was an envelope on which Margaret's husband had written in a marker: 'E.P.M's LETTER BREWER'S OF 28-09-2013'. Margaret's evidence was that she told Carolyn and Libby about the note the day after it was written. Libby, however, said she knew nothing about the note until the proceeding commenced.

74 Save for discussing the note briefly with a lawyer, Margaret did nothing more with the note until the 2018 will was read after the deceased's death.

Paul's note dated 28 November 2014

75 In evidence is a document that bears Paul's writing and an electronic date of 28 November 2014.

76 Initially, Paul gave evidence that he had not spoken to the deceased about the terms of his will between the time the deceased entered the Village in December 2013 and 4 January 2015. He was then taken to the note, and gave evidence that it recorded instructions from the deceased. The document bears the signature of the deceased. Paul agreed that the document appeared to be a draft will signed by the deceased on 28 November 2014.

77 Paul then remembered seeing the deceased at the Village, where he attempted to take instructions on a computer or tablet with the functionality to write on the screen. The instructions recorded, inter alia, were:

> Amend my Will so Brewers goes to son Eugene having a right for $1,500,000.

78 Paul had no recollection of this attendance, other than remembering writing the instructions on the screen of the computer, and the deceased signing the screen. Initially, he accepted that he would have been provided with those instructions in November 2014. Later, he said the date of 28 November 2014 could have been the date the document was printed rather than the date the instructions were taken. He accepted, when it was put to him, that the attendance must have been earlier than 28 November 2014, but cavilled with the suggestion that the instructions were taken some time in 2014, saying as he had no

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recollection, it could have been any point earlier than 2014. Later still, Paul gave evidence that the note could have recorded instructions given in 2015, that is, after the date which appears on the document.

79 Paul then gave evidence that he could not say whether he took the instructions before or after the deceased's admission to 'Calvary' in September 2013, notwithstanding his evidence shortly before that he recalled seeing the deceased at the Village when he took these instructions. It is to be remembered that the deceased commenced residing at the Village only following his discharge from Calvary Wakefield. When it was put to Paul that the instructions may have been recorded when Paul attended on the deceased with the applicant at Calvary Wakefield on 27 September 2013, Paul then repeated his evidence that he remembered the deceased signing the screen at the Village. The applicant also denied that the document was prepared on 27 September 2013 when Paul and he visited the deceased at Calvary Wakefield.

80 No explanation was given for how Paul came to be drafting a will for the deceased at the time. No file notes, costs entries, or draft formal will reflecting those terms appears in the file.

81 The document was signed by the deceased, so if necessary an attempt could be made to prove it as a will. Paul initially gave evidence that he 'probably would have been' concerned about the deceased's health on this occasion, but later said that he did not have any particular concern about the deceased's health, stating, 'I wasn't very much aware of what the state of his health was'. The following exchange then occurred:

> Counsel: You accept it's good practice to keep file notes in relation to attendances on elderly testators?
>
> Paul: Yes.
>
> Counsel: Especially ones that you are related to?
>
> Paul: No, I don't see the distinction.

2015–16

The deceased's testamentary intentions January 2015–January 2016

4 January 2015 instructions

82 Included in Paul's file is a file note recorded on 4 January 2015. In part, it says:

> I have attended the Village in Maitland. [The deceased] instructed me to change his Will so that
>
> - [The applicant] receives a cash gift of $500,000,
>
> …

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- [The applicant] receives Brewers if he paid the girls the market value.

83 Beyond what is recorded in that note, Paul said he had a recollection that the deceased wanted 'to make it easier' for the applicant, and thought giving money to the applicant would be appropriate. Paul inferred that this would make it easier for the applicant as he could use that money to purchase Brewers.

84 Paul could not recollect how this attendance on the deceased was arranged. When it was suggested that the applicant had asked him to attend, Paul said that he did not recollect the applicant ever asking Paul to go and see the deceased. His evidence was that no one else was present, as if they were he would have recorded that fact in his file note. When asked in cross-examination what the deceased said to Paul on 4 January 2015, Paul said he had no independent recollection other than what was recorded in the note. Paul also said the deceased had only told Paul once why he was making changes to his will, and that was in relation to a later change. This contrasts with his evidence-in-chief, recorded above, in which Paul recalled the deceased explaining on this occasion that he wanted to 'make it easier' for the applicant.

23 February 2015 instructions

85 The following recorded entry in Paul's file is dated 23 February 2015 at 9:30am:

> I have attended village in Maitland. After some discussion [the deceased] instructed me to change his Will so that
>
> - Brewers goes to the girls with [the applicant] having the right to purchase it for $1,500,000

86 On this occasion, the applicant was present with the deceased at the Village when the instructions were given. The applicant accepted that $1.5 million was a considerable discount on the market value of Brewers at the time, the undisputed evidence before the Court being that, as at 23 January 2015, the market value of Brewers was $2.8 million.

87 The respondents allege that the applicant arranged for Paul to attend upon the deceased, who was then aged 92 years. The respondents contend that the instructions resulted from discussions between Paul, the applicant and the deceased, and would permit the applicant to purchase Brewers for far less than its market value.

88 Paul could not recall any discussion with the deceased on that occasion as to why the deceased wanted that change. Paul denied that the instructions came from the applicant rather than the deceased.

89 The day after giving the evidence recorded at para [78] above about the note dated 28 November 2014, Paul gave evidence that, on reflection, the document dated 28 November 2014 could well document the instructions

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received later on 4 January 2015. Looking again at the file note of the attendance on 4 January 2015, which recorded instructions that Brewers was to be acquired by the applicant for market value, but with the applicant receiving a cash gift of $500,000, Paul accepted that he did not receive the instructions recorded in the note dated 28 November 2014 on 4 January 2015. Those instructions are clearly inconsistent.

90 The instructions are, however, consistent with what is recorded as being the instructions given on 23 February 2015, when the applicant was present with the deceased and Paul. Paul agreed it is possible the note was created on 23 February 2015 in the presence of the applicant, but he could not recall. He could also not explain why it would then bear a date of 28 November 2014. Paul also gave evidence that he did not see the deceased on 28 November 2014 as he spent most of that day at Brisbane airport having returned from a trip to America and the note was likely to have been drawn up on 23 February 2015.

91 The applicant gave evidence, however, that he never saw the deceased sign a tablet or computer screen in the presence of Paul. The applicant gave conflicting evidence about his attendance at this meeting, first agreeing that he was present with Paul in February 2015 when the deceased gave instructions in relation to how Brewers was to be acquired by the applicant, before then saying he did not think he was present at the attendance in February 2015. Upon being shown Paul's file note recording the applicant's presence, he did not deny attending but said he had no memory of it. However, the applicant did later deny being there, stating 'It could have happened but I wasn't there'. Later still, when it was put to him that there was a difference between not being able to remember being somewhere and positively remembering not being somewhere, the applicant gave evidence that he positively was not there for the February 2015 meeting.

92 Although not put to him, the applicant's diary which was in evidence records on Monday 23 February 2015 at 10:00am:

> Paul Boylan called to discuss Dad's Will with him.

93 On a strict reading, this note is equivocal as to whether the applicant was present with the deceased when this occurred, or whether the applicant was merely recording a fact relayed to him by either the deceased or Paul. On balance, it is more probable that the applicant would record something in his diary that occurred in his presence. This is also consistent with Paul's recording of the applicant being present.

94 When asked whether the deceased discussed why he wanted the change in instructions from market value on 4 January 2015 to $1.5 million on 23 February 2015, Paul said that the deceased did not on those two occasions, or on most other occasions, offer an explanation. When asked if there was a discussion

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between any of the applicant, the deceased and Paul as to the value of Brewers on 23 February 2015, Paul said:

> Well, I can't say no because I don't remember. Generally if there was a change in relation to Brewers there was generally some discussion if [the applicant] was there as to value.

95 This answer suggests that there were a number of conversations where the applicant was involved in discussing the value to be attributed to Brewers in respect of the deceased's will being changed.

96 Paul's evidence was that he did not think it was important to ascertain the reason why the deceased changed his instructions in a little over a month, in circumstances where he was taking instructions from the deceased in the presence of the applicant, who stood to benefit from that change in instruction.

97 On the basis of Paul's evidence that the document dated 28 November 2014 was in fact created on 23 February 2015, he was asked whether he maintained his evidence that the reason he had the deceased sign the document was in case it was necessary to prove it as a will. Paul agreed. It was put to Paul that the applicant told Paul that he was concerned that the deceased intended to change the will to specify that Brewers was to be acquired at market value, and that the applicant wanted this addressed on 23 February 2015. Paul could not recall the applicant saying that. When asked why, therefore, the applicant was present at the time those instructions were given, Paul responded, 'He was there when I arrived'. This evidence is difficult to reconcile with Paul's earlier evidence that he did not have an independent recollection of the meeting, save for what is recorded in his file note dated 23 February 2015.

98 Paul was asked why he took instructions on 4 January 2015 but did not take any action in respect of those instructions, while at the meeting attended by the applicant, a document was created and signed so that it could be proved as a will. His explanation was because 'the ability was there', referring to the fact the deceased could sign the screen. Paul said he may have been interested in seeing how it was done on a screen, as he had not done it before. Paul agreed there was nothing on file to indicate he had taken steps to prepare a will after 23 February 2015.

19 March 2015 instructions

99 On 19 March 2015, Paul received a telephone call from the deceased. His notes record:

> [The deceased] said that he would like to put the Will back as it was
>
> He said that Peter Humphreys [sic] came over to see him at Kate's urging
>
> I said I would do so.

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100 Peter Humphries is the husband of the deceased's daughter, Kate, and is a litigation lawyer.

101 The respondents allege that this instruction from the deceased was to the effect that the deceased wished to leave the 2012 will, as he believed its terms to be, in place, that is, with Brewers to be acquired for market value.

102 Paul gave evidence that the deceased did not give any explanation other than what was recorded in the second line of that note. The conversation was very short, with Paul forming the impression that the deceased was annoyed and did not want to discuss anything else. Paul understood that the deceased wanted his will to be returned to how it was prior to the February instructions.

103 Notwithstanding that this conversation is referred to in the respondents' pleading filed at least since 24 December 2018, the applicant's evidence was that he has no knowledge of this telephone call from the deceased to Paul following the alleged conversation with Mr Humphries.

104 Kate's evidence was that she was distressed by the 2015 telephone conversation with the deceased about leaving a cap of $1.5 million on Brewers. She then spoke with her husband and wanted him to send a message to the deceased that he should not remove her as an executor. The applicant contends that as there is no evidence that the deceased was removing Kate as an executor, it was more likely that she asked her husband to convey a message to the deceased in relation to the cap of $1.5 million on Brewers. It would seem likely that this conversation may have pre-empted Peter's visit to the deceased.

The draft will dated July 2015

105 A draft will appears in Paul's file that bears the date 30 July 2015. According to Paul, the relevant instructions to prepare that document were those from the deceased to 'put the [w]ill back as it was' in March 2015. It was put to him, however, that the draft permitted the applicant to acquire Brewers at market value, but did not provide him with any cash, and that therefore the draft will was not consistent with the instructions given on 4 January 2015, but rather with the 2010 draft will. Paul agreed the draft will dated 30 July 2015 did not leave the applicant any cash gift. Paul could not recall why the document was prepared, save that it was part of the process of putting the will back 'back as it was', and that the document could have been a copy of the last will on file on which Paul was going to work.

106 It was put to Paul that when the deceased instructed him to 'put the will back as it was', Paul understood the deceased to mean back to the position where the applicant would receive Brewers if he paid market value for it, not the instructions given on 23 February 2015 where the applicant was to pay $1.5 million. Paul could not remember what his understanding was at that time, but agreed the draft will dated 30 July 2015 reflects the market value position

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adopted in the 2010 draft will. He said it was possible that was his understanding.

The 2016 will

107 On 18 January 2016, the deceased signed a will which was witnessed only by Paul ('the 2016 will'). The 2016 will relevantly provides:

> 2 I appoint my children ~~Kathryn Mary Humphries~~, Mary Elizabeth Heyward [sic] and Eugene Joseph Moloney (in this Will called 'my trustee') as executor and trustee of my Will.
>
> 3 I direct that my debts, funeral and testamentary expenses be paid from my estate after my death.
>
> 4 I give the rest of my estate (in this Will called 'my residuary estate') to my trustee upon the following trusts
>
> (a) To hold the sum of Five Hundred Thousand Dollars ($500,000.00) for my son Eugene Joseph Moloney
>
> (b) If I have commenced farming for the current farming season by preparing any of my farming land for the planting of a crop, to carry on my farming partnership with my farming partners until the completion of the next harvest
>
> (c) To hold my farming land known as 'Brewers' for my son Eugene Joseph Moloney provided that
>
> (i) My son pay to my estate within one year after the completion of the next harvest following my death a sum equal to the be [sic] market value of 'Brewers' as determined by a licensed valuer nominated by my trustee
>
> (ii) My share of the income from 'Brewers' be paid to my estate until such time as that land is transferred to my son
>
> (d) To hold the balance of my partnership farming business income for my son Eugene Joseph Moloney
>
> (e) To hold the balance of all my freehold and leasehold farming land for my son Eugene Joseph Moloney for his own use and benefit absolutely
>
> (f) To hold the whole of my interest in the partnership farming business now carried on by me in partnership with my son Eugene Joseph Maloney [sic] and my daughter-in-law Deirdre Jane Moloney under the name EP Moloney & Co together with all stock in trade … for my son Eugene Joseph Moloney for his own use and benefit absolutely …
>
> (g) To hold all money standing to the credit of my Australian and New Zealand Banking Group Ltd account which I have used to finance my share of the partnership farming business and into which I have paid the income from the partnership farming business for my son Eugene Joseph Moloney
>
> …

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(j) ~~To hold my residential property, situate [sic] at Grant Avenue Toorak Gardens South Australia together with the contents contained therein for my daughter Mary Elizabeth Heyward [sic] provided that my daughter pay to my estate within one year after the date of my death the sum of Five Hundred Thousand Dollars ($500,000.00)~~

(k) To hold any private utility motor vehicle owned by me at the date of my death for my son Eugene Joseph Moloney

(l) To hold any private motor passenger vehicle owned by me at the date of my death for my daughter Carolyn Anne Toolis

(m) The hold [sic] the balance of my residuary estate upon the following trusts

(i) as to 20% thereof for my daughter Margaret Winifred Lehmann,

(ii) as to 20% thereof for my daughter and [sic] Kathryn Mary Humphries,

(iii) as to 20% thereof for my daughter Carolyn Anne Toolis,

(iv) as to 20% thereof for my daughter Mary Elizabeth Heyward [sic],

(v) as to 20% thereof for my grandchildren Brigid Mary Boylan, Joseph Thomas Boylan, Esther Nellie Boylan and Ignatius Patrick Boylan who survive me and if more than one equally

5 I directed [sic] my trustee shall permit my daughters for the period of two years following my death to have the use occupation or enjoyment of my residence and its curtilage known as 'The Cedars'.

108 The struck out amendments recorded in cls 2 and 4(j) were initialled by the deceased and Paul.

109 Paul's evidence as to the execution of the 2016 will was that he took the document to the Village and discussed it with the deceased. Paul was to be the first witness, and he sought to find someone in the Village to sign as a second witness. He spoke to two nurses who told him they would not sign it as they were not allowed to do so. Paul suggested to the deceased that he would find another resident to sign, but the deceased did not like that idea. Paul then suggested they call someone the deceased knew to be a witness, but the deceased did not like that idea either. Paul said to the deceased that it was not fatal to a will that there was only one witness, so Paul and the deceased decided just Paul would witness the will until they could find a second witness. Paul did not have an answer for why no steps were in fact taken to regularise the witnessing of the 2016 will.

110 No file notes or costs entries relating to this attendance were evident in the file.

111 The content of the 2016 will in respect of Brewers is consistent with the instructions recorded in Paul's notes dated 4 January 2015. It was put to Paul that the 2016 will was in fact prepared after the attendance on 4 January 2015,

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and signed by the deceased not on 18 January 2016 (which is the date it bears) but in fact on 18 January 2015. Paul did not agree.

112 The evidence suggests that a copy of the 2016 will was posted to the applicant's address, addressed to the deceased, in March 2017, although the applicant does not recall seeing it.

Further hospitalisation in May 2016

113 On 5 May 2016, the deceased fell, resulting in a fractured right hip and left femur. He was transferred from the Village to Maitland Hospital, and then admitted to the Royal Adelaide Hospital for specialist orthopaedic treatment. There, he underwent two operations on 9 May and 11 May 2016. He was discharged and returned to the Village on 17 May 2016.

114 The parties agreed that in 2016–17, the deceased continued to experience a decline in his health, with both the applicant and respondents acknowledging that the deceased was becoming more frail, losing weight, experiencing increased issues with incontinence and no longer going to mass, etc.

The deceased's testamentary intentions July 2016-August 2017

115 Both the applicant and the deceased were in the habit of making notes or diary entries over the years. In the case of the applicant, he kept diaries and the deceased made notes in his notebooks.

116 The applicant points to two sets of documentary evidence which he says provide insight into the deceased's testamentary intentions and state of mind at this later time: the applicant's diaries, and the deceased's notebooks.

117 The applicant's practice since 1980 was to maintain a daily diary recording activities on the farm, as well as social engagements. Between January 2012 and the deceased's death in April 2018, the applicant recorded nearly 600 interactions involving the deceased. Some of these entries record what are alleged to be statements by the deceased as to his intentions with respect to Brewers.

118 The applicant identified the following relevant entries from his diaries:

Date	Entry
27 September 2016	Visited Dad at the "Village" (leaving money to enable keeping Brewers)
28 October 2016	Visited Dad at the "Village" … (Council valuation for Brewers, leave me the money)
8 March 2017	"Village" (wants me to have Brewers)
29 March 2017	Visited Dad at the "Village" (wants me to have Brewers at Council (Valuation) ($1,850,000) & $1,000,000
19 April 2017	Visited Dad at "the Village" … (Farm 3m, cash for me)

119 No questions were directed to the entries on 8 March 2017 or 19 April 2017. In relation to the entry on 27 September 2016, the applicant denied that he

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said to the deceased that he would not be able to acquire Brewers at market value or that he said words to the effect that 'if you leave it at market value the farm won't be able to be kept for me and Tom'. He said that possibly he said it would have been difficult. He also denied that he kept telling the deceased that he could not afford to pay market value for Brewers. When it was put to the applicant that throughout 2016 and 2017 he raised the topic of Brewers with the deceased, saying that it would be difficult for him to pay for it at market value, the applicant responded that he had no memory of that.

120 In relation to the entry on 28 October 2016, the applicant said the entry reflected the deceased's view on that day. The deceased thought the council valuation for Brewers was the price and that the money in his fixed deposit, roughly $2 million, would be given to the applicant. The applicant denied that he said to the deceased that 'we can't acquire it at market value' and that the deceased said it would be at council valuation less a sum of money.

121 On 29 March 2017, the applicant recorded in his diary that he visited the deceased at the Village and that the deceased 'wants me to have Brewers at Council (Valuation) ($1,850,000) & $1,000,000'. Giving evidence about this conversation, the applicant said the deceased brought up the topic of the will and asked what was the council valuation of Brewers. The applicant told him, and the deceased responded to the effect recorded in the diary. The applicant agreed that would have been a good outcome for him, as it meant he would only be paying $850,000 for Brewers. He denied that he suggested to the deceased that that was the price he should have to pay. When it was put to him that in February 2015 the deceased wanted the applicant to pay $1.5 million for Brewers and by March 2017 the amount had decreased to $850,000, the applicant said he did not know what had changed between those two dates. It was put to the applicant that whenever he saw the deceased in that period he said words to the effect he could not afford to pay the higher amount for Brewers. The applicant denied this.

122 Also in evidence were two notebooks of the deceased that were located at the Village after his death. The applicant says that jottings, notes and calculations recorded in the notebooks evidence the deceased's consideration and evaluation of the ways in which he could dispose of his estate, including Brewers. The applicant submits the notebooks provide good evidence of the deceased's cognitive functioning at this time.

123 A note by the deceased dated 5 July 2016 records that he called the council to obtain the valuation of Brewers, at that time being $1.85 million. This value accords with the rate notice for the 2015–16 year.

124 In the deceased's notebook there is a note that in mid-2017 the deceased contacted Paul. The entry is 'Disc will with Paul. 2 weeks from Thursday, June 22. No driving until three weeks from June 22'. At this date Paul was in

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hospital for a hip replacement in June 2017, which explains the reason for the deceased noting 'no driving' for three weeks from June 22.

125 The applicant gave evidence that in the period 2017–18 the deceased was aware of the current values of the land in Maitland and surrounding areas, and that the deceased thought land was 'dear', mentioning a sale of land near Ardrossan that he considered expensive for that sort of land.

126 The applicant submits these documents provide 'valuable insights into the deceased's character and state of mind over the relevant period', including by evidencing calculations made by the deceased concerning how much each of his children would inherit depending on the value ascribed to Brewers.

127 The respondents submit that reliance on the deceased's notebooks is misplaced. They submit that what is recorded in Appendix D of the applicant's closing submissions headed 'Documentary evidence of the deceased's testamentary intentions regarding Brewers' is a gloss on what is actually recorded in the notes. Further, while the notebooks record numbers that one can infer relate to values of Brewers, Grant Avenue etc, there is no evidence of reasoning or testamentary intentions.

128 While the notes appear to be contemporaneous and record matters relating to the deceased's thoughts at the relevant time, little weight can be placed on them as their relevant context is unknown and, as with some of the files notes referred to in Paul's evidence, they may simply be inaccurate or unreliable.

Instructions for new will – August 2017

129 On Friday, 18 August 2017, the deceased met with Paul and the applicant and gave Paul instructions for a new will, in the presence of the applicant.

Paul's evidence

130 Paul's file note of that date was created by Paul reading into voice recognition software within the next few days after the attendance and it records:

> I attended at the village in Maitland
>
> The three of us discussed [the deceased's] will
>
> I was instructed to
>
> - Give $1 million of [the deceased's] invested money to the girls and the balance to [the applicant]
> - Delete 'If I have commenced farming for the current farming season'
> - Place a price of $2 million on brewers for [the applicant] to pay the estate
> - 'The whole the balance of my partnership farming business income for my son Eugene Joseph Moloney'

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- Delete 'with my son Eugene Joseph Moloney and my daughter-in-law Deirdre Jane Moloney' from the gift of the partnership
- Delete 'to pay my share of the next annual payments for farming plant'
- Delete 'to hold any private utility motor vehicle owned by me at the date of my death for my son Eugene Joseph Moloney'. They will transfer the vehicle into the partnership immediately
- Delete 'I direct that my trustee shall permit my daughters for the period of two years '

I will email the new Will to [the applicant] who will print it and take it down to [the deceased.] I told both of them how to sign the will with two witnesses.

131 Paul's evidence was that earlier that week, the deceased phoned him and asked him to come to the Village in order to discuss the deceased's will. It was arranged that Paul would attend on Friday. Paul denied that the applicant had arranged the meeting. The applicant was in attendance, which Paul had not expected, but he was not surprised by that fact. Counsel for the respondents suggested that Paul was not surprised because Paul had previously attended upon the applicant and the deceased when instructions were being given, referencing the attendance on 23 February 2015. Paul said he did not attend upon them both, making the distinction that he attended upon the deceased and the applicant was there. According to Paul, the instructions came from the deceased and not from the applicant. He said that the applicant did not talk to Paul, but that the applicant and the deceased discussed things.

132 As was his usual practice, Paul had with him a copy of the deceased's most recent will on which he marked changes. He may have made other notes as well. The evidence suggests that this was a copy of the 2016 will. Paul was shown a copy of the 2016 will which bore handwritten amendments, and agreed it was probable that that was the document on which he made markings during the 18 August 2017 attendance. He agreed that the markings on the document did not reflect the instructions that were recorded in the file note, there being no record of any change to the amount the applicant was to receive or the price of Brewers being amended to $2 million. He denied that the reason was because he was not given the instructions which he recorded in his file note. The clauses relevant to those two instructions were marked, however, with the sum of $500,000 recorded in cl 4(a) underlined and the word 'price?' appearing next to cl 4(c). The other instructions recorded in the file note are reflected in the handwritten amendments made to the copy of the 2016 will.

133 Paul said that the applicant and the deceased briefly discussed the disposition of the deceased's invested money, as recorded in the note. It was his recollection that the applicant said he would find it difficult to pay the interest on money borrowed to 'pay the girls' for Brewers, and the deceased responded, 'You'll manage it'. Paul understood that the applicant was talking about interest on a debt of $1 million, given the applicant would be receiving $1 million. When

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it was suggested that it was the applicant who said the price for Brewers should be $2 million, Paul said he could not remember if the applicant said that, but asserted he was not instructed by the applicant. However, Paul also gave evidence that he thought the applicant said words to the effect that he could not pay market value for Brewers. The evidence before the Court suggests that market value for Brewers at the time was $3,650,000. Paul denied that the deceased merely agreed with what was said by the applicant.

134 Paul could not recall any discussion of the value of Brewers on that occasion, nor any discussion of the balance of the deceased's bank accounts.

135 Paul was asked whether he observed on 18 August 2017 anything in the nature of coercion on the part of the applicant towards the deceased. He said no, describing their interaction as a discussion about the farm as a business by business partners.

136 He was also asked about his general practice in taking instructions where there may be an issue of cognitive capacity or testamentary capacity. Paul identified the relevant 'warning signs' or 'red flags' that he is alert to, based on the three well-known elements of the *Banks v Goodfellow*[9] test: first, that the testator understands they are making a will and disposing of their property upon their death; second, that the testator understands what their property is and the extent of it; and third, that the testator is aware of whether or not they have obligations to provide for particular people. He gave evidence that he observed no such warning sign or red flag in his discussion with the deceased on 18 August 2017, stating that the deceased had been consistent since 1987 in 'the way he approached his will, in the way he discussed things … in the way he made his decisions'.

137 When asked if he had noticed any cognitive decline in the deceased while he resided at the Village, Paul said he did not think so.

138 Paul's evidence was that during this meeting, the deceased's instructions were coherent, there was no difficulty conversing with him, and at no point was the deceased confused. Specifically, Paul gave evidence of the deceased understanding an issue of stamp duty which may arise in respect of a utility vehicle. Paul explained that the deceased's utility vehicle was not included as an asset of the partnership and so was dealt with under the will as a personal asset. It was suggested that the will be altered to ensure the utility vehicle went with the plant of the partnership, but either the applicant or deceased suggested that the vehicle be transferred to the partnership immediately rather than dealing with it in the will. Paul pointed out there would be a stamp duty issue, but the deceased decided that the utility vehicle would be transferred to the partnership immediately. Paul's evidence was that it could have been the applicant who suggested that the vehicle be transferred immediately.

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9 (1870) LR 5 QB 549 ('*Banks v Goodfellow*').

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139 When Paul said that he could prepare the will, but that he would not be back in Maitland for some time to bring it back to the deceased, the deceased suggested faxing the will to the applicant. The deceased agreed to Paul emailing the will instead to the applicant when Paul advised that he no longer had a fax machine.

140 In evidence is an email from Paul to the applicant at 6:28am on 22 August 2017:

> Attached are two versions of [the deceased]'s Will. One has the figures we spoke of last Friday in it, the other does not and in the other I have highlighted that a set amount of the invested money, the money payable for Brewers and Grant Avenue each form part of the balance of the residuary estate, which goes to the girls.

141 The first version of the will provides:

> 4 I give the rest of my estate (in this Will called my 'residuary estate') to my trustee upon the following trusts
>
> (a) To hold the sum of One Million Dollars ($1,000,000.00) of any money I have invested with a bank or other financial institution as part of the balance of my residuary estate
>
> (b) To hold the balance of any money I have invested with a bank or other financial institution for my son Eugene Joseph Moloney
>
> (c) To hold my farming land known as 'Brewers' for my son Eugene Joseph Moloney provided that he pay to my estate within one year after the completion of the next harvest following my death the sum of Two Million Dollars ($2,000,000.00) which shall be held by my trustee as part of the balance of my residuary estate

142 In the second version of the will, 'the sum of $?' appears in cls 4(a) and 4(c) instead of a dollar amount.

143 Paul was asked why he sent two versions of the will, rather than just the version reflecting the instructions he had been given. He responded:

> To show [the deceased] that that's where basically the adjustment's been made and where any future adjustment could be made. I remember discussing with him a couple of times I spoke of the residuary estate, which was a concept that I had to explain twice. I think simply because of the wording of it and the novelty I suppose, of a lay person having to come to terms with that lawyer language.

144 In cross-examination it was put to Paul that he sent the two versions of the will because there had been a general discussion about those figures, but the deceased had not made up his mind. Paul denied this, and gave evidence that the deceased had made up his mind and selected those figures. He denied that he sent the two wills because he had doubts as to whether the instructions really reflected the deceased's intentions. When asked again why he sent the two wills, Paul's answer included that 'if there were to be any adjustments that was where

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they … could be'. It was put to him that he understood that there could potentially be adjustments. He said, 'There had been in the past'.

145 Counsel for the respondents noted that previously, in the 2016 will, the deceased had instructed that the applicant would be left a sum of $500,000 with the balance of the residuary estate to be divided between the respondents and Helen's children, but on this occasion the instructions were that a specific sum of money be provided to the residuary estate with the balance to go to the applicant. Paul said the deceased did not explain why he wanted to make this change. Counsel noted Paul's earlier evidence about explaining to the deceased the concept of the residuary estate and questioned whether the deceased did in fact give that instruction. Paul did not agree that his evidence was that the deceased did not understand the concept of the residuary estate, but rather that Paul explained to the deceased what it was. In circumstances where Paul's evidence was that the concept of the residuary estate was one that he 'had to explain twice' to the deceased, the distinction Paul seemed to be attempting to make cannot be regarded as compelling.

146 Noting that the wills were sent to the applicant early Tuesday morning following the Friday attendance, it was put to Paul that he had prepared the wills with some urgency. The 2016 will by contrast had only had one signature since January 2016 and there had been no rush to remedy that will. Paul said that he had not been told the preparation of the wills was urgent, but he perceived there to be some urgency. Counsel for the respondents suggested that the applicant had told Paul the will should be drafted as soon as possible so the deceased could execute it before the applicant and his wife went overseas at the end of August. Paul said he did not remember that occurring.

The applicant's evidence

147 The applicant gave evidence-in-chief that the day before the meeting on Friday, 18 August 2017 the deceased phoned the applicant at home asking him to be present for the meeting. The applicant attended as requested. He recalled that Paul had an older will with him and that the deceased and Paul went through the older will point by point and changed it in places. The applicant said Paul said it was the 2016 will, which the deceased had never discussed with the applicant.

148 The applicant recalled the specific amounts of money that were discussed at the meeting on 18 August 2017. In respect of the amount that the applicant would pay for Brewers, the applicant recalled the deceased talking about varying amounts, but being 'mostly decided' on $1.5–2 million. His evidence was that the instructions given by the deceased to Paul were $2 million for Brewers, and $1 million in cash for the applicant's sisters, but that the deceased 'didn't seem to be totally decided'. The applicant said the deceased seemed to be decided on leaving each of the respondents (and Helen's children together) $700,000.

149 According to the applicant, the figures of $2 million for Brewers and $1 million cash for the respondents and Helen's children had been discussed by

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the deceased and the applicant prior to that meeting. The applicant's evidence was that after the deceased became a resident at the Village, he spoke about his will quite regularly, but mainly about the amounts of money he wanted to leave 'the girls', and how much the applicant would have to pay for Brewers. The deceased would vary these amounts; sometimes it would be 'more cash and less for [Brewers] and vice versa'. The applicant gave evidence that the deceased said words to the effect that if the applicant paid more for Brewers, he would get cash. However, he was not sure when the deceased said this. Previously, the deceased had mentioned a price of $1.5 million for Brewers, without nominating what cash moneys he was to leave to the applicant and to his sisters. That concerned the applicant as if no cash was left to him, he would have to source the $1.5 million to purchase Brewers.

150 The applicant also gave evidence that it was sometime in 2017 that a figure of $1.5 million for Brewers was first mentioned by the deceased to the applicant. According to the applicant, the deceased was concerned about the ability of 'the farm' to pay for it.

151 The applicant was asked about other assets of the deceased:

> Counsel: Now, apart from cash for them and the amount for Brewers, were there other assets that he was leaving?
>
> Applicant: Yes, he had a unit in Adelaide …
>
> Counsel: Did he say who he was going to leave that to?
>
> Applicant: That was always being left to my sisters.

152 This evidence by the applicant is equivocal as to whether the deceased discussed the fact that he wanted to leave Grant Avenue to the respondents, or only that the applicant knew the deceased owned Grant Avenue and it was the applicant's understanding that it would always be left to the respondents. Later, the applicant gave evidence that Grant Avenue was discussed, and that it was 'always a given that [the] sisters would inherit the unit'.

153 When the deceased said that day that the price for Brewers was to be $2 million, he asked the applicant if the applicant and Tom would be able to manage that price. The applicant said he responded, 'Yes, I think so'. The applicant said there had been no discussions where the amount to be paid for Brewers was higher than $1.5–2 million.

154 The applicant said that the deceased also mentioned that he was leaving the applicant the remaining cash money at the bank, which the deceased said he thought was about $1 million. The applicant's evidence was to the effect that from time to time, including before the meeting on 18 August 2017, the deceased would ask what his term deposit and bank account balances were, and the applicant would update him. There was no evidence as to how recently before this meeting the applicant had advised the deceased of his account balances, but

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the applicant gave evidence that the deceased did not ask often, generally every few months.

155 The applicant perceived the deceased during this meeting to be giving coherent instructions, and following the conversation that occurred. He had no difficulty in understanding what was being said to him or asked of him. The applicant denied that the deceased acted irrationally, or that he repeated himself or forgot things said earlier in the discussion. He seemed, in the applicant's words, 'very with it'.

156 The applicant denied coercing or threatening the deceased into giving the instructions he gave on 18 August 2017. He further denied giving Paul or the deceased any instructions and said he did not participate in that discussion at all.

157 Following the meeting on 18 August 2017, the applicant spoke to his banker about the potential need to borrow $1 million. The banker said that he thought that would be okay. The applicant told the deceased about this conversation just after it occurred.

158 In cross-examination, when asked how he came to be at the meeting on the afternoon of 18 August 2017, the applicant replied that the deceased asked the applicant when the applicant was at the Village that morning. When reminded that his previous evidence had been that the deceased had called the applicant the day before, the applicant confirmed his previous evidence. The deceased told the applicant either by telephone the day before or in person the morning that Paul was coming to take instructions for the will.

159 The applicant denied that it was he who told the deceased that Paul was coming to see him about his will. He was then shown entries from his 2017 diary. It records that on the afternoon of 17 August 2017, the deceased phoned the applicant around 1:00pm. At 3:00pm, the applicant visited the deceased at the Village. On 18 August 2017, the diary records that at 10:00am the applicant visited the deceased to tell him that Paul was visiting that afternoon. The diary indicates that the applicant arrived at the Village at 2:00pm, and that Paul arrived at 3:00pm and stayed for two hours, before leaving for Adelaide. The applicant accepted he had remembered incorrectly. He assumed the call from the deceased on 17 August 2017 was the deceased asking him to call Paul. The applicant then accepted he had arranged Paul's visit, but said he did so because the deceased had asked him to arrange it. He accepted he had not given that evidence in evidence-in-chief, saying he had forgotten. He denied that he did not give that evidence earlier because he wished to downplay his involvement in the creation of the will, and denied that he requested Paul attend the Village with some urgency before the applicant went on a six week holiday. The applicant could not say why Paul agreed to attend the next day.

160 In cross-examination, the applicant said Paul was reading items from the 2016 will, but did not remember him writing or making markings on the 2016

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will. When asked if he understood from that meeting what had been in the 2016 will, the applicant said he got 'a greater understanding' of what was included in the 2016 will, but said that Paul did not read the will out. However, the applicant's later unequivocal evidence was that at the meeting Paul did in fact read aloud the 2016 will and the applicant heard what was in the 2016 will.

161 The applicant's evidence was that Paul would read every line and between the deceased and Paul they would decide whether a change was required. When the clause of the 2016 will that provided for a gift to the applicant of $500,000 was read out, the deceased said that he wanted to 'change it to a million to the girls'. The applicant could not recall what Paul said. There was then a discussion about the price of Brewers, and the deceased said he 'wanted $2 million for the farm'. According to the applicant, neither he nor Paul said anything. The applicant's earlier evidence was that the deceased had asked the applicant if he could manage that price and the applicant had agreed.

162 The applicant was asked if there was any discussion about a utility vehicle owned by the deceased. At first the applicant said there was no discussion, but then said he remembered the deceased saying if the utility vehicle was mentioned in the will, it was to stay with the farm. It was put to the applicant that what was discussed between him and the deceased was that the utility vehicle would immediately be transferred to the partnership. The applicant agreed. It was put to him that that evidence was inconsistent with the evidence that the utility vehicle would go to the farm in the will. The applicant merely responded, 'No, it was — it was mentioned in the will, from my memory'.

163 It was put to the applicant that he was lying in respect of only becoming aware of the contents of the 2016 will at the August 2017 meeting, having regard to correspondence dated March 2017 which suggests the 2016 will was sent to the applicant's address. The applicant said he did not recall receiving the letter, but accepted that it appeared that he had.

164 A few days after the August 2017 meeting, the applicant printed off the two versions of the will that had been sent to him by email and took them to the deceased. The applicant agreed Paul had drafted the documents quickly, but said he did not know why it was done quickly and denied he asked Paul to draft them as quickly as possible. He did not agree with the suggestion that Paul did not normally move so fast, saying he did not have a lot of dealings with Paul.

165 The deceased read through them for a few minutes and left them on the table or desk that was positioned over his bed. According to the applicant there was no discussion about the wills other than the deceased commenting that there were no figures in one of the wills, and saying, while looking at the will with the figures included, that it looked okay, and the applicant responding 'That's good'.

166 Originally when asked what happened to the two wills that the applicant gave to the deceased, the applicant gave evidence that the last time he saw the

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covering email and the wills was when he gave them to the deceased, who left them on his desk. He then said that he took home the draft will that included the figures because the deceased said he was not keen for it to be lying around. He left the other draft will which contained no figures. The applicant's explanation for this discrepancy was that he had forgotten that he took one version of the will home.

167 At the trial, the respondents' counsel called for production of the copy of the will that was taken home by the applicant. The applicant produced the copy that had no figures in it. The respondents rely on this as a further example of the applicant lying or being unreliable.

168 The applicant agreed no steps were taken to execute the will, but he did not know why. He did not press the deceased to sign the will, as it was the deceased's business, not the applicant's business.

169 The applicant agreed that it was his understanding that these instructions were the deceased's final instructions. When it was put to him that this conflicted with his earlier evidence that the deceased 'didn't seem to be totally decided', the applicant said 'Well, that was the instruction he gave at the time', before saying he did not know whether the deceased had made up his mind. The applicant denied discussing the figures with the deceased during the meeting, despite his earlier evidence that the deceased had asked the applicant if the applicant would be able to manage a price of $2 million for Brewers.

170 When asked why Paul had emailed two wills, the applicant said that he thought 'Paul thought [the deceased] might put a lesser amount in one of the wills'.

171 The applicant was asked whether at the meeting the deceased said anything about Paul and Helen's children. The applicant responded that the deceased did not say anything about the children, nor about 'the girls'. He repeated that the topic of 'the girls' did not form part of the discussion with the deceased. When reminded of his previous evidence, he said that the girls were discussed only insofar as the deceased said he wanted 'the girls to get two million for the farm and a million in cash'. The applicant understood when the deceased referred to 'the girls' that that term included Paul and Helen's children. The applicant said the residuary estate was mentioned only when Paul was reading out the clauses in the 2016 will. It does not appear from the applicant's evidence that he recalled a discussion or explanation of the residuary estate as suggested by Paul's evidence.

27 October 2017

172 On 27 October 2017, the applicant visited the deceased at the Village between 2:00pm and 8:00pm. The applicant agreed that it was a long visit, but did not agree that it was a 'very unusual' length of time to spend with the deceased. When asked if it was an unusual visit, however, the applicant said yes, but said he did not know why it was an unusual visit. He could not recall talking

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about the deceased's will and Brewers, but said they may well have done so. The applicant denied asking the deceased what he was doing with the will, saying the deceased 'always took a long time to make up his mind, what he was going to do'.

173 The applicant gave evidence that at that point he understood the deceased's operative will was the 2012 will. It was put to him that he knew there was the 2016 will. The applicant replied, 'I didn't know what was in it. If I did I didn't know what was in it'. This is inconsistent with the applicant's earlier evidence that Paul read the 2016 will aloud, line by line.

174 It was put to the applicant that the deceased, during the visit, recorded figures and calculations in his notebooks relating to various options for the purchase of Brewers. The applicant accepted the deceased continually recorded figures about a range of matters in his notebooks, but could not recall it occurring on this occasion.

175 In the deceased's notebooks, the page dated Friday, 27 October 2017 records:

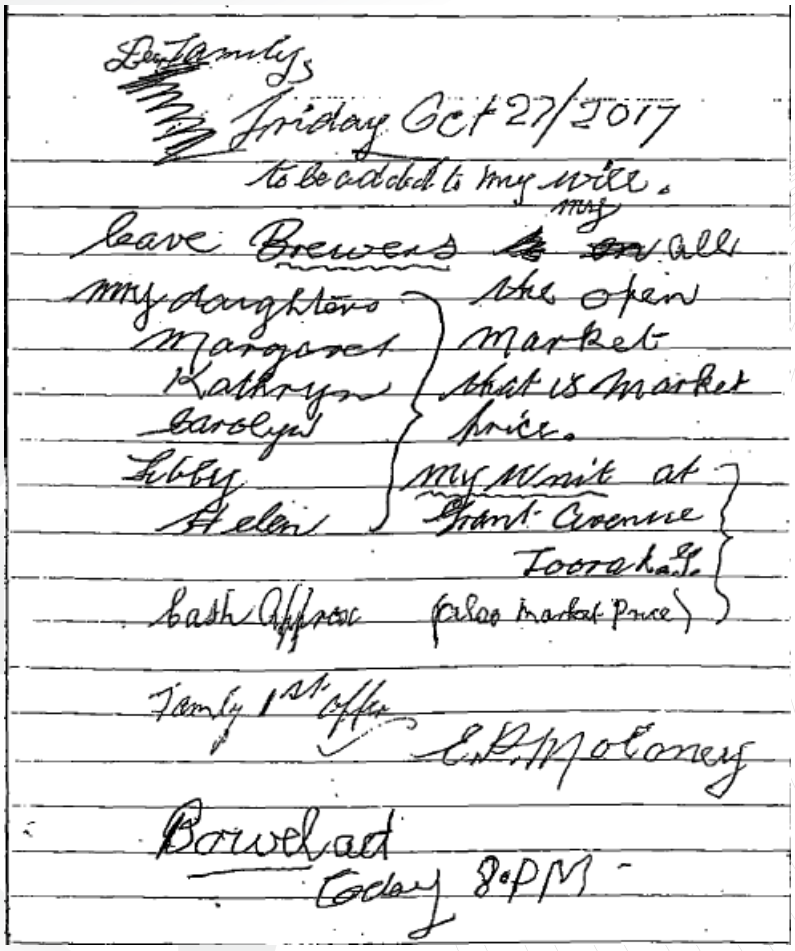

Figure 1: Notebook entry of EP Moloney dated Friday, 27 October 2017

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176 The deceased's signature appears below this note, and it is also recorded that the deceased had a bowel action at 8:00pm. The applicant agreed it looked like that would have occurred just as he was leaving, but said he had no memory of the deceased writing the note while he was present. In substance, the note appears to record that the deceased wanted additions to his will such that Brewers was left to the girls at 'the open market that is market price' and Grant Avenue was also left to the girls at 'market price'. There are also references to 'cash approx.' and 'family first offer', although it is not clear what the deceased intended by this.

177 The applicant gave evidence that at this stage a physical deterioration in the deceased could be noticed, in that he was thinner and losing weight. He agreed that the deceased had ceased going to mass, saying the deceased had explained to the applicant this was because of his concern about his bowels. The applicant denied that any deterioration was evident in the way the deceased spoke, rejecting that the deceased was by this point forgetful. He accepted the deceased would tire after a few hours, but said this tiredness had gradually increased over time. The applicant recalled the visit on 27 October 2017 as 'normal', in terms of the deceased's attentiveness and ability to cope. A wide variety of topics were discussed over the six hour visit, and the deceased was engaged throughout that time.

Execution of the 2018 will

178 On 15 February 2018, the deceased executed the 2018 will with Paul and Brigid (Paul and Helen's daughter) as witnesses. The applicant was also present at this time. Brigid, Paul and the applicant each gave evidence as to the circumstances of the execution of the 2018 will. The respondents submit that this evidence gives rise to three conflicting narratives as to the circumstances in which the 2018 will was signed, in particular in respect of whether the deceased read the 2018 will.

179 Paul, Brigid and Brigid's newborn son, Jim, visited the deceased at the Village on 15 February 2018. Conflicting evidence was given by Paul and Brigid as to whether the visit was initiated by Brigid wanting to introduce her son to the deceased (Paul's version of events) or by Paul seeking to have the deceased execute his will (Brigid's version of events). Nothing turns on who initiated the visit; it is unremarkable that one suggested the visit and the other, having a legitimate reason to also wish to see the deceased, offered or agreed to come along.

Paul's evidence

180 Paul became aware at Christmas of 2017, following a discussion with the applicant, that the deceased had not yet signed the will prepared by Paul in August 2017. He was 'a bit cross' about this, as he had understood in August 2017 that there was some urgency on the deceased's part to have the will finalised. Paul thought he should take some action to get the will signed, and so

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when Brigid suggested visiting the deceased with her son, Paul said he would visit with her. Paul denied telling the applicant in advance that he was going to visit the deceased so that the will could be executed, or that Paul ensured the applicant would be there for the will's execution.

181 Paul's file contains a file note dated 15 February 2018 at 2:00pm:

> I went with Brigid and Jim to show [the deceased] his new grandson and hopefully get his Will signed. We talked for about two hours. He was extremely pleased to meet Jim. I took a photograph of [the deceased], Jim and Brigid together. Towards the end of our visit [the applicant] called in. Brigid wanted to get back to Adelaide by about 6 o'clock. Before leaving I told [the deceased] I had two copies of his draft will with me. One being the Will which he and only I signed as a single witness and the other being the one he instructed me to prepare last August which I had sent to [the applicant]. I asked him if he would like to sign either of the Wills. He said he wanted to sign the August Will. I gave it to him. He signed it in my presence and in the presence of Brigid. I took the original Will to scan and keep in our safe.

182 For about two hours Paul, Brigid and the deceased discussed mainly family matters, including Brigid's husband Dennis and what various family members had been up to. Paul brought up the topic of the will at the end of the visit, in the manner recorded in his file note. Paul thought Tom, the applicant's son, might have come with the applicant to the Village during the visit.

183 Paul did not discuss the contents of the 2018 will with the deceased, nor did he read it to him on that occasion. Paul said:

> No, I thought he'd had enough time, and knowing [the deceased], he was quite a ponderous chap and I had — absolutely sure he wouldn't sign anything without reading it.

184 Paul later repeated that he was 'quite confident' the deceased would not sign something that he had not read. Paul disagreed that his evidence was that he was in a hurry for the will to be signed, despite his earlier evidence that he was annoyed it had not yet been done. Paul said that before signing the 2018 will, the deceased would have had time to glance at its contents, but not fully read the three pages.

185 Paul gave the deceased the will, and after the deceased signed the bottom of the first page, Paul took the first page away so the deceased could sign the second page. That process was followed with the second and third pages. Paul then gave the three pages to Brigid to sign. The will was signed right at the end of the visit, and Paul, Brigid and Jim left shortly after.

186 According to Paul, during this meeting the deceased was mentally alert, able to converse and convey information and was not confused. The deceased did not behave irrationally, repeat himself, or forget matters which had been discussed earlier in the meeting. Paul said the deceased was 'quite aware', noting that the deceased asked after Paul's sons-in-law by name, although he did not know them very well as 'they hadn't been on the scene for very long'. He

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did not observe any warnings signs or 'red flags' that he would understand, as a legal practitioner, to indicate an issue of cognitive or testamentary incapacity.

Brigid's evidence

187 Brigid was not an impressive witness. As will be seen, in cross-examination she was forced to resile somewhat from her initial evidence, which she had given with some conviction. As submitted by the respondents, she may have given evidence that represented what she thought ought to have taken place at the signing of a will. At certain stages, she appeared to not fully appreciate the gravity and seriousness of the task she was undertaking in giving evidence.

188 Brigid recalled that it was Paul who mentioned to her that he had some documents for the deceased to sign, and asked Brigid if she would like to come with him and introduce the deceased to his great grandson. Brigid could not recall whether the applicant and Tom were already there when she and Paul arrived, or whether they arrived shortly after. Paul's evidence, recorded above, was that the applicant, and potentially Tom, did not arrive until towards the end of the visit.

189 There was much discussion about the new baby, with the deceased asking lots of questions about Jim; how he was sleeping, and how the new parents were coping. Brigid's evidence was that the deceased followed and participated in conversation without difficulty and did not repeat himself or appear forgetful. Although the deceased appeared frailer than he had been in earlier years, there was no significant physical decline from Brigid's previous visits.

190 In evidence-in-chief, Brigid deposed to the execution of the 2018 as follows. After about an hour and a half or two hours, Brigid likely said words to the effect that they should be leaving as she was anxious to get home. Paul mentioned that they had brought documents to be signed so he retrieved the document. Although she was not paying close attention, Brigid's impression was that there were parts of the document that the deceased had asked to be changed in an earlier conversation, and Paul was pointing out to the deceased where those parts had been changed. She recalled Paul saying, 'I will leave a copy of this with you, so that you can read it at your leisure and ask if you've got any questions afterwards'. The discussion took only five to ten minutes, and the deceased appeared to be checking and approving the changes made. While the applicant was still present at this time, he was not part of the conversation and Brigid could not recall him saying anything about a will during the visit.

191 Brigid came over to stand next to the deceased and observed him signing the bottom of each page. She then witnessed the deceased's signature by signing, and Paul signed the document after her. A photo was taken of the deceased, Brigid and Jim minutes after the will was signed, at 4:13pm. Brigid's evidence was that the deceased was not tired at the conclusion of the meeting, but was 'really well'.

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192 Brigid gave the following evidence in cross-examination.

193 Brigid again said that it was Paul who asked if she would like to visit the deceased with him. When it was put to her that it was she who suggested the visit and Paul said he would come with her, she said that exchange could have occurred in the course of a conversation with her father. She then gave evidence that she could not really recall. As mentioned, it is entirely plausible that Brigid and Paul have different recollections of who in fact initiated the visit in the course of a conversation where each had a desire to visit the deceased.

194 Brigid was unable to say whether she was asked to be a witness by Paul before the visit or only at the time of signing.

195 Brigid could not recall Paul saying anything to the deceased about two documents, or giving the deceased an option of two documents to sign. She initially recalled that only one document was produced to be signed, but later gave evidence that it was quite possible that Paul brought out two documents.

196 Paul took the deceased through the document, and although she could not remember verbatim what was said, Brigid again gave evidence that her impression was that Paul was pointing out sections that had been amended following an earlier discussion and giving the deceased an opportunity to look at it. The following exchange then occurred:

> Counsel: So when you say he had an opportunity to look at that, what did that entail?
>
> Brigid: Reading the sections that dad had pointed out.
>
> Counsel: So you say he read certain sections of the will?
>
> Brigid: That was my understanding of what was happening … I didn't have a look at what he was reading.
>
> Counsel: But you did see him read it?
>
> Brigid: Yes.
>
> Counsel: So you say that he read the will?
>
> Brigid: What I witnessed is that he was reading what dad was pointing out.
>
> Counsel: So if I was to suggest to you that there was no pointing out by your father and that [the deceased] didn't read the will, that would be wrong.
>
> Brigid: That would be completely wrong.
>
> Counsel: Are you certain of that?
>
> Brigid: I am certain that he read — he understood what dad was pointing out and that he was reading through. I don't know if he read it in detail … but he read until he was comfortable with what was there.

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Counsel: So if anyone else was to come to court and say that he didn't read the will on that occasion, they would be wrong?

Brigid: I guess it depends on their recollection and what they were seeing … I had the impression that he was reading it, he understood it, he had the opportunity to ask questions. Actually, dad said 'Do you have any questions?' and he was comfortable with it.

197 Paul's evidence, recorded above, was that he did not discuss the contents of the will with the deceased on that occasion or read the contents of the will to him.

198 Brigid then accepted that she did not have a proper memory of the deceased reading the will. She said she did not recall the deceased reading the will from beginning to end, but her 'impression from the conversation that was had' was that the deceased was familiar enough with the document to follow where Paul pointed out sections that had changed. She could not recall if the deceased asked questions, but said 'he was certainly responding'. She could not, however, recall what the deceased was saying when he responded.

199 Later she gave evidence that, to the best of her recollection, the deceased was in fact asking questions of Paul during this exchange. She could not recall the content of the questions, but said she understood the deceased to be questioning Paul from the tone of the deceased's voice. She then clarified the deceased might have only been making comments. When it was put to her that she could not really recall what was said, the following exchange occurred:

Brigid: No, I don't pretend to … To be honest I remember the gestures, so I remember dad pointing at bits of the document.

Counsel: So, you in fact have no memory of what was said, you just remember gestures?

Brigid: I remember some of what was said, I don't remember it verbatim.

Counsel: Well, what do you remember?

Brigid: I remember my impression of the conversation was that dad was showing [the deceased] a document, he pointed out some sections that had changed, [the deceased] responded, yes, that's what I understand, and 'Are you comfortable to sign? Do you have any questions?' Kind of wrap up conversation.

Counsel: Did you father say that 'Do you have any questions?'

Brigid: I don't recall specifically what was said.

Counsel: So, why did you just say it then?

Brigid: I said it then because that's the kind of — I've known dad for a long time, that's the kind of thing he generally says at this stage of signing a document.

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200 It was then put to Brigid that her evidence was in fact a reconstruction of what happened on the basis of what she perceived to be her father's usual practice. She disagreed with that suggestion.

201 Looked at objectively, it is a strong possibility that Brigid's evidence was in fact a reconstruction. As recorded above, Brigid gave evidence-in-chief that what Paul said to the deceased was that he would leave a copy of the will with the deceased so the deceased could read the will at his convenience and ask questions later. She repeated this evidence in cross-examination. In light of this, her evidence suggesting that Paul asked the deceased whether he had any questions before signing the document seems entirely likely to have stemmed from her understanding or expectation of Paul's practice, rather than from her independent memory.

202 According to Brigid, by the time the will was signed, Tom had left but the applicant was still present.

203 Brigid's evidence as to execution was that the deceased signed the first page of the will, before she also signed the first page. This process was repeated in respect of the second and third pages. Brigid could not recall whether Paul signed each page after the deceased and Brigid had signed each page, or whether he signed all three pages at the end.

204 Brigid was then asked what happened with the will. Initially, her recollection was that a copy was left with the deceased, stating it would have stood out to her as 'disingenuous' if it had not been left. When asked where the copy came from, she said she assumed Paul had brought a copy with him, but she could not recall whether she had signed three pages or six pages. Very shortly after in the same exchange, she gave evidence that she did not in fact remember Paul leaving a copy of the will, suggesting that perhaps what Paul had said was that he would send the deceased a copy. Brigid disagreed with the suggestion that this evidence was a further reconstruction.

The applicant's evidence

205 According to the applicant, he had been to see the deceased at the Village on the morning of 15 February 2018, and the deceased asked him to come back in the afternoon when Paul was coming. When asked how he came to be at the Village on the morning of 15 February 2018, the applicant said that the deceased called him at home in Maitland. The deceased said to the applicant on the morning of 15 February 2018 that he was 'fairly decided' about the figures he was going to ask Paul to include in the will — $2 million for Brewers, and $1 million in cash. The applicant responded, 'That's fine, that's good'.

206 According to the applicant he did not arrange Paul's visit that afternoon. When the applicant arrived, Paul, Brigid and Jim were already present. The applicant could not recall specifically what time he arrived, but suggested he

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stayed for two to three hours, leaving about 5:00pm, which was dinner time at the Village.

207 When Brigid suggested they would have to leave soon, Paul asked the deceased if he wanted to sign his will. The deceased said 'Yes', and Paul asked the deceased 'Which one?'. The applicant understood Paul to be referring to the two wills Paul had emailed to the applicant in August 2017 — one with those figures included and one with no figures in it. The deceased responded, 'The one with two million and one million to the girls'.

208 When asked if the deceased read through the will, the applicant said that the deceased was turning pages and 'appeared to be reading'. The applicant could not recall any discussion of any other provision of the will, and said no one, including himself, said anything about the contents of the will.

209 The applicant observed the deceased sign the will and Brigid and Paul witness his signature. He could not remember if anything was said by any of them during the execution. The applicant agreed he was happy once the will was signed on those terms. He considered it a good outcome, as he finally had clarity on the exact amount he would have to pay for Brewers.

210 The applicant's evidence was that on that day, the deceased was participating in conversation and appeared to understand what people were saying to him. The applicant witnessed no sign of irrational behaviour, forgetfulness or repetition. The applicant denied coercing the deceased into signing the 2018 will.

211 The applicant was asked in cross-examination how he came to be with the deceased at the Village on 15 February 2018. He answered that the deceased had called him at home the night before. His earlier evidence was unclear as to when the deceased had called him, but in cross-examination he clarified it was the night before. The applicant agreed, however, when it was put to him, that he had in fact been at the airport preparing to fly to Darwin with his wife on 14 February 2018 when the deceased called him to tell him Paul was coming to the Village the next day. The applicant postponed his trip to Darwin for a few days, as the deceased asked him to be present when Paul attended about the will. The applicant agreed that it was that important to him to be there when Paul visited the deceased that he postponed his trip, later saying, 'it was important to dad'. This conclusion was not said to be based on anything the deceased said, but rather his demeanour.

212 According to the applicant, there had been no discussion with the deceased about execution of the 2018 will prior to February 2018. It was put to the applicant that it appeared that prior to that point, the deceased had not made up his mind as to what would be included in the will. The applicant said the deceased may have made up his mind but not told the applicant.

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213 The applicant said the deceased 'looked through' the will just before signing it, taking a few minutes to read it to himself. According to the applicant, Paul didn't say anything other than asking which will the deceased wanted to sign, and the deceased did not say anything while reading the will. The applicant's evidence was that the deceased signed the will first, followed by Paul and then Brigid. He could not recall whether the deceased signed one page followed by Paul and Brigid signing the same page, or whether the deceased signed all pages first.

214 When asked why he was there if he did not say anything during this process, the applicant said he was there because the deceased had asked him to be present.

Tom's evidence

215 Tom's evidence suggests that on 15 February 2018 he and his father, the applicant, were visiting with the deceased when Paul, Brigid and Jimmy arrived. Tom stayed only for about 10 minutes. He recalled that the deceased was very excited to meet his great grandson. Tom said the deceased was in good health on that day.

Post-execution events and observations of the deceased

216 Early in March 2018, a meeting was arranged with Dr Moore and a head nurse at the Village to address the deceased's deteriorating position and quality of life, particularly in respect of his incontinence. Libby and the applicant were present.

217 On 6 March 2018, Libby, at the deceased's direction, wrote a cheque payable to herself in the sum of $350 to reimburse her for underwear she had purchased for the deceased. The deceased signed it. On 20, 27 and 28 March 2018, the deceased authorised for Libby to charge accommodation totalling $590 to his credit card. Libby agreed that she was comfortable, when these things occurred, that the deceased knew what he was doing. It was put to Libby that she accepted that the deceased was mentally 'totally with it' when she allowed him to authorise those purchases. She denied that proposition, but said that the deceased knew what he was signing.

218 It was also put to Kate that in March 2018 the deceased wrote a cheque for her. She agreed he did so reasonably often, always for the sum of $100 and that it was to cover petrol costs. She gave evidence that she had no reason to believe the deceased did not know what he was doing when he did so. Kate said she did not recall when he last wrote a cheque for her. She was shown a cheque dated 5 December 2017, but no cheque dated later than this.

219 Tom's evidence of the deceased in late March — likely around 22-3 March 2018 —was that he was 'really, really good … very chatty'. They spoke a lot about the farm, particularly the recent purchase of some farm

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equipment. The visit lasted a couple of hours, and at no time according to Tom was the deceased confused or forgetful.

220 Paul last saw the deceased on Maundy Thursday, which was 29 March 2018. Apart from appearing more frail and skinnier than he had in February 2018, the deceased 'seemed pretty good'. However, Paul did give evidence that the deceased asked after Paul's mother, who had died in 2014. Paul attempted to explain away this evidence by saying, 'I made the same mistake myself', and that when it was pointed out to the deceased that Paul's mother had passed away some time ago, the deceased responded, 'Of course'. What Paul meant by, 'I made the same mistake myself' is not entirely clear. It cannot be countenanced that he intended to convey that he himself forgot that his mother had passed away. Rather, it appears that Paul was intending to convey that forgetting that an acquaintance or extended family member had passed away was not unusual or a sign for concern.

221 Brigid visited the deceased either on Friday or Saturday of the Easter long weekend — 30 or 31 March 2018 — with her husband Dennis and son, Jim. She also visited the deceased on Easter Monday — 2 April 2018 — on her own. Brigid said that she had been warned prior to her first visit of the Easter long weekend that the deceased was very sick and tired, and that he might not know who she was. Contrary to these indications, Brigid was surprised by the deceased's mental capacity. She gave two examples. First, her husband Dennis is Canadian, specifically from Saskatchewan. Brigid said the deceased had only met Dennis between six to eight times, but he asked Dennis about the weather in Saskatchewan. Brigid said she was 'heartened' by the fact that the deceased remembered that detail in respect of someone he had only known a few years. Second, Brigid recalled that the deceased commenting on the sandpaper ball tampering scandal — 'Sandpapergate' — that was engulfing the Australian cricket team at the time. Physically, the deceased was significantly more frail and tired in March 2018 than he had been during the February 2018 visit.

222 The deceased died on 7 April 2018.

Reliance on the expert evidence

223 The applicant relies on the expert opinion evidence of Dr Moore and Dr Jane Hecker to establish that the deceased had testamentary capacity.

224 The respondents rely on the expert opinion evidence of Dr Jane Lonie and Dr Tuly Rosenfeld to deny that the deceased had testamentary capacity.

225 Dr Moore was the deceased's general practitioner for 20 years. She was the only expert who assessed the deceased during his lifetime. The applicant submits that Dr Moore was best placed to identify and assess any alleged cognitive deficit or decline, and she did not identify any such deficit.

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226 Neither Dr Hecker nor the respondents' experts treated the deceased during his lifetime.

Dr Moore

227 Dr Moore is a general practitioner of 31 years standing in rural South Australia. She graduated in 1980, subsequently completing diplomas in obstetrics and anaesthetics as well as rural family medicine training. She has maintained a private rural practice since 1986. Until recently she has also been a Clinical Lecturer at the University of Adelaide and a Visiting Medical Officer at the Maitland Hospital. She treated the deceased for 24 years, seeing him regularly every four to six weeks at the Village.

228 On 26 June 2018, Dr Moore wrote a general letter addressed 'To Whom it may concern' stating that the deceased was a bright and strong willed 95 year old man and that he had testamentary capacity, at least up until the end of March 2018.

229 Dr Moore provided two expert reports, the first dated 13 March 2021 ('the first Moore report') and the second dated 27 August 2021 ('the second Moore report'). She gave oral evidence and was cross-examined. In each report and in her oral evidence, Dr Moore asserted the opinion that the deceased had testamentary capacity both at the time of giving instructions and executing the 2018 will.

230 The respondents contend that Dr Moore was not an objective witness. Dr Moore is married to Richard Moloney, a nephew of the deceased and a cousin of the applicant and the respondents. She is a friend of the applicant and his wife, Deidre. One of her brothers is married to Jane Boylan, the sister of Paul. Dr Moore rejected the proposition that her opinion in respect of the deceased's testamentary capacity was influenced by her familial relations with the Moloney and Boylan families, stating her opinion was made 'as the [deceased]'s doctor who I respected for many years and knew very well'.

Dr Hecker

231 Dr Hecker is a consultant physician with specialist qualifications in General Internal Medicine and Geriatric Medicine. She graduated with a Bachelor of Medicine, Bachelor of Surgery in 1982, and has over 30 years' experience in all areas of the medical care of the elderly. She currently is a part-time senior consultant physician/geriatrician at the Royal Adelaide Hospital, and also has a private practice at Calvary Rehabilitation. Dr Hecker has extensive experience in the assessment and management of memory disorders, cognitive impairment and dementia, and has given many medico-legal assessments and opinions in the last 15 years. She is widely published on the subject of dementia assessment and management, and has established memory disorder study and trial units at Repatriation General Hospital and the Royal Adelaide Hospital.

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232 Dr Hecker provided two expert reports, the first dated 7 July 2021 ('the first Hecker report') and the second dated 30 August 2021 ('the second Hecker report'). Dr Hecker gave oral evidence and was cross-examined. Dr Hecker's opinion was that the deceased had testamentary capacity both at the time of giving instructions for the 2018 will and at the time of executing the 2018 will.

Dr Lonie

233 Dr Lonie is a clinical neuropsychologist. She graduated with a Bachelor of Arts with Psychology Honours in 1996, and holds a Masters of Clinical Neuropsychology and a PhD in Clinical Neuropsychology (cognitive function in pre-clinical and early stage dementia). She has 20 years' post-graduate experience in neuropsychological assessment and cognitive evaluation of early and moderate stage dementia, and other medical conditions giving rise to cognitive impairment. Dr Lonie is an associate fellow with the British Psychological Society. She is a member of the Psychology Board of Australia's specialist College of Clinical Neuropsychologists and also of the Australian Psychological Society's specialist Division of Neuropsychologists. She is an honorary associate member of Macquarie University Sydney's Department of Psychology. She practices as a private consultant clinical neuropsychologist, as well as being a senior clinical neuropsychologist at the Royal North Shore Hospital.

234 Dr Lonie provided three expert reports. The first report dated 2 December 2019 ('the first Lonie report') is directed to the issue of the vulnerability of the deceased to undue influence from 2013 onwards. The second report dated 1 February 2021 ('the second Lonie report') is directed to testamentary capacity in the context of the deceased suffering from an undiagnosed early stage dementia in 2013. The third report dated 5 August 2021 ('the third Lonie report') reviews and comments on the first Hecker report.

235 Dr Lonie's opinion is that the deceased would not have retained cognitive ability to remember the content of discussions regarding his will making across the period between 5 August 2017 to 15 February 2018. Dr Lonie was not required for cross-examination.

236 The respondents contend that as Dr Lonie was not cross-examined, her evidence should be accepted by the Court, citing the decision of *Makita (Australia) Pty Ltd v Sprowles*.[10] The applicant rejects this contention, stating that the decision not to cross-examine Dr Lonie was on the grounds that her evidence was irrelevant and the factual basis for her opinion was not made out as it was 'hopelessly incomplete'.

[10] (2001) 52 NSWLR 705.

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Dr Rosenfeld

237 Dr Rosenfeld is a consultant geriatrician and physician in private practice. He is a Fellow of the Royal Australian College of Physicians and a former Director of Geriatric Medicine and Senior Specialist in Geriatric Medicine at the Prince of Wales Hospital. He is a Conjoint Associate Professor at the University of New South Wales, Adjunct Associate Professor at Notre Dame University, Sydney and Adjunct Professor at the University of Technology Sydney.

238 Dr Rosenfeld was asked to provide a report commenting on the first Hecker report from the perspective of a geriatrician. In reaching his opinion, Dr Rosenfeld assumed the factual information in his letter of instructions and the documents provided to him. Beyond his letter of instructions, the documents provided to him included the statement of claim, the second defence and cross action, the first Lonie report, the second Lonie report, the third Lonie report and the first Hecker report. He was not provided with the reports of Dr Moore or the deceased's medical records.

239 In respect of the first Hecker report, Dr Rosenfeld was in strong disagreement with a large number of assumptions, the interpretation of the history and events, and Dr Hecker's evaluation of the deceased's cognitive function, the likelihood of the diagnosis of dementia, and the deceased's capacity at the time of the instructions for and making of the will six months later. While Dr Rosenfeld did not address the testamentary capacity of the deceased, the issues he highlighted are relevant to the likelihood of brain disease, dementia and capacity.

Comments regarding the expert evidence

240 Dr Lonie opined that the deceased was suffering cognitive impairment in the form of undiagnosed early stage dementia from mid-2013. Dr Lonie did not meet or assess the deceased during his lifetime. She considered that the medical records evidenced, amongst other things, confusions, delirium, aggressive and risk taking behaviour, and that the deceased suffered a significant cognitive and functional decline from 2013 onwards.

241 Dr Lonie's opinion was that the deceased would have retained the capacity to know and understand the nature and effect of a will and would have retained the ability to recognise each family member and appreciate their status as natural beneficiaries. However, Dr Lonie opined that from mid-2013 onwards it was unlikely that the deceased would have been capable of retaining an up to date overall value of his estate or an independent knowledge and understanding of the value of his assets nor would he have retained the reasoning, insight and recent working memory abilities to facilitate the process of weighing up the relative claims of his beneficiaries.

242 Following receipt of the first Lonie report, the respondents filed the second defence and cross-action on 5 March 2020. This introduced the claim that from

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2013 onwards, the deceased was suffering cognitive impairment in the form of an undiagnosed early stage dementia and, accordingly, there was a doubt as to the deceased's testamentary capacity at the date of giving instructions for the 2018 will and at the date of the execution of the 2018 will.

243 As a result of the new claim, thousands of pages of medical reports and opinions dating from 2013 onwards were in evidence and oral evidence was given on the question of whether the deceased suffered undiagnosed early stage dementia from 2013 onwards. This is despite the fact that the relevant dates for assessing the deceased's testamentary capacity were 18 August 2017, when instructions for the 2018 will were given, and 15 February 2018, when the 2018 will was signed. In addition, whether the deceased was in fact suffering an undiagnosed early stage dementia on those relevant dates does not necessarily mean that he lacked testamentary capacity on those dates.[11]

244 Dr Moore disagreed with Dr Lonie's opinion. She considered that the medical records did not accurately reflect the deceased's cognitive, functional and behavioural status at the times of giving instructions and executing the 2018 will. Dr Moore reviewed the nursing notes in the residential care plans for the period 9 April 2014 to 5 March 2018 and found that 'a lot of the comments appeared to have been taken from the initial Residential Care Plan' in April 2014 and 'cut and pasted' into the later notes. In April 2014 the deceased was adjusting to residential care and experienced instances of confusion and displayed aggression while he settled into residential life at the Village. Dr Moore considered that the later reports were not accurate or up to date and did not reflect what was written in progress notes by visiting allied health professionals, general practitioners and Village staff. Dr Moore also said that her notes did not record any of these behaviours at the dates when the deceased gave instructions for and executed the 2018 will and that the staff at the Village did not raise any such issues with her. Dr Moore considered that as at those times, the deceased had settled into life at the Village, referring to a note on 22 November 2017 in the lifestyle and wellbeing care plan that recorded '[the deceased] liked his daily walks outside, is happy to converse with staff and other residents, enjoys meal time with other residents, is happy with his care, enjoys sitting and reading in his room'.

245 A review of a sample of the medical reports before the Court substantially bears out Dr Moore's view regarding the accuracy of the medical records. Dr Moore's view was also generally supported by the lay witnesses who spoke of the deceased struggling initially, but then settling into residential life at the Village. In addition, no issue of any cognitive decline of the deceased was raised by family members before his death.

246 Based on her regular interactions with the deceased, Dr Moore rejected outright certain opinions expressed by Dr Lonie, such as the deceased not being

[11] *Roche v Roche* [2017] SASC 8, [17]–[19] (Kourakis CJ).

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able to hear or understand conversations. In this regard, her evidence was also supported by each lay witness who gave evidence as to their interactions with the deceased.

247 Other matters identified and relied upon by Dr Lonie, such as the instance of the deceased rejecting the use of continence aids being evidence of a lack of insight by the deceased, Dr Moore attributed to the deceased being stubborn. She variously described the deceased as 'stubborn', 'strong-willed', etc — a characterisation that was also supported by other lay witnesses who knew the deceased well.

First Lonie report

248 On 6 September 2019, Dr Lonie was requested by the respondents to provide her expert opinion as to the vulnerability of the deceased to undue influence. The first Lonie report records that the respondents:

> consider the 2018 will makes a substantial change from their father's longstanding testamentary wishes and question [the deceased]'s knowledge and approval of its contents or the role in undue influence in bringing about this change.

249 As is apparent, Dr Lonie was instructed to consider the deceased's vulnerability to undue influence. Accordingly, little or no weight can be placed on the first Lonie report in considering the question of the deceased's testamentary capacity.

Second Lonie report

250 On 9 December 2020, the respondents sought a supplementary report from Dr Lonie on her assessment of the deceased's testamentary capacity to make the 2018 will. That report, the second Lonie report, was provided on 1 February 2021.

251 Dr Lonie focused on cognitive, functional and behaviour disturbances documented within the medical notes from 2013 onwards. The key evidence identified by Dr Lonie was that showing the deceased: was no longer able to care for himself or manage his own affairs; was displaying short term memory impairment, loss of insight and judgment, risk taking behaviours, and difficulties communicating; and was exhibiting a range of behavioural and psychological symptoms of dementia, such as wandering, night-time disorientation, suspicion, argumentativeness and combativeness.

252 Dr Lonie's conclusions on the deceased's testamentary capacity were expressed as follows:

> Although the medical notes contain clear and persisting evidence of cognitive and functional decline from 2013 onwards consistent with neurodegenerative process, there is no evidence to suggest [the deceased] would not have retained an understanding of the nature and effect of a will at any of the relevant times of will-making …

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> Additionally, *and in the context of a presumed undiagnosed neurodegenerative process*, there is no evidence to suggest, either based on the medical correspondence made available to me, or expert knowledge of the course and differential cognitive impacts of a neurodegenerative process, that [the deceased] would not have retained the ability to recognise each member of his family and appreciate their status as natural beneficiaries to his will.
>
> …
>
> The levels of cognitive, functional and behavioural disturbance documented within the medical notes from 2013 onwards … together with knowledge of [the deceased's] disengagement from direct involvement in the management of his property and finances from at least mid-2013 onwards, suggest that it is unlikely he would have been capable of retaining and up-to-date account of the approximate overall value of his estate and the relative values of its major constituents from mid-2013 onwards. The evidence equally suggests it is unlikely he would have been capable of obtaining and then retaining and independent view on as much.
>
> The levels of cognitive, functional, and behavioural disturbance documented within the medical notes from 2013 onwards … further suggest [the deceased] would not have retained the reasoning, insight, recent or working memory abilities to facilitate the process of weighing up the relative claims of his beneficiaries from mid-2013 onwards.

First Moore report

253 On 22 January 2021, the applicant sought a report from Dr Moore as to whether in her opinion the deceased had testamentary capacity on 18 August 2017 and on 15 February 2018. The applicant provided Dr Moore with the First Lonie report.

254 On 10 February 2021, the applicant provided Dr Moore with a copy of the second Lonie report. Dr Moore provided her report on 13 March 2021.

255 Dr Moore addressed many of the cognitive, functional and behavioural disturbances pointed to by Dr Lonie. Dr Moore observed no evidence of significant cognitive decline in the deceased, and no family or nursing home staff raised concerns about cognitive decline. This is also supported by the evidence of the family. In her view while the deceased's independence declined, this was due to physical ill-health and mobility issues leading to his admission to the Village. Dr Moore rejected Dr Lonie's assessment that the deceased was exhibiting a lack of insight, for example, into his continence problems in 2014, by explaining that her perception of the deceased was that he demonstrated a stubborn personality which manifested in him rejecting continence aids.

256 Dr Moore considered that the deceased did suffer from noise-induced hearing loss due to having been a farmer, but rejected Dr Lonie's assertion that the deceased was likely to have 'experienced considerable difficulty hearing and understanding conversation pertaining to the contents of the will'. Dr Moore visited the deceased frequently and considered that he was always able to follow conversations. She had no recollection of allied health or Village staff, or visiting clergy, reporting that the deceased could not understand or follow

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instructions. There was also no concern raised about the deceased's vision. Dr Moore's recollection is supported by the evidence of each lay witness who gave evidence as to the deceased's ability to hear and participate in conversations.

257 Dr Moore noted no short-term memory loss in the deceased on her regular visits with him. If the deceased had displayed memory loss, her usual practice would have been to perform, or ask staff to perform, a mini-mental test.

258 Dr Moore disagreed with Dr Lonie's statements assuming a pre-existing neurodegenerative process. According to Dr Moore, there was no medical evidence of neurodegenerative disease in the deceased's medical records, nor any signs or symptoms that the deceased complained of, or displayed, that would suggest to her an 'undiagnosed neurodegenerative process'.

259 After stating that she read and considered the test for testamentary capacity, Dr Moore concluded:

(a) the deceased had cognitive capacity on 18 August 2017 when he gave instructions to Paul for the 2018 will;

(b) the deceased had cognitive capacity on 15 February 2018 when he executed the 2018 will; and

(c) the deceased had the mental capacity on 15 February 2018 to remember the instructions he gave to Paul on 18 August 2017 and assess whether the 2018 will was in accordance with those instructions.

First Hecker report

260 Dr Jane Hecker was requested by the applicant on 18 March 2021 to provide an opinion on the testamentary capacity of the deceased, responding to the first and second Lonie reports.

261 In the first Hecker report, Dr Hecker set out the documents and reports provided to her for the purpose of her report. Dr Hecker believed that the deceased understood the nature and meaning of a will and understood that he was providing instructions for his will in August 2017 and at the time of signing his will in February 2018; that the deceased understood, in general terms, the nature and value of his various assets including the farming business he ran in conjunction with the applicant and that the deceased appreciated and was able to recall those who were his natural beneficiaries; and that he retained the ability to weigh up the pros and cons and to reason regarding differing options for his testamentary division and distribution and to discuss this with his lawyer.

262 Dr Hecker did not believe that the deceased had delusional thought (paranoia) regarding any of the potential beneficiaries which could have affected his proposed division of his assets and did not believe that there was any

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evidence to support undue influence, acknowledging that all elder individuals and particularly those in residential care have potential vulnerability to influence.

263 In regard to the specific questions she was asked to address, Dr Hecker's belief was that:

(a) the deceased had testamentary capacity when he provided instructions to Paul on 18 August 2017 and that he had testamentary capacity when he executed the 2018 will on 15 February 2018;

(b) the deceased was capable of remembering the instructions he had given in August 2017 and assessing whether the 2018 will was in accordance with the instructions.

Dr Rosenfeld's report

264 Dr Rosenfield strongly disagreed with Dr Hecker's opinions and concluded:

(a) the deceased suffered from a dementia, likely associated with vascular brain disease likely complicated by stroke associated with inadequately treated atrial fibrillation;

(b) the deceased suffered with a range of behavioural and psychological problems related to brain disease and dementia. His need for full time care in a residential setting, promoting guidance and assistance with decision making by his family and carers are indications of the presence of at least moderately sever cognitive impairment associated with brain vascular disease;

(c) the deceased suffered with brain disease and very significant impairments in higher level cognitive function that accounted for his need for residential care, the significant behavioural problems that both Dr Lonie and Dr Hecker outlined in their reports, and his need for assistance with decision making, even in 2013 when he entered residential care, that are not explained by the incorrect and possibly misleading commentary in Dr Hecker's report;

(d) Dr Hecker's views about Dr Lonie's report were not substantiated by the historical progress, medical problems and clinical aspects outlined in the medical history of the deceased as indicated in Dr Rosenfeld's commentary in his report. Further, from his knowledge and experience working with neuropsychologists throughout his career in secondary (peripheral hospitals) and tertiary (referral hospitals), in private practice in the community, as well as in academic settings, knowledge and expertise of neuropsychologists forms an important and crucial role in the evaluation of cognitive impairment, dementia, capacity and decision making in many clinical and medico-legal settings.

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Second Hecker report

265 The second Hecker report responds to Dr Rosenfeld's opinions concerning the medical care, investigations and diagnoses of the deceased.

Second Moore report

266 The second Moore report also addresses the Rosenfeld report. Dr Moore stated her belief was that the deceased did not suffer from a dementing illness and between 18 August 2017 to 15 February 2018, she did not observe or record any symptoms or signs of dementia in the deceased. She stated that the deceased did not ever have a stroke or suffer from any other heart disease.

267 In terms of any anxiety, Dr Moore said the deceased did become more anxious after the death of his wife and he experienced increasing anxiety symptoms in Calvary with all the extra stresses. On that basis, he started on taking mitazapine which reduced his anxiety symptoms. When he had a break from the medication, these symptoms returned in August 2017 when the applicant was overseas. His anxiety symptoms were never severe enough to be classified as a significant psychological disorder. Dr Moore did not observe any substantial decline in the deceased's executive functioning and cognitive abilities.

Conclusion on expert evidence

268 Generally a court is cautious about acting on the basis of expert evidence by medical experts given after the event, particularly where they never met or examined the testator. The evidence of Dr Lonie, Dr Hecker and Dr Rosenfield was given without the benefit of meeting the deceased or examining him in his lifetime. By necessity, they are compelled to rely on secondary evidence in making their assessments, which may be untested or inaccurate.

269 The expert evidence of Dr Lonie, Dr Hecker and Dr Rosenfield has significant difficulties and inadequacies as a result of the deceased's medical records being inaccurate and not reflecting the deceased's cognitive, functional and behavioural status at the times of giving instructions and executing the 2018 will.[12] Although Dr Moore was the only expert who treated the deceased within the relevant timeframes, her attendances on the deceased at the Village were limited in time and frequency.

270 While medical evidence can be of assistance in certain circumstances, ultimately it is not necessarily essential or determinative as the test for testamentary capacity is a legal test. Determining testamentary capacity is a practical question that does not depend solely on medical or legal definition. It is a question of degree to be solved as a whole on the facts disclosed by the entire

[12] *Hawes v Burgess* [2013] EWCA Civ 74, [60] (Mummery LJ, Patten LJ and Sir Scott Baker agreeing).

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body of evidence, which may include medical evidence, as well as lay witnesses, and depends on the circumstances of each case.[13]

Applicable principles — testamentary capacity

271 The parties were not in dispute as to the relevant legal principles for testamentary capacity. In *Roche v Roche*,[14] Kourakis CJ recounted the relevant authorities and principles:

> In *Banks v Goodfellow*,[15] Cockburn CJ articulated the common law test for testamentary capacity as follows:
>
> > It is essential to the exercise of such a power 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 sound, would not have been made.[16]
>
> In *Thomas v Nash*,[17] Doyle CJ cited the passage and continued:
>
> > [71] This statement has often been cited with approval, although the point has been made that the effect of the concluding part is not altogether clear. The case before the court was one in which the testator had suffered mental illness. As to that, Cockburn CJ said at 565–566:
> >
> > > If therefore, though mental disease may exist, it presents itself in such a degree and form as not to interfere with the capacity to make a rational disposal of property, why, it may be asked, should it be held to take away the right? It cannot be the object of the legislator to aggravate an affliction in itself so great by the deprivation of a right the value of which is universally felt and acknowledged. If it be conceded, as we think it must be, that the only legitimate or rational ground for denying testamentary capacity to persons of unsound mind is the inability to take into account and give due effect to the considerations which ought to be present to the mind of a testator in making his will, and to influence his decision as to the disposal of his property, it follows that a degree or form of unsoundness which neither disturbs the exercise of the faculties necessary for such an act, nor is capable of influencing the result, ought not to take away the power of making a well, or place a person so circumstanced in a less advantageous position that others with regard to this right.[18]
>
> As with other 19th century common law principles governing the legal effect of mental illness, the statements in *Banks v Goodfellow* no longer reflect modern medical knowledge. It is now recognised that there are a broad range of cognitive, emotional and

[13] *Zorbas v Sidiropoulous (No 2)* [2009] NSWCA 197.
[14] *Roche v Roche* (n 11) [15]–[17], [29]–[31] (Kourakis CJ).
[15] *Banks v Goodfellow* (n 9).
[16] Ibid 565 (Cockburn CJ).
[17] (2010) 107 SASR 309 ('*Thomas v Nash*').
[18] Ibid 320 (Doyle CJ).

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> mental dysfunctions, the effects of which are difficult to identify precisely or delineate from the exercise of ones 'natural faculties' and the reasoning capacity of the 'sound' mind. Moreover, rules as to testamentary capacity must recognise and allow for the natural decline in cognitive functioning and mental state which often attends old age.
>
> …
>
> A testator may have testamentary capacity even if his or her cognitive function is impaired in the sense of not being as acute as it once was or because he or she falls within a very low percentile of the community for the functioning. However … more is required than a capacity to identify those persons who have a socially acceptable claim on the estate. A capacity to appreciate that there are competing claims on the estate and to make a deliberative choice, even a badly reasoned or capricious one, to ignore or compromise those claims is necessary.
>
> It is also important to remember that the issue is one of capacity. It is not necessary that the testator in fact turn his or her mind to the extent of his or her estate, recall all who have a claim on it, and weigh their claims. It is merely necessary that a testator have a capacity to do so if he or she wishes. …
>
> A radical departure from long adhered to testamentary intention may also support an inference of incapacity at least in the absence of an adequate explanation.[19]

272 In *Carr v Homersham*,[20] Basten JA (with whom Leeming JA agreed), stated that the concept of testamentary capacity as set out by Cockburn CJ in *Banks v Goodfellow* can be divided into affirmative and negative components. The three affirmative elements are:

(a) the capacity to understand the nature of the act of making a will and its effects;

(b) understanding the extent of the property the subject of the will; and

(c) the capacity to comprehend moral claims of potential beneficiaries.[21]

273 The negative elements — which include 'disorders of the mind' and 'insane delusions' —are relevant only to the extent that 'they are shown to interfere with the testator's normal capacity for decision-making'.[22]

274 The relevant question is not whether the choices made by the testator were unwise, improper or unjust, but whether the decisions, taken together with other relevant evidence, demonstrate a lack of capacity to identify moral claims, and if there are multiple, weigh and choose between them.[23]

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[19] *Estate of Budniak; NSW Trustee & Guardian v Budniak* [2015] NSWSC 934, [372]–[377] (Hallen J).
[20] (2018) 97 NSWLR 328 ('*Carr v Homersham*').
[21] Ibid [5] (Basten JA).
[22] Ibid [6] (Basten JA).
[23] Ibid [12] (Basten JA).

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275 Basten JA considered the question of who bears the onus of establishing testamentary capacity. After referring to relevant judicial comments in earlier decisions, his Honour concluded:

> There is a ready temptation to reformulate these propositions in the language of presumptions and shifting burdens, and by reference to burdens of adducing evidence and burdens of proof. However, such complexity is unlikely to be helpful and may distract from a determination of what is in substance a purely factual issue, the resolution of which will turn on the nature of the particular matters raised and by whom.
>
> To speak of there being a 'doubt' as to testamentary capacity is to say little more than that a real issue has been raised on the evidence, which requires the resolution of the court. Unless such an issue has been raised, testamentary capacity need not be addressed; its existence will be presumed. Once the issue is raised, the court must resolve it; that must be done by a consideration of all the evidence and the inferences which may be drawn from it. It is true that the court must be affirmatively satisfied as to testamentary capacity, but in doing so, it should be alive to the fact that to find incapacity and thus invalidate a formally valid will is … 'a grave matter'. A doubt which does not preclude the probability that the testator enjoyed testamentary capacity cannot warrant a finding of invalidity.[24]

276 Although in some circumstances medical evidence may be probative as to questions of capacity, it is not essential or determinative as the test for testamentary capacity is a legal test. Lay witnesses, including solicitors, are usually in a position to provide probative evidence for determining testamentary capacity.[25]

277 As stated in *Re Sue*:[26]

> [T]he essential question, in deciding whether a particular document should be admitted to probate, is whether, on the whole of the evidence, the Court is satisfied that the document was the last will of a free and capable testator. That decision can be, and ordinarily is, made with the benefit of evidence extrinsic to the document itself, including evidence as to the provenance of the document.[27]

Duties of solicitors

278 The duty upon a solicitor taking instructions for a will is always a heavy one. In *Manning v Hughes; Estate of Ludewig*,[28] White J referred to the practical application of the test in *Banks v Goodfellow* in situations where a testator's capacity might later be questioned, adopting the following summary from *Hutley's Australian Wills Precedents*:

> Where the solicitor is drafting a will and there is any possibility that the testator's capacity might later be questioned, the solicitor should ask questions the answers to which will establish whether or not each of the requirements for capacity laid down in

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[24] Ibid [46]–[47] (Basten JA).
[25] *Zorbas v Sidiropoulous (No 2)* (n 13) [65] (Hodgson JA, Young JA and Bergin CJ in Eq agreeing).
[26] [2016] NSWSC 721 ('*Re Sue*').
[27] Ibid [100] (Lindsay J)
[28] [2010] NSWSC 226, [47] (White J).

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Banks v Goodfellow is satisfied. It follows that the solicitor taking instructions for a will must have the *Banks v Goodfellow* tests at the front of her or his mind.[29]

279 A solicitor taking instructions for a will has a duty to ensure that the person giving instructions has testamentary capacity and is giving the instructions freely and voluntarily and that the effect of the will is understood.[30] In carrying out that duty solicitors must take reasonable steps to satisfy themselves that a testator has testamentary capacity at the relevant time.

280 Where a testator is elderly, it is generally considered prudent that a medical opinion be obtained as to the testator's medical condition and whether any such conditions may affect the testamentary capacity of a testator.[31]

281 A solicitor's duties when taking instructions and preparing wills for a client vary depending on the circumstances. In *Ryan v Dalton*; *Estate of Ryan* ('*Ryan v Dalton*'), Kunc J set out a useful summary of the matters for a solicitor to consider when retained to prepare wills, in particular, for elderly clients:[32]

> (1) The client should always be interviewed alone. If an interpreter is required, ideally the interpreter should not be a family member or proposed beneficiary.
>
> (2) A solicitor should always consider capacity and the possibility of undue influence, if only to dismiss it in most cases.
>
> (3) In all cases instructions should be sought by non-leading questions such as: Who are your family members? What are your assets? To whom do you want to leave your assets? Why have you chosen to do it that way? The questions and answers should be carefully recorded in a file note.
>
> (4) In case of anyone:
>
> (a) over 70;
>
> (b) being cared for by someone;
>
> (c) who resides in a nursing home or similar facility; or
>
> (d) about whom for any other reason the solicitor might have concern about capacity,
>
> the solicitor should ask the client and their carer or a care manager in the home or facility whether there is any reason to be concerned about capacity including as a result of any diagnosis, behaviour, medication or the like. Again, full file notes should be kept recording the information which the solicitor obtained, and from whom, in answer to such inquiries.

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[29] Charles Rowland, *Hutley's Australian Wills Precedents* (LexisNexis Butterworths, 7th ed, 2009) [1.14].
[30] *Petrovski v Nasev; Estate of Janakievska* [2011] NSWSC 1275.
[31] See, eg, *Fradgley v Pocklington (No 2)* [2011] QSC 355, [28] (Mullins J).
[32] [2017] NSWSC 1007 ('*Ryan v Dalton*').

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(5) Where there is any doubt about a client's capacity, then the process set out in sub-paragraph (3) above should be repeated when presenting the draft will to the client for execution. The practice of simply reading the provisions to a client and seeking his or her assent should be avoided. [33]

282 His Honour also emphasised that in the many cases that come before the Court, the evidence of the solicitor will be critical. For that reason, it is essential that a solicitor make full and contemporaneous file notes of their attendances on the client and any other persons and that those file notes be retained indefinitely.[34]

283 The weight to be given to a solicitor's evidence will depend on his or her experience, training, and understanding of the test of testamentary capacity; his or her ability to make an assessment of capacity taken with the quality of the assessment made, as appears from any contemporaneous notes and records; his or her knowledge of and familiarity with the will-maker, including the age and state of health of the will-maker; his or her independence; the will-maker's presentation to the solicitor; and whether there are any 'red flags' suggesting a possible challenge to capacity. It will also depend on 'the level of enquiry and discussion on the part of the lawyer of and with the deceased'.[35]

Consideration — testamentary capacity

284 The applicant submits that it appears to be common ground that:

(a) the deceased understood the nature of a will and its effect as at 18 August 2017 and 15 February 2018; and

(b) the deceased would have retained the ability to recognise each member of his family and appreciate their status as natural beneficiaries to his will.

285 The respondents submit that the deceased's level of cognitive impairment was such that he was not able to weigh up particular decisions for any of his wills from 2013 onwards.

286 Based on the above, the applicant submits that the disputed issues are whether the deceased was capable of understanding or had the requisite awareness of the nature, extent and value of his estate and whether he had the requisite capacity to weigh potentially competing claims and make a deliberative choice.

287 Accordingly, based on the test for testamentary capacity, the second and third elements of the test in *Banks v Goodfellow* are disputed.

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[33] Ibid [107] (Kunc J).
[34] Ibid [108] (Kunc J).
[35] *Loosley v Powell* [2018] 2 NZLR 618, 632 [51] (Asher J).

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288 The applicant bears the onus of showing that the deceased possessed testamentary capacity at the relevant time.[36] A presumption of testamentary capacity arises if the will is rational on its face and duly executed.[37] Notwithstanding the evidence of the differing circumstances of the signing of the 2018 will by the applicant, Paul and Brigid, it is not contested that the deceased executed the 2018 will in their presence on 15 February 2018.

289 However, it cannot be concluded that the 2018 will is rational on its face. The 2018 will makes a substantial change to the deceased's testamentary intentions where the inheritance of the girls is reduced substantially to the benefit of the applicant. On the basis that the value of Brewers was $3,925,000 in February 2018, the inheritance of the girls under the 2018 will was reduced by $2,925,000 to $2,975,000 and the inheritance of the applicant was increased by that amount. Further, the evidence of Paul and the applicant of the meetings with the deceased on 18 August 2017 and 15 February 2018 varies substantially and there is a serious concern that the applicant was present with Paul and the deceased at the meetings on 18 August 2017 and 15 February 2018.

Did the deceased have testamentary capacity on 18 August 2017 when giving instructions for the 2018 will?

290 The applicant's evidence of the meeting on 18 August 2017 was in many respects inconsistent or variable and not truly relevant to the issue of the testamentary capacity of the deceased. Paul's evidence was limited and variable. At the time he was the deceased's solicitor, he appeared not to understand that he placed himself in a difficult personal and professional position. There were obvious red flags that he should not have acted as the deceased's solicitor. Not only is he the son-in-law of the deceased, he is also the brother-in-law of the applicant and the respondents, and his four children are beneficiaries under the 2018 will. Paul was also aware of the deceased's testamentary intentions before the 2018 will and how his instructions in regard to Brewers and the term deposit benefited the applicant when he was present, for example, the instructions in February 2015 compared with March and July 2015. Paul should not have allowed the applicant to be present or involved at the meetings for the 2018 will yet his evidence was that he was not concerned about the presence of the applicant at the meetings.

291 Given the substantial change to the deceased's testamentary intentions in the 2018 will, it should have been evident to Paul that the 2018 will would likely be controversial and that he should not have been the deceased's solicitor. Had he removed himself as the deceased's solicitor, it would have been likely that an independent solicitor would have been retained and that solicitor would have obtained a medical opinion from a medical practitioner regarding the testamentary capacity of the deceased at the relevant times. It would also have

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[36] *Veall v Veall* (2015) 46 VR 23, 188 [202] (Santamaria JA, Beach and Kyrou JJA agreeing), quoting *Tobin v Ezekiel* (2012) 83 NSWLR 757, 771 [47] (Meagher JA, Basten and Campbell JJA agreeing).

[37] Ibid.

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been likely that the applicant would not have been present when instructions for the 2018 will were obtained and when the 2018 will was signed and the witnesses to the 2018 will would not have been family members.

292 The evidence differs as to whether the deceased or the applicant arranged the meeting held on 18 August 2017. Paul said the deceased called him and arranged the meeting and denied the applicant arranged it. While the applicant's evidence on this point was contradictory, ultimately he accepted that he arranged for Paul to visit the deceased on 18 August 2017.

293 Paul's file note of the meeting records that 'the three of us discussed [the deceased's will]'. His oral evidence was that the applicant did not talk to him, although he said the applicant and the deceased 'discussed things'. Paul was not surprised that the applicant was present as in the past when he attended on the deceased, the applicant had been present. The fact that the applicant was present in past meetings when Paul attended on the deceased is no justification for the applicant's presence at the meeting on 18 August 2017. Paul should have insisted that he take instructions from the deceased on his own, and not in the presence of the applicant. This was a red flag missed by him.

294 The meeting on 18 August 2017 took place approximately eight months before the deceased's death on 7 April 2018, aged 95 years. The instructions taken at the meeting make significant changes in the disposition of Brewers and the deceased's term deposit which substantially affect the value of the inheritances of both the applicant and the girls. The effect of the changes can be seen by comparison with the 2012 will, assuming rectification, with the 2018 will. Under the 2012 will, as rectified, based on the value of Brewers at $3,650,000 when Paul took instructions, the inheritance of the girls would reduce by $2,650,000 and the applicant's inheritance would increase by $2,650,000 in circumstances where he receives the remaining assets of the estate.

295 Paul agreed that the markings on the copy 2016 will did not reflect his instructions in his file note as there was no record of any change to the amount the applicant was to receive or the price of Brewers being amended to $2 million. He denied that the reason was because he was not given the instructions that he recorded in his file note. The clauses relevant to those two instructions were marked, however, with the sum of $500,000 recorded in cl 4(a) underlined and the word 'price?' appearing next to cl 4(c). The other instructions recorded in the file note are reflected in the handwritten amendments made to the copy of the 2016 will. Paul thought that the applicant said he could not pay market value for Brewers but Paul could not recall any discussion of the value of Brewers or the balance of the deceased's term deposit.

296 Paul's file note of the meeting on 18 August 2017 does not record that he considered the deceased's testamentary capacity. His oral evidence was that he observed no warning signs or red flags in his discussions with the deceased on 18 August 2018. His conclusion appears to be based on his view that the

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deceased's instructions were coherent, that he had no difficulty conversing with the deceased and at no point was the deceased confused. In support of this view, Paul referred to the deceased's understanding of a stamp duty issue, however, he also said that it could have been the applicant who suggested the resolution of that issue. Otherwise Paul said the deceased had been consistent since 1987 in 'the way he approached his will, in the way he discussed things … in the way he made his decisions'. Paul's evidence does not support a finding that the deceased had testamentary capacity when he took instructions from the deceased on 18 August 2017.

297 While the parties agree that the deceased was aware of his family members and his assets, Paul did not ask the deceased about his assets or their value or his reasons for wanting to change his testamentary intentions in the manner set out in the 2018 will. Paul could not recollect any discussion of the value of Brewers or the balance of the deceased's bank accounts. There was no evidence of the overall value of the deceased's estate. While Paul recollected that the applicant told the deceased that he may not have sufficient funds to keep the farm and he could not pay market value for Brewers and he would find it difficult to pay the interest on money borrowed to 'pay the girls' for Brewers, Paul did not ask the deceased whether this was his understanding or any questions about the applicant's statements to the deceased. Paul also could not remember who said the price for Brewers should be $2 million. Having regard to the fact that the applicant was inheriting the remaining farm properties of the deceased, it would have been prudent for Paul to ask the deceased whether he considered there was any basis for the applicant's position.

298 Given the deceased's age, his long standing health and medical issues, his residence in care since 2013 and his declining health, it was important for Paul to follow the type of process for obtaining instructions for elderly clients set out in *Ryan v Dalton*.[38] Essentially, it is an exercise that addresses specific questions concerning all components of the test for testamentary capacity. In that regard, Paul should have asked the deceased what he understood to be his assets and while it is not necessary that he recollect each and every item, it must be shown that he was aware in general terms of the nature and value of his estate. While the deceased was aware of those who might reasonably have a claim on his testamentary bounty, Paul should have asked questions directed to the deceased's ability to evaluate and discriminate between the respective strength of those claims so that he could determine in which proportions his estate should be divided between the claimants.

299 Paul did not have any discussion with the deceased concerning his reasons for the change or whether he understood the effect of the change on the value of the inheritance to the girls and the applicant respectively. Given that the deceased had the objectives of maintaining the family farm in the hands of the applicant while making provision for his daughters, the latter objective being

[38] *Ryan v Dalton* (n 32).

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embodied by the deceased's long standing intention that Brewers be the inheritance for the girls, a prudent solicitor would have obtained at least indicative values of the deceased's other two farm properties comprising 60 per cent of the deceased's land holdings and his other assets, such as his share of the partnership and his term deposit. The value of the deceased's estate is relevant to the deceased's understanding of the competing claims on his estate and his ability to make a deliberative choice between the competing claims on his estate. Paul was present when the applicant told the deceased that he may not have sufficient funds to keep the farm, that he could not pay market value for Brewers and he would find it difficult to pay the interest on money borrowed to 'pay the girls' for Brewers, yet Paul did not ask questions of the deceased about these statements or whether he knew the value of Brewers. The evidence does not establish that the applicant's statements concerning his financial position in regard to Brewers was accurate. Without accurate information of these matters, the deceased was not in a position to understand and the weigh up the competing claims on his estate.

300 While it is accepted that at the meeting on 18 August 2017, the deceased understood the extent of his assets, the evidence does not establish that the deceased knew the approximate value of his estate or that he understood the relative weights of the competing claims on his estate such that he could make a deliberative choice between them.

301 On balance, the evidence does not establish to the requisite standard that the deceased had testamentary capacity when he gave instructions on 18 August 2017 for the 2018 will.

Did the deceased have testamentary capacity to execute the 2018 will?

302 As submitted by the respondents, the evidence of the circumstances of the meeting on 15 February 2018 when the 2018 will was signed by the deceased consists of three conflicting narratives, in particular, in respect of whether the deceased read the 2018 will.

303 The deceased's testamentary intentions were not finalised at the meeting on 18 August 2017 when the deceased gave instructions for the 2018 will. Paul subsequently sent an email dated 22 August 2017 to the applicant attaching two versions of the 2018 will. One version was the 2018 will, the other left the amounts blank in case there were any adjustments to be made, which Paul said had occurred in the past. The applicant also said the deceased did not seem 'totally decided' referring to the deceased's testamentary intentions at that time.

304 The conclusion that the deceased's instructions were not finalised on 18 August 2017 is corroborated by the deceased's note dated 27 October 2017 where he wrote that he wanted to leave Brewers to the girls at market price and the funds in his term deposit.

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305 Further corroborative evidence of the deceased's instructions not having been finalised is seen in Paul's file note of the meeting on 15 February 2018. Before the deceased signed the 2018 will, Paul asked the deceased whether he would like to sign either of the wills sent to him in August 2017, indicating that the deceased had not communicated his final instructions to Paul prior to asking that question.

306 The signing of the 2018 will was done at the end of a two hour afternoon visit by the applicant, Paul, Brigid with her new born son, and the applicant's son, Tom, although Tom was not present for long. The applicant had visited the deceased earlier that day at which time he said the deceased said that he was 'fairly decided' about the figures he was going to ask Paul to include in the will — $2 million for Brewers, and $1 million in cash.

307 Paul's file note records that he told the deceased he had brought the draft will that the deceased and Paul as a single witness had signed, that is, the 2016 will, and the one the deceased instructed Paul to prepare on 18 August 2017. When asked which will he would like to sign, the deceased said he wanted to sign the August will. The applicant's evidence was that he thought Paul was referring to the two wills emailed to the applicant in August 2017 and when Paul asked the deceased which will he wanted to sign, the applicant said the deceased responded, 'The one with two million and one million to the girls'. Paul said that before signing the 2018 will, the deceased would have had time to glance at its contents, but not fully read the three pages.

308 Paul then gave the 2018 will to the deceased who then signed it in the presence of Paul and Brigid. This occurred in a matter of minutes. Before signing the 2018 will, Paul did not discuss it with the deceased, nor did he read it to him. Paul's evidence was that he did not observe any warning signs or red flags that he would understand, as a legal practitioner, to indicate an issue of cognitive or testamentary incapacity. Shortly after the 2018 will was signed, Paul and Brigid left the deceased.

309 According to the applicant, Paul did not say anything other than asking which will the deceased wanted to sign, and the deceased did not say anything while reading the will. When asked if the deceased read through the will, the applicant said that the deceased was turning pages and 'appeared to be reading'. The applicant could not recall any discussion of any other provision of the will, and said no one, including himself, said anything about the contents of the will. As the 2018 will had been in possession of the applicant after he had shown it to the deceased in late August 2017, the deceased was likely looking at the 2018 will again for the second time when he signed it on 15 February 2018.

310 The 2018 will comprises two and a half pages of single spaced typing. Clause 4 is a dispositive clause and takes up one page as it has ten sub-clauses. While a person familiar or experienced with wills may consider that it could be read with little more than a glance, it is improbable that a lay person unfamiliar

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with wills could readily absorb the ten dispositive provisions in a glance. In the case of the deceased, it is unlikely that he could have absorbed the relevant provisions in a glance, particularly at the end of a two hour family meeting and his overall circumstances, such as his deteriorating health and age.

311 Little weight can be placed on the evidence of the applicant and Brigid. The applicant's evidence was variable, conflicting and at times not responsive. Brigid's evidence as to what was said and what she observed at the time of the signing of the 2018 will consisted mostly of her impressions or reconstructions of the signing of the 2018 will on that day.

312 Paul did not ask the deceased any questions that would have informed him that the deceased had testamentary capacity. By 15 February 2018 the deceased was failing. Paul's last discussion with the deceased regarding the 2018 will was on 18 August 2017. Paul should have addressed the issue of the deceased's testamentary capacity before the signing of the 2018 will. He should have asked the deceased relevant questions, such as those set out at para [281], so that he could satisfy himself whether or not the deceased had testamentary capacity when he signed the 2018 will. This should have been done by him while he was alone with the deceased.

313 The value of Brewers when the 2018 will was signed was $3,925,000. By contrast to the 2012 will, if rectified, the dispositions under the 2018 will reduce the inheritance of the girls by $2,950,000 and increase the inheritance of the applicant by $2,950,000.

314 Paul's evidence of the meeting on 15 February 2018 when the 2018 will was signed does not provide any basis to conclude that the deceased understood the approximate value of his estate or the relative weights of the competing claims such that he could make a deliberative choice between them.[39]

315 On balance, the evidence does not establish to the requisite standard that the deceased had testamentary capacity on 15 February 2018 when he signed the 2018 will.

Applicable principles — knowledge and approval

316 Knowledge and approval is a discrete concept from testamentary capacity. Where it is determined that a testator had testamentary capacity, it may nevertheless be determined that a testator did not know and approve of the contents of the will. In *Nock v Austin*, Isaacs J provided a summary of the principles to be drawn from the leading cases on the question of knowledge and approval.[40] In summarising the principles, his Honour said:[41]

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39 *Roche v Roche* (n 11) [33] (Kourakis CJ).
40 (1918) 25 CLR 519 ('*Nock v Austin*').
41 Ibid 528 (Isaacs J).

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(1) In general, where there appears no circumstance exciting suspicion that the provisions of the instrument may not have been fully known to and approved by the testator, the mere proof of his capacity and of the fact of due execution of the instrument creates an assumption that he knew of and assented to its contents.[42]

(2) Where any such suspicious circumstances exist, the assumption does not arise, and the proponents have the burden of removing the suspicion by proving affirmatively by clear and satisfactory proof that the testator knew and approved of the contents of the document.[43]

(3) If in such a case the conscience of the tribunal, whose function it is to determine the fact upon a careful and accurate consideration of all the evidence on both sides, is not judicially satisfied that the document does contain the real intention of the testator, the Court is bound to pronounce its opinion that the instrument is not entitled to probate.[44]

(4) The circumstance that a party who takes a benefit wrote or prepared the will is one which should generally arouse suspicion and call for the vigilant and anxious examination by the Court of the evidence as to the testator's appreciation and approval of the contents of the will.[45]

(5) But the rule does not go further than requiring vigilance in seeing that the case is fully proved. It does not introduce a disqualification.[46]

(6) Nor does the rule require as a matter of law any particular species of proof to satisfy the onus.[47]

(7) The doctrine that suspicion must be cleared away does not create 'a screen' behind which fraud or dishonesty may be relied on without distinctly charging it.[48]

317 The following statement of Sir Samuel Evans in the case of *In the Estate of Osment*,[49] was also referred to in the joint decision of Barton and Gavan Duffy JJ in *Nock v Austin*:

> It is well established that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court and cause it to be vigilant and jealous in examining the evidence in support of the instructions for the will; it ought not to pronounce for the document unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.[50]

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[42] *Barry v Butlin* (1838) 2 Moo PC 480; 12 ER 1089, 484; *Fulton v Andrew* (1875) LR 7 HL 448.
[43] *Baker v Batt* (1838) 2 Moo PC 317, 12 ER 1026, 321; *Tyrrell v Painton* (1894) P 151; *Shama Churn Kundu v Khettromoni Dasi* (1899) LR 27 Ind App 10, 16 (Sir Richard Couch).
[44] *Baker v Batt* (n 43) 320; *Fulton v Andrew* (n 42).
[45] *Barry v Butlin* (n 42) 484; *Fulton v Andrew* (n 42); *Low v Guthrie* (1909) AC 278, 284 (Lord Shaw).
[46] *Low v Guthrie* (n 45) 282–3 (Lord James).
[47] *Barry v Butlin* (n 42) 484.
[48] *Low v Guthrie* (n 45) 281–2 (Lord Loreburn LC).
[49] [1914] P 129 ('*Estate of Osment*').
[50] *Nock v Austin* (n 40) 524 (Barton and Gavan Duffy JJ), quoting *Estate of Osment* (n 49) 132 (Sir Samuel Evans).

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318 Their Honours, quoting from *Tyrrell v Painton*,[51] considered that although this rule shifts the onus of proof onto those propounding to affirmatively establish knowledge and approval, it does not require the Court to do any more than carefully examine the evidence and draw conclusions on the balance of probabilities.[52] Subsequent authority is clear that where there is suspicion, there is no requirement of any more satisfaction than the conventional civil standard of proof.[53] However, in accordance with the principles expressed in *Briginshaw v Briginshaw*, the cogency of the evidence necessary to displace the suspicion will depend on the circumstances of each case.[54]

319 More recently the approach involving presumptions has been considered to be artificial. Instead the preferred approach is to consider all of the relevant evidence available and then draw inferences from the totality of the evidence to determine whether the propounder of the disputed will has discharged the burden of establishing that the testator knew and approved of the contents of the disputed will.[55]

320 Ultimately it is a testator's understanding that is decisive in determining whether the testator knew and approved the contents of their will.[56] If there is a just ground of suspicion, the applicant does not have the benefit of the presumption that the deceased knew and approved of the 2018 will. In that case the onus returns to him to show that the deceased knew and approved of the will. The question is whether the deceased actually knew the substantive content of the particular will and approved of that content.

321 It should be noted that while testamentary capacity and knowledge and approval are discrete concepts, where it is determined there is a lack of testamentary capacity, in most cases, there is no need to consider knowledge and approval as knowledge and approval only has significance where a testator had testamentary capacity. However, given that the issue of knowledge and approval was before the Court, it is appropriate to determine it in any event.

Consideration — knowledge and approval

Did the deceased know and approve of the 2018 will?

322 The applicant seeks to propound a will that is valid on its face and have the benefit of the presumption that the deceased knew and approved of the contents of the will.

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51 *Tyrrell v Painton* (n 43).
52 *Nock v Austin* (n 40) 523–4 (Barton and Gavan Duffy JJ).
53 *Tobin v Ezekiel* (n 36) [48] (Meagher JA). See also *Worth v Clasohm* (1952) 86 CLR 439, 453 (Dixon CJ, Webb and Kitto JJ); *Kantor v Vosahlo* [2004] VSCA 235, [22] (Ormiston JA).
54 *Briginshaw v Briginshaw* (1938) 60 CLR 336.
55 *Mekail v Hana; Mekail v Hana* [2019] NSWCA 197, [161] (Leeming JA, Basten JA and Emmett AJA agreeing); *Hawes v Burgess* (n 12) [12]–[14] (Mummery LJ, Patten LJ and Sir Scott Baker agreeing); *Starr v Miller* [2021] NSWSC 426, [474] (Hallen J).
56 *Veall v Veall* (n 36) [179] (Santamaria JA, Beach and Kyrou JJA agreeing).

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323 The respondents must establish the existence of suspicious circumstances in order to remove that presumption and cause the burden to shift to the applicant to prove positively that the deceased knew and approved of the contents of the will.

324 Suspicious circumstances may arise where a testator is mentally or physically frail or where a beneficiary has been part of the process of drawing a will where that person benefits under the will. Other circumstances may include where a beneficiary arranged meetings for a testator to make a will or was present during meetings where a solicitor took instructions for a will or where the solicitor was not concerned that the beneficiary of a proposed will was present with the deceased at the time of executing a will. In these circumstances a court must be satisfied that the relevant will truly represents the testator's intentions.

325 There are multiple circumstances that excite suspicion that the deceased did not know and approve of the contents of the 2018 will. In the five years preceding his death, the deceased suffered from a variety of medical and health issues, resided in care at the Village from late 2013 onwards and was around 95 years of age.

326 The applicant is the principal beneficiary of the 2018 will yet his involvement and presence in the deceased's will making process was constant. Paul's evidence was that in discussions about the deceased's wills generally, the applicant always said to the deceased that he could not afford Brewers if he had to pay market value for it. When Paul discussed the deceased's wills on earlier occasions and the applicant was present, the applicant stood to benefit from the proposed changes, whereas the discussions where the applicant was not present generally provide that Brewers was devised to the girls, with the applicant to have the option to purchase it at market value as at the date of the deceased's death.

327 The applicant arranged the meeting on 18 August 2017 and was present when Paul took instructions for the 2018 will. On that occasion, Paul thought the applicant said words to the effect that he could not pay market value for Brewers. There is no evidence whether the applicant's position was accurate. Paul was not concerned that the applicant was present at this meeting and did not consider the applicant's presence was a problem. As the solicitor for the deceased and knowing the history of the deceased's testamentary intentions and being the deceased's son in law, it would have been preferable if he had advised the deceased to retain an independent solicitor. At the very least, Paul should have been aware that the 2018 will was likely to be controversial and he should have obtained instructions from the deceased without the presence of the applicant and asked questions of the deceased to ascertain whether the instructions represented the deceased's testamentary intentions. Paul did not discuss the reasons for change in the deceased's instructions nor did he ask relevant questions to determine if the deceased understood the effect of the instructions.

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328 Paul also sent the two draft 2018 wills to the applicant and the draft 2018 will with the figures in it remained in his possession until the signing of the 2018 will on 15 February 2018. After the draft 2018 wills were sent to the applicant and before the 2018 will was signed, the deceased made the handwritten note dated 27 October 2017 recording that he wanted to leave Brewers to the girls at market price and the funds in his term deposit. The signing of the 2018 will took place on 15 February 2018 in a matter of minutes at the end of a two hour visit to the deceased by Paul, the applicant, Brigid for the whole of the time, and with Tom present for a short time. The evidence of Paul, the applicant and Brigid on the signing of the 2018 will was not uniform. On balance, Paul's evidence is the best available evidence as to whether the deceased knew and approved of the will. His notes of the meeting were brief with no discussion or confirmation of the contents of the 2018 will with the deceased. His oral evidence was that he did not discuss the contents of the 2018 will and he did not read it to the deceased. Paul did not read through the will to the deceased. He did not point out the amendments made to the 2018 will nor did he discuss the will to ensure that the deceased knew of its contents. At most, Paul's evidence was that, at the end of a long afternoon with visitors, the deceased glanced at it before he signed it. In the circumstances it cannot be concluded that the 2018 will truly represented the deceased's testamentary intentions.

329 On balance, the evidence does not establish to the requisite standard that the deceased knew and approved of the contents of the 2018 will.

The rule in Parker v Felgate

330 In the alternative, the applicant relies on the rule in *Parker v Felgate*.[57] The applicant submits that the evidence clearly establishes that the deceased was capable of understanding and clearly did understand that he was engaged in executing a will for which he had given instructions to Paul. In those circumstances, it is not necessary to prove knowledge and approval of the will provided that the deceased believed that the 2018 will was giving effect to his instructions and in fact it does so, that is, that the 2018 will was prepared in accordance with the deceased's instructions and at the time of execution, the deceased remembered that he had given instructions and believed the will to be in accordance with them.

331 The applicant relies on the evidence of Paul, the applicant and Brigid to the effect that the deceased believed he was signing a will giving effect to previous instructions that he had given to Paul on 18 August 2017 and that the deceased was able to recollect giving instructions previously and was clearly satisfied that Paul had given effect to those instructions, referring to the discussions on 15 February 2018 when the 2018 will was executed, that is, when Paul said 'the one I prepared back in August' and 'I'll sign the August one', when Brigid

[57] (1883) 8 PD 171. This rule was approved by the Judicial Committee in *Perera v Perera* (1901) AC 354, 361.

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referred to the changes which had been made to the particular section and when the applicant said 'the one with the two million and one million to the girls'.

332 Under the rule in *Parker v Felgate,* a will which is drawn in accordance with instructions given by a testator at a time when he had full testamentary capacity but executed at a time when he no longer had such capacity will be upheld, provided the testator knew that the document he was signing conformed with the instructions he had given and approved it by executing it in those terms.[58]

333 The rule in *Parker v Felgate* does not displace the requirement for full testamentary capacity; it merely displaces the ordinary requirement that the testator should have had such capacity at the time he executed the will.[59] The applicant's submissions are premised on the basis that the deceased had testamentary capacity on 18 August 2017 when he gave instructions for the 2018 will. As it has been determined that the deceased did not have testamentary capacity when he gave instructions for the 2018 will, the reliance on the rule in *Parker v Felgate* is misplaced.

Appliable principles — undue influence

334 The claim for undue influence only becomes relevant if it is determined that the deceased had testamentary capacity and knew and approved of the 2018 will. As that has not occurred, strictly it is unnecessary to determine the issue of undue influence. As mentioned above in respect of knowledge and approval, however, it is appropriate to consider the claim as it was before the Court and so that all claims in the proceeding are determined.

335 The respondents claim that the applicant unduly influenced the deceased in the lead up to and in the making of the 2018 will. While direct evidence of coercion was not adduced by them, their position is that there was a course of conduct in the discussions between the applicant and the deceased over time, particularly when the deceased was elderly, mentally and physically unwell and susceptible to influence. According to them those circumstances give rise to a reasonable and definite inference of testamentary undue influence, or in the respondents' words, a compounding influence of the applicant upon the deceased which was more than the sum of its parts.

336 The applicant submits that there is no evidence that the deceased was ever coerced into doing anything, let alone giving instructions to Paul on 18 August 2017 or when signing the 2018 will on 15 February 2018. He submits that whatever might be thought about the fairness of the ultimate disposition of Brewers and the funds in the term deposit under the 2018 will, the deceased had been thinking for years about how best to dispose of his estate and the 2018 will

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[58] *Perrins v Holland* [2011] Ch 270.
[59] Ibid [54] (Moore-Bick LJ).

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represents a rational way of disposing of his assets in a way that achieved at least one of his objectives.

337 The applicant accepts that the deceased, being a widower aged in his nineties and living in a residential care facility, would have had some vulnerability to influence from friends and family members, and would have been more vulnerable than a fit, healthy, younger and independent person. However, he does not accept that that establishes any influence, let alone undue influence, was actually exerted, or that the deceased was coerced into acting against his will.

338 For a will to be admitted to probate, it must have been the free will of the testator. A will that has been the subject of undue influence, within the meaning recognised by the courts of probate, is invalid.[60] Testamentary undue influence is a serious claim of an equitable species of fraud, an essential component of which is an allegation of fraudulent conduct.[61]

339 In *Hall v Hall,*[62] Sir J P Wilde said:

> To make a good will a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affection or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like, — these are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgment, discretion or wishes, is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led but not driven; and his will must be the offspring of his own volition, and not the record of someone else's.[63]

340 The primary element of undue influence, in a probate context, is that the conduct overbears the will of the testator so that the will is made without intending or desiring the disposition thereby made. The act must be coerced, not voluntary.[64] When a person is more vulnerable or impressionable, it may be easier to influence them. As such, the degree or nature of pressure that may invalidate the will making process will depend according to the vulnerability and susceptibility of an individual testator.[65]

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60 See *Bridgewater v Leahy* (1998) 194 CLR 457, 474–5 (Gaudron, Gummow and Kirby JJ).
61 *Wingrove v Wingrove* (1885) 11 PD 81; *Bailey v Bailey* (1924) 34 CLR 558.
62 (1868) LR 1 P & D 481 ('*Hall v Hall*').
63 Ibid 482 (Sir J P Wilde).
64 *Wingrove v Wingrove* (n 61) 82–3 (Sir Hannen P).
65 *Nicholson v Knaggs* [2009] VSC 64, [149] (Vickery J).

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341 Where undue influence is alleged, the onus of proof lies with the person alleging such conduct.[66] However, it has long been acknowledged 'the difficulty of defining with distinctness what is undue influence',[67] and in particular 'the point at which influence exerted over the mind of a testator becomes so pressing as to be properly described as coercion'.[68] The Lord Chancellor in *Boyse v Rossborough*,[69] Lord Cranworth, considered that the influence must be in the nature of either coercion or fraud, noting the clearest example:

> If I meet a man in the street, and he puts a pistol to my breast, and threatens to shoot me if I do not give him my purse, and to save my life I yield to his demand; or if a neighbour, meaning to steal my horse, asks for the loan of it, stating that he wants it in order to go to market, and trusting to this representation I deliver it to him, and then he rides off and sells it, — in both these cases it was my will to hand over the purse and the horse; but the law deals with the case as if they had been obtained against my will, my will having been the result in one case of fear, and in the other of fraud. The same principles must guide us in determining whether an instrument duly executed in point of form, so far as legal solemnities are concerned, is or is not a valid will.[70]

342 As his Lordship then acknowledged, however, most cases will be more nuanced than outright theft or blatant deception:

> In the interpretation of these words, some latitude must be allowed. In order to come to the conclusion that a will has been obtained by coercion, it is not necessary to establish that actual violence has been used or even threatened. The conduct of a person in vigorous health towards one feeble in body, even though not unsound in mind, may be such as to excite terror and make him execute as his will an instrument which, if he had been free from such influence, he would not have executed.[71]

343 In *Wingrove v Wingrove*,[72] Hannen P described what the law regards as sufficient coercion:

> The coercion may of course be of different kinds, it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may have become so weak and feeble, that a very little pressure will be sufficient to bring about the desired result, and it may even be, that the mere talking to him at that stage of illness and pressing something upon him may so fatigue the brain, that the sick person may be induced, for quietness' sake, to do anything. This would equally be coercion, though not actual violence.[73]

344 Whether influence exercised over the testator is regarded, in law, as undue, is a question of the nature and extent of that influence. It is not a question susceptible to a neat definition. Instead, it must be ascertained through the

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66 *Boyse v Rossborough* (1857) 6 HL Cas 2, 49; 10 ER 1192, 1211 (Lord Cranworth); *McKinnon v Voigt* [1998] 3 VR 543, 562 (Ormiston JA).
67 *Boyse v Rossborough* (n 66) 47 (Lord Cranworth); *Williams v Goude* (1828) 1 Hag Ecc 577; 162 ER 682, 596 (Sir John Nicholl).
68 *Boyse v Rossborough* (n 66) 48 (Lord Cranworth).
69 Ibid.
70 Ibid 44–5 (Lord Cranworth).
71 Ibid 48–9 (Lord Cranworth).
72 *Wingrove v Wingrove* (n 61).
73 Ibid 83 (Sir Hannen P).

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analysis and comparison to cases in the classic common law sense, as opposed to law derived from the analysis and exposition of authoritative texts.[74]

345 In *Nicholson v Knaggs*,[75] Vickery J explored the manner in which in England, the United States and Australia, the test has come to be liberalised such that actual physical coercion or physical threat are no longer required (if indeed they ever were).[76] As his Honour noted, the test remains distinct from the equitable concept of undue influence.[77] The Rubicon between permissible and impermissible influence remains coercion:

> The influence moves from being benign and becomes undue at the point where it can no longer be said that in making the testamentary instrument the exercise represents the free, independent and voluntary will of the testator. It is the effect rather than the means which is the focus of the principle. The effect can be achieved in the context of a variety of circumstances and relationships. It can be the product of a chain of events, or a single event. It may be achieved by the conduct of one person or several, whether acting in concert or quite independently. Further, the influence need not be intentionally exercised by any particular person or persons for the purpose of overbearing the free and independent will of the testator.[78]

346 The onus of proof of undue influence rests upon the person alleging it,[79] and the standard of proof is the civil standard. In *Boyse v Rossborough*, the Lord Chancellor famously required that:

> In order to set aside the will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with the contrary hypothesis.[80]

347 In *Nicholson v Knaggs*, Vickery J rejected this approach as being 'in conflict with the general law as it currently applies in Australia', declaring that:

> The test to be applied may be simply stated: in cases where testamentary undue influence is alleged and where the Court is called upon to draw an inference from circumstantial evidence in favour of what is alleged, in order to be satisfied that the allegation has been made out, the Court must be satisfied that the circumstances raise a more probable inference in favour of what is alleged than not, after the evidence on the question has been evaluated as a whole.[81]

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[74] See *Apotex Pty Ltd v Sanofi-Aventis Australia Pty Ltd* (2013) 253 CLR 284, [17] (French CJ); *PGA v The Queen* (2012) 245 CLR 355, [22] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); Peter Cane and Joanne Conaghan (eds), *The New Oxford Companion to Law* (2008) 164–6.
[75] *Nicholson v Knaggs* (n 65).
[76] Ibid [145]–[149] (Vickery J).
[77] Ibid [148] (Vickery J). See also *Trustee for the Salvation Army (NSW) Property Trust v Becker* [2007] NSWCA 136, [61]–[69] (Ipp JA).
[78] *Nicholson v Knaggs* (n 65) [150] (Vickery J).
[79] *McKinnon v Voigt* (n 66).
[80] *Boyse v Rossborough* (n 66) 51 (Lord Cranworth).
[81] *Nicholson v Knaggs* (n 65) [121], [127] (Vickery J).

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348 In *Tobin v Ezekiel*,[82] Brereton J endorsed this:

> In the context of civil proceedings, it is of course not necessary that the circumstances admit of no rational hypothesis inconsistent with undue influence; but undue influence must more probably than not be the true explanation.[83]

349 In both cases, the judges considered that given the seriousness of an allegation that a will had been procured by coercion or fraud, the principles expressed in *Briginshaw v Briginshaw* were applicable.[84] These principles require that the gravity of the allegation of undue influence, the significance of property passing under a will, and the inability of the testator to give evidence, should be taken into account in considering the evidence.

350 The statement of principle by the Lord Chancellor in *Boyse v Rossborough* does not impose any standard or onus of proof that differs from the general law as it applies in Australia.[85] The party alleging undue influence must show that the circumstances attending the execution of the will are inconsistent with the will having been obtained other than by undue influence. The standard to which they must show that the circumstances are so is on the balance of probabilities. If all they are able to prove is that undue influence and a lack thereof are equally likely, they have not proved their case. They must instead show that on balance, the hypothesis that the testator has been unduly influenced must be more likely than the contrary.

The respondents' claim

351 The respondents allege that from around 2013, the applicant commenced exerting pressure on the deceased to change the devise of Brewers to be on terms more favourable to himself.

352 They allege that the applicant knew of the deceased's intention that Brewers or its market value be inherited by the girls and that the bulk of the farm land owned by the deceased would pass down the male line to the him. In knowledge of this the applicant would attend upon the deceased from time to time in the period 2013 to 2017 and state to him words to the effect that:

(a) the farm was not making as much money or was as profitable as the deceased believed;

(b) the applicant would not be able to raise or utilise funds to purchase Brewers at market value; and

(c) without Brewers, the remaining parts of the farm would likely be unviable and need to be sold, in whole or in part.

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82 *Tobin v Ezekiel* (n 36).
83 Ibid [43] (Brereton J).
84 *Nicholson v Knaggs* (n 65) [128]–[129] (Vickery J); *Tobin v Ezekiel* (n 36) [42] (Meagher JA).
85 *Boyse v Rossborough* (n 66).

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353 The respondents otherwise identify two specific events at which pressure was said to be exerted by the applicant on the deceased. First, the respondents say that on 27 September 2013, the applicant arranged for Paul to attend upon the deceased while he was at Calvary Wakefield in an attempt to have the deceased change the terms of his will as it related to Brewers. Secondly, on 23 February 2015, the applicant arranged for Paul to attend upon the deceased to change his will to permit the applicant to acquire Brewers for less than market value. Otherwise the giving of instructions for, and the execution of, the 2018 will is alleged to be caused by the ongoing undue influence of the applicant.

27 September 2013

354 As part of the argument that the applicant sought on 27 September 2013 to have the deceased change his will in respect to Brewers, the respondents sought to establish what the applicant knew around this time of the contents of the 2012 will. In short, the respondents allege that during the visit on 27 September 2013 the applicant attempted to have the deceased change the terms of his will as it related to Brewers.

355 In examination-in-chief, the applicant confirmed that he knew the 2012 will left Brewers to the girls. He knew this because the deceased had told him where the will was located at his house and asked the applicant to look at it. The applicant's evidence was that the deceased 'had told me when he was in the Village where the 2012 will was'. No other evidence was given in examination-in-chief to confirm when it was during the four years or so that the deceased resided at the Village that this occurred. Understanding that he had no right under the 2012 will to buy Brewers, the applicant said he raised that fact with the deceased. According to the applicant, the deceased's response was that it was a mistake. However, after that there was only passing further discussion on that topic between the applicant and the deceased.

356 In cross-examination, the applicant's evidence was that this conversation took place in 2013. He gave evidence that prior to 2013, he believed the deceased had a will but the applicant did not know its contents. The applicant repeated that the deceased was at the Village when he told the applicant where the will was. The applicant then said that the deceased may have still been in Maitland Hospital. The applicant then maintained that the deceased was in Maitland Hospital, but did not clarify during which admission to Maitland Hospital it was when the conversation about the 2012 will occurred.

357 The applicant agreed that prior to the conversation, the fact that he did not know what was to occur to the farming land was a source of some concern and anxiety to him, but he never raised it with the deceased as the deceased was 'very private about his business'.

358 In cross-examination, the applicant was asked what occurred after he had read the 2012 will and gave the following evidence that avoided answering the question:

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Counsel: You saw that there was no right to acquire Brewers.

Applicant: Yes, I did.

Counsel: But you also saw you would receive the rest of the farming land.

Applicant: Yes.

Counsel: What did you do about that?

Applicant: I didn't do anything about it.

Counsel: Did you speak to your father about it?

Applicant: Yes, I'm sure I would have.

Counsel: You said yesterday that you did.

Applicant: Yes.

Counsel: Did you?

Applicant: Yes.

…

Counsel: What did you say?

Applicant: I can't remember.

Counsel: Did you express any concern about what was in the will?

Applicant: I can't remember the detail.

Counsel: You did yesterday.

359 The applicant was concerned that there was no right to buy Brewers because Brewers was part of the farm and normally farmers try to retain farmland. The applicant denied that he had an expectation at the time that the will would enable him to purchase Brewers from the estate, but said he hoped that was the case. The applicant said he knew nothing of his parents' prior wills. The applicant understood that a right to buy Brewers as opposed to being gifted it absolutely was the deceased's way of accommodating the girls, apparently after the deceased told him so.

360 The applicant then gave evidence that he did not recall when the conversation with the deceased which he relayed during examination-in-chief took place. That is, he gave evidence that he did not remember when the deceased said that there being no right to acquire Brewers was a mistake. It was put to the applicant that he knew prior to 2012 that Brewers was always going to be left to the girls with him having an option to purchase it, and that it was a lie when he said he knew of it only in 2013. The applicant denied this. The applicant was later asked whether it was before or after the deceased commenced

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residing at the Village in December 2013 or January 2014 that the mistaken conversation occurred. His evidence was that it was after.

361 It was put to the applicant that his earlier evidence was that prior to the visit to the deceased on 27 September 2013 at Calvary Wakefield, when the deceased was in Maitland Hospital, the applicant had read the 2012 will. The applicant agreed, and accepted that prior to the 27 September 2013 visit, he would have known what was in the 2012 will, namely, that he had no right to acquire Brewers. Notwithstanding that the applicant was worried and concerned about the fact that if the deceased passed away at Calvary Wakefield, as the will stood he would have no option to acquire Brewers, he maintained he did not discuss the will or Brewers with the deceased at that time, during a visit that lasted an hour and half, and during which, according to him, Paul was present for that entire time.

362 The applicant denied that he told the deceased at that time that he wanted the deceased to leave Brewers to him, or the right to acquire Brewers, at less than market value. The applicant's evidence that there was no discussion of the 2012 will or Brewers at this meeting was corroborated by Paul's evidence.

363 The visit by the applicant and Paul on the deceased on 27 September 2013 is referred to at paras [60]–[61]. Paul gave evidence that the main reason he went to Calvary Wakefield was to see his own mother who was also in the hospital. While he was there, he saw the deceased who appeared 'a bit weak', having 'been through the wringer' in terms of suffering from an infection that took some time to be properly diagnosed. It was put to Paul in cross-examination that the applicant had asked him to attend upon the deceased so that the deceased could give Paul new instructions in respect of Brewers as the deceased was very sick. Under cross-examination, Paul admitted he did not go solely to visit his own mother. His best recollection was that the applicant had told him that the deceased was in hospital and Paul offered to visit the deceased. Paul's evidence was that the applicant may have said 'Dad might want to change his will'. Paul denied that the applicant wanted him to attend in order for the deceased to give new instructions for an amendment in respect of Brewers, saying 'I doubt that I would have gone'. It was put to Paul that the applicant said words to the effect that he could not afford Brewers if he had to pay market value. Paul said that he could not remember the applicant saying that on this occasion but he thought that the applicant had been saying this all the way along.

364 Paul could not recall whether the deceased and the applicant discussed the will during his visit. He was 'pretty sure' he was not involved in any discussion about the will. No notes were taken by him of the meeting. Paul rejected the characterisation of the deceased at this time as very sick, stating that he was improving as a diagnosis had been made.

365 The applicant denied that he telephoned Paul asking him to come to the hospital in order to discuss the deceased's will. He said that Paul was visiting his

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mother, and when the applicant ran into him at the hospital and informed him that he was visiting the deceased, Paul joined him. According to the applicant, the three of them discussed social matters, the family and the farm and there was no discussion in relation to the will.

23 February 2015 meeting

366 The evidence as to the 23 February 2015 meeting is set out above at paras [85]–[98]. Paul's file note of this meeting records that the applicant was present at the meeting with the deceased. The applicant was unsure as to whether he was present at the meeting and gave conflicting evidence. However, his diary note on that date suggests that he did attend the meeting. At this meeting the deceased instructed Paul to change his will so that Brewers was left to the girls, with the applicant having the right to purchase Brewers for $1.5 million. The applicant accepted this amount was a considerable discount on the market value of Brewers at the time.[86] The applicant denied that the instructions came from him, as did Paul. Paul's recollection of the meeting appeared to be primarily from his file note of the meeting. His evidence was also that if there was a change regarding Brewers and the applicant was present, generally there was discussion as to the value of Brewers and that generally the applicant was involved in discussions concerning the disposition of Brewers in respect of the deceased's wills. In that regard, the applicant admitted there were times when he said to the deceased that it would be difficult for him to pay market value for Brewers, although he denied that he said to the deceased the words to the effect as pleaded.

Applicant on various topics in cross-examination

367 The applicant was also questioned as to his knowledge about the deceased's wills at various points in time.

368 It was suggested to the applicant that the question of how much he would have to pay for Brewers had been a live issue for some time. The applicant was taken to a file note recorded by Paul dated 1 April 2007, where after noting the deceased's concerns that the applicant would 'not be saddled with too much debt and will still be able to farm profitably', Paul records:

> [Mona and the deceased] were particularly concerned because of a recent conversation with [Deidre] regarding [the applicant's] inheritance.

369 The applicant said he had no knowledge of such a conversation between his wife and parents.

370 It was also put to Paul that the applicant became aware of the instructions of 4 January 2015 and so arranged the meeting on the 23 February 2015 to have the will changed back to reflect the instructions recorded in the document dated 28 November 2014. Paul's evidence was that he did not think that was possible.

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[86] The market value of Brewers as at 23 January 2015 was $2.8 million.

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371 The applicant's evidence was that he was not aware of the 4 January 2015 instructions until they were being shown to him in cross-examination. He denied that he knew about the instructions shortly after they were given and saying words to the deceased to the effect that he could not afford to pay market value and could only afford $1.5 million. He denied that an arrangement was made for he and Paul to meet with the deceased in February 2015 to ensure those instructions were given.

372 As at March 2015, the applicant thought the deceased's will was the 2012 will, which did not give him the right to acquire Brewers. The applicant's evidence was in many regards unsatisfactory. For example, when asked if he said that by February 2015, he had had a conversation with the deceased in relation to the 2012 will, his response was, 'It may have been mentioned, yes'. This qualified answer was completely unnecessary, given his earlier evidence that there was such a conversation. He then said it was 'quite likely' that he had spoken to the deceased about the 2012 will more than once in 2014, but that he could not remember. When asked again he said, 'I don't know'. His evidence was then that throughout the course of 2015, there was no discussion with the deceased at all in relation to his will although they did, however, speak about the price of land.

373 The respondents also sought to establish what discussions the applicant had had with the deceased about market value being paid for Brewers. The applicant's evidence in examination-in-chief was that there was never a discussion between him and the deceased that he might have to pay market value for Brewers. In cross-examination his evidence was that it was not until 2013 that the deceased mentioned that market value was 'something he had in mind' and that although it was not true to say there was never a discussion, it was not something the deceased spoke about often:

> Counsel: [D]id he tell you at some point that's what he wanted?
>
> Applicant: It was a possibility.
>
> Counsel: He told you it was a possibility?
>
> Applicant: He mentioned it, he didn't say this is what I'm going to do.
>
> Counsel: What did you say?
>
> Applicant: I would have said — I think I would have said that would have been difficult.
>
> Counsel: And what did he say?
>
> Applicant: I can understand that.
>
> Counsel: Isn't that a [discussion] about you might having to pay market value for Brewers?

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Applicant: Yes.

374 When asked if, at the time of the conversation about the mistake in the 2012 will, market value was mentioned, the applicant said no:

Counsel: At what point do you say this discussion about market value did occur?

Applicant: I knew about it by 2015.

Counsel: How did you come to know about it?

Applicant: Dad told me.

Counsel: So at some point after the conversation where he's told you it was a mistake you've had another conversation where he's told you that he wants you to pay market value.

Applicant: No, he didn't say he wanted me to pay market value, he said my sisters wanted it market value.

Counsel: When did he say that to you?

Applicant: I think sometime in 2015.

Counsel: Where were you when this conversation took place?

Applicant: At the Village.

...

Counsel: What did you say?

Applicant: I said that's going to be difficult.

375 The applicant's explanation for why he had previously said he had not had a discussion with the deceased that he might have to pay market value was, first, because he 'hadn't up to that point'. The applicant's evidence thus far was that there was never a discussion on that topic; that it was not until 2013 that market value was mentioned; and now that the discussion took place in 2015. Secondly, the applicant said it was not a discussion with the deceased, rather it was the deceased relaying that the respondents wanted Brewers to be at market value.

376 The applicant was also questioned about his meeting with the deceased on 29 March 2017 recorded in his diary. The questioning appeared to relate to the respondents' assertions that the applicant exerted pressure on the deceased to change the devise of Brewers to be on terms more favourable to him. The evidence as to the meeting is set out above at paras [118] and [121]. The applicant said that the deceased said at the meeting that he wanted the applicant to have Brewers at the then council valuation of $1,850,000 plus $1 million. The applicant denied that he suggested to the deceased that this was the price he should have to pay and also said he did not know why the amount for Brewers had changed when one month earlier, in February 2017, the deceased had wanted

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the applicant to pay $1.5 million for Brewers. The applicant denied that whenever he saw the deceased in this period he said words to the effect he could not afford to pay the higher amount for Brewers.

Expert evidence

The first Lonie report

377 The first Lonie report was directed to reviewing the documentation and medical evidence relating to risk factors for undue influence in the context of the deceased's wills from 2013 onwards. In considering her task, Dr Lonie assumed the correctness of the facts alleged by the respondents as pleaded in the second defence and had regard to the general practitioner records, Calvary Hospital records, Maitland Hospital records, and Village records, including the Resident Progress Notes, Resident Care Plans, and Resident Assessment Reports. As stated at para [244], the Village records were not accurate or up to date and did not reflect what was written in progress notes by visiting allied health professionals, general practitioners and Village staff.

378 In addressing the deceased's cognitive status as a risk factor for undue influence, Dr Lonie opined:

> The balance of the medical evidence suggests that [the deceased] was suffering cognitive impairment from 2013 onwards …
>
> The cognitive findings are significant in so far as they indicate that [the deceased] would have been reliant upon his children, and arguably in this sense particularly his son, [the applicant] (on account of his having taken over the business affairs of the farm from September 2013[87]) to provide him with up to date and accurate information of the value(s) of land and other assets … and the operational costs associated with the same, in order to arrive at a decision as to how he wished to distributed [sic] his estate between each of his surviving children … It is suggested that this would have entailed information pertaining 'the increasing value of Brewers; increasing debt that would have to be serviced by the farming operations if the [applicant] has to pay an increased amount for Brewers, the net farm income, and the degree to which the farming operations were in debt or cash-strapped, the increasing value of the other assets intended to pass to the deceased daughters [sic]'.
>
> Given that Mr Moloney is said to have been requiring assistance with routine bill payments from September 2013 onwards, it is doubtful he would have retained the cognitive capacity to balance or weigh up the claims of his each of his [sic] children in the light of such knowledge.
>
> Furthermore, the medical evidence suggests that it is highly unlikely that Mr Moloney would have had the short-term memory ability to retain the details of his discussions with [Paul] around the preparation of the 2018 will across the time period 15 August 2017 – 15 February 2018. In this context it is noted that [the deceased] is said not to have read or had the 2018 will read to him before he signed it.

[87] Dr Lonie was instructed to accept certain factual matters, including that the deceased ceased to be regularly involved in the affairs of the farm and its business in 2013.

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> The medical evidence further suggests that [the deceased] is likely to have experienced considerable difficulty hearing and understanding conversation pertaining to the contents of the will, unless very deliberate actions were taken to communicate with him in at a [sic] reduced pace, in a piecemeal manner, using direct eye contact and regularly repeating information and checking in order to ensure that he had comprehended what had been said.

379 Dr Lonie further opined that other factors including pain, anxiety, disturbed sleep and medications including sleep aids and analgesics, 'are likely to have compounded any communicative and/or decision making difficulties arising secondarily to his losses of cognitive and sensory (hearing and visual) function'.

380 Dr Lonie concluded that, inter alia, an undiagnosed early stage dementia in existence from 2013 onwards meant that the deceased was vulnerable to undue influence from family members in making decisions as to the distribution of his estate.

The first Moore report

381 Dr Moore was asked to comment on the conclusions in the first Lonie report to the effect that, from 2013 onwards, the deceased would have been 'susceptible to the influence of others' or 'vulnerable to the influence of family members, specifically his children, in the context of estate distribution decisions'. In particular, Dr Moore was asked for her opinion, based on her consultations and dealings with the deceased, of whether he was at any time in the period from 2013, a person who would be, or was likely to be, coerced or compelled into signing a will which he did not wish to sign.

382 Dr Moore found the deceased a very independent, strong willed man who was not easily influenced right up until his death, and referenced the following matters to support her opinion:

(a) In August 2010 the deceased suffered a myocardial infarct and was transferred to a hospital in Adelaide. Dr Moore recalled that prior to his ambulance transfer and while in the resuscitation room at the Maitland Hospital, in the presence of the applicant, discussing his advance care directive and the deceased said he wanted full resuscitation measures;

(b) On his return from the hospital in Adelaide, the deceased had trouble sleeping and required a small dose of temazepam 5 mg at night, which in late 2011 was increased to 10mg. He walked daily and managed well at home on the farm, and continued to drive his car locally;

(c) On 12 December 2013 Dr Moore organised a family meeting in the hospital to discuss possible care options for the deceased. From her memory, in addition to the deceased and herself, the applicant and two of the deceased's daughters were present, as well as a registered nurse. Dr Moore's recollection was that the deceased was very much in

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charge of the family group and it was only on her recommendation that he accepted that he required respite residential care, even though he was not pleased. The deceased was transferred to the Village on 20 December 2013, initially for respite care that became permanent on 20 February 2014;

(d) Dr Moore's experience is that going into residential care can be very challenging for some people, especially those who have been the patriarch of their family and a product of their generation. The deceased found it difficult and took some time to adjust. This was reflected in his observed behaviours, for example, finger tapping, being short with staff, not taking direction and sleep disturbance;

(e) In February 2016 the deceased had suffered acute urinary retention, and needed a urinary catheter inserted. Blood tests revealed elevated prostate specific antigen levels that strongly indicated the presence of prostate cancer. After discussion with the visiting urologist, a diagnostic prostate biopsy was booked with him for early May 2016. The booking was cancelled because the deceased had a fall that resulted in a fractured right hip and left femur. He was transferred from the Village to Maitland Hospital and then for specialist orthopaedic treatment at the Royal Adelaide Hospital. He had a total right hip revision as well as an internal fixation of the left femur and returned to the village on 17 May 2016.

Consideration — undue influence

383 The respondents contend that the applicant unduly influenced the deceased in the lead up to and in the making of the 2018 will on the basis of the discussions between the applicant and the deceased over time and when the deceased was elderly, mentally and physically unwell and susceptible to influence.

384 By 2013 the applicant knew what was in the 2012 will, namely, that he had no right to acquire Brewers. The deceased's wills and evidence of his testamentary intentions from 2013 onwards show a stark contrast between the deceased's position when the applicant was present and when he was not. This was compounded by Paul not recognising that it was inappropriate for the applicant to be present when Paul met with the deceased regarding his various wills.

385 Paul also said that if there was a change regarding Brewers and the applicant was present, generally there was discussion as to the value of Brewers and that generally the applicant was involved in discussions concerning the disposition of Brewers in respect of the deceased's wills. Paul's response to the question as to whether the applicant said words to the deceased to the effect that he could not afford Brewers if he had to pay market value at the meeting on 27

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September 2013, addressed a wider view when he said the applicant had been saying this all the way through.

386 The meeting on 27 September 2013 with the deceased was attended by the applicant and Paul. Shortly after that meeting the deceased called Margaret and asked her to come and see him. He gave her a handwritten note signed by him dated 28 September 2015, although it was signed on 29 September 2015, to the effect that he wanted Brewers left to the girls at market value.

387 On 4 January 2015 the deceased instructed Paul to change his will so that the applicant would receive $500,000 and he could also receive Brewers if he paid the market value of Brewers to the girls.

388 The next month there was a meeting on 23 February 2015 of which Paul's recollection was primarily from his file note. The instructions were that Brewers would be left to the girls with the applicant having the right to purchase it for $1.5 million. The applicant was present at the meeting. This instruction provided a considerable discount to the applicant as the market value of Brewers was then $2.8 million. Despite this, Paul thought that it was not important to ascertain the reasons for the deceased's changed in his instructions in a little over a month, in circumstances where he was taking instructions from the deceased in the presence of the applicant, who stood to benefit from that change in instructions.

389 On 19 March 2015 the deceased called Paul and told him that he wanted the will put back as it was, that is, as contained in the 2012 will with Brewers to be acquired for market value. On this occasion the applicant was not present when the call was made by the deceased.

390 A draft will dated 30 July 2015 reflected the market value position for Brewers as adopted in the draft 2010 will.

391 The will dated 18 January 2016 provided for the disposition of Brewers consistent with instructions in Paul's notes dated 4 January 2015.

392 On 18 August 2017 the deceased gave instructions for the 2018 will in the presence of the applicant. On this occasion the applicant stood to benefit from the instructions given by the deceased.

393 On 27 October 2017 the deceased made an entry in his notebook after the applicant visited him for six hours and during which time the applicant may have spoken to him about the will and Brewers. The entry recorded, in effect, that the deceased wanted to leave Brewers, the Grant Avenue property and cash to the girls.

394 On 15 February 2018 the deceased signed the 2018 will in the presence of the applicant.

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395 The applicant's involvement in the deceased's wills and testamentary intentions from 2013 onwards establishes that he was far from disinterested in the deceased's testamentary dispositions. His evidence was largely unresponsive to the issues.

396 Based on the deceased's wills and testamentary instructions from 2013 onwards, it is open to conclude that the deceased would not have given those instructions or made the wills that preferred the applicant in a substantial manner if the applicant had not been present or involved in the will making process.

397 It is also a fair inference that these instructions resulted from the applicant placing pressure on the deceased over the years by telling him in substance that without the changes being made in respect of Brewers, the viability of the Moloney farm was at risk, on the various grounds alleged by the respondents at para [352] above. Whether the viability of the Moloney farm was in fact at risk is not known yet it appears to be the primary basis for urging the change in the dispositions in the 2018 will, as well as the earlier wills that favour the applicant. It may be accepted that the deceased had the objectives of maintaining the family farm but the evidence also strongly supports that he was concerned about the inheritance to be received by the girls. It may be inferred that the deceased would not have given the instructions for, or signed, the 2018 will if the applicant had not pressured him regarding the viability of the Moloney farm being at risk over the years.

398 The Court is satisfied that the instructions for the 2018 will were not the genuine instructions of the deceased and that the 2018 will was the product of undue influence of the applicant upon the deceased.

Conclusion

399 The deceased did not have testamentary capacity on 18 August 2017 when he gave instructions for the 2018 will or when he signed the 2018 will on 15 February 2018. Given this, it was unnecessary to decide the issues of knowledge and approval and undue influence. However, as these issues were before the Court, it was appropriate to determine them in any event.

400 The determination as to the deceased's lack of testamentary capacity means that the 2018 will should not be admitted to probate. In that event, the parties agreed that the respondents would seek rectification of the 2012 will so that it includes an option for the applicant to purchase Brewers at market value and that the 2012 will, as rectified, be admitted to probate.

Orders

401 The parties are to forward proposed orders to that effect on or before 5 August 2022. In the event that the parties are unable to agree on the costs of the proceeding, written submissions are to be filed by 9 September 2022.

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