Neutral Citation Number: [2014] EWCA Civ 280

Case No: A3/2013/1653

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT, CHANCERY DIVISION
Mr Nicholas Strauss QC (sitting as a Deputy High Court Judge)
HC10C0430

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 13th March 2014

Before :

LORD JUSTICE SULLIVAN
LORD JUSTICE McFARLANE
and
LORD JUSTICE LEWISON

- -

Between :

SIMON	**Appellant**
- and -	
BYFORD & ORS	**Respondent**

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
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165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Ms Penelope Reed QC and Ms Sarah Haren (instructed by **Lyons Davidson Limited**) for the **Appellant**
Mr Dennis Sharpe (instructed by **Lindops Solicitors**) for the **Respondent**

Hearing date : 5 March 2014

- -

Judgment

Lord Justice Lewison:

The issue

1. The issue raised on this appeal is whether the late Mrs Constance Simon who died on 15 January 2009 (a) had testamentary capacity and (b) knew and approved the contents of her will when she executed it at or immediately after her 88th birthday party on 18 December 2005. The judge (Mr Nicholas Strauss QC) answered both those questions in the affirmative. One of Mrs Simon's sons, Robert Simon, appeals.

2. Ms Penelope Reed QC and Ms Sarah Haren appear for Robert. Mr Dennis Sharpe appears for two of his siblings. For the reasons that follow, I would dismiss the appeal.

3. The judge's judgment, which runs to over 70 pages and 160 paragraphs is very detailed. It is at [2013] EWHC 1490 (Ch). It is not possible to reproduce the whole of his narrative or his factual findings. But it necessary to set out sufficient of it so that the questions arising on this appeal can be put into proper context.

Background facts

4. Mrs Simon had four children: Jonathan, Hilary and Robert (who are twins) and David. Hilary is married to Prof Martin Woolley (who was present when the disputed will was signed). Mrs Simon's late husband had founded a manufacturing company called RW Simon Ltd. At the time of the will each of her children held 14,997 shares in the company; and Mrs Simon held the remaining 16. The effect of this was that each of the four children had a 24.99 per cent shareholding. Mrs Simon had retained the remaining shares to prevent deadlock. At the date of the disputed will Robert, Hilary and Jonathan were all directors of the company. Robert was the managing director, and it seems that neither Hilary nor Jonathan played any active day to day role in the company's business. David had died of cancer in November 2004, and his son Louis had committed suicide in August of that year.

5. It is also necessary to mention at this point that Mrs Simon had a long-standing housekeeper called Mary Murray who had begun to work for her in 1970. In later years she assumed a greater role which the judge described as "generally looking after Mrs Simon and ensuring that her life ran smoothly". Mrs Murray was paid a salary of £36,000 per annum and pension contributions.

6. Mrs Simon's main assets were her house in St John's Wood (valued at £1.75 million at the date of her death); a flat in Westcliff-on-Sea (valued at £262,000), savings and shares worth about £55,000 and her shares in the company. The assets which underlie this dispute are the Westcliff flat and the shares. Although they form a small part of the overall estate, ownership of the shares may serve to change control of the company; or at least either to permit or to prevent deadlock.

7. Mrs Simon had made a number of wills before the disputed will. They were:

    i) A will dated 23 March 1978 by which she left all her property to her four children in equal shares.

ii) A will dated 15 June 1992 by which she left a legacy of £20,000 to Mrs Murray but otherwise left her property to her children in equal shares, subject to a deduction from David's share for any amount still outstanding on a mortgage of the Westcliff flat which had been taken out to provide funds for David.

iii) A will dated 1 August 1994 by which she again left a legacy of £20,000 to Mrs Murray; bequeathed the 16 shares in the company and the Westcliff flat to Robert, but otherwise left her property to her children in equal shares.

iv) A will dated 27 June 1996 which was in the same terms (apart from a change in the executors, who were named as Mrs Murray and Robert). That will was supplemented by a codicil dated 27 January 1999 which replaced Jonathan's share with a discretionary trust because of some financial difficulties that he was then experiencing.

8. She also signed an enduring power of attorney in 1998 in favour of Mrs Murray and Robert. But that was not activated until 2009.

9. The judge made two findings about Mrs Simon's general approach to her assets. The first was that she was always insistent on treating her children equally. She used to say that "if there is only one apple, it be divided equally into four". The second concerned the reasons for the alteration of the equal dispositions between her children in the 1994 and 1996 wills, which had favoured Robert. These were set out in a letter dated March 1993 which she did not send to her children but which she kept in her safe. However, she showed it to Mrs Murray. She began by saying that over the years she had tried to be fair in helping her children financially according to their situations. She thought it was time to review the position "in order to try to level you up". She noted the various financial benefits that each of the four children had had, and recorded that Robert had given her unstinted help. She said that:

> "It is therefore my decision that my shares in the family Company shall go to Robert – and it is well deserved that he should hold the controlling interest, for he has proved himself to be the one who should hold the reins of the Company …"

10. She concluded that:

> "Other funds in my estate must be balanced as equally as possible, after such gifts specifically stated in my will, such as my gift to Mary [Murray]…"

11. This letter dealt only with the shares as an exception to the principle of equality: the Westcliff flat was not specifically mentioned. It would, therefore, appear to fall within the general description of "other funds in my estate".

12. In October 2004 when David was close to death he wrote to his mother and his siblings. He said (among other things) that he did not object to Robert receiving the Westcliff flat as part of his inheritance, but that he would object if he was to be given the flat over and above what was to be shared between all four siblings. He also said that Mrs Simon's 16 shares should be divided equally between all four which, he said,

was a "fair and equitable basis". Although the letter (and subsequent correspondence) was sent to Mrs Simon there is no direct evidence that she read it.

Mrs Simon's general mental health

13. It was common ground that from 2001, when Mrs Simon was 83, her mental health deteriorated. The experts called before the judge agreed that by 18 December 2005, when the disputed will was made, Mrs Simon was suffering from mild to moderate dementia, to such a degree as to put her testamentary capacity in doubt. But neither expert had examined her during her lifetime and neither was able to say with certainty whether she did or did not have testamentary capacity on that date. The judge thus had to fall back on his own evaluation of the evidence of those who knew her.

14. The judge heard evidence from a number of witnesses called by each side. He did not think that any of the witnesses was deliberately untruthful. Although their accounts of Mrs Simon's mental health were very different, the judge considered that they could be reconciled. He said at [137]:

> "I do think that the claimant's witnesses tended to exaggerate, in the sense that what they described was Mrs. Simon's state for some of the time, but by no means always. I also think that the accuracy of witnesses' recollection as to the dates to which their observations related was open to doubt: it would not be easy to remember exactly when a particular stage in the decline had been reached, this does not apply to November 2004. Equally I think that Hilary exaggerated in suggesting that, when she saw her mother, she was her normal self."

15. His general conclusion at [138] was:

> "In my view, the key to the dispute of fact is Professor Howard's evidence that once capacity is lost it is lost, but that the patient's mental state may be further adversely affected by other factors at some times. This explains the "good days" and "bad days" observed by Martin, both in Mrs. Simon and in his mother-in-law. Therefore, it is not so surprising that Mrs. Simon was at times unable to recollect that David was dead, perhaps because of distress or tiredness, and at other times, as some of the evidence shows, well able to recall it."

The judge's approach to the evidence

16. The judge thus placed most weight on the evidence of what happened on the day when Mrs Simon made the disputed will. As he put it at [18]:

> "It follows that the most important evidence is that of the persons present when the will was prepared on 18th December 2005, namely Jonathan and his wife, June, Hilary and her husband Professor Martin Woolley, and Ann Schlachter and Derek Basten, whose roles will be explained below. Hilary gave evidence before the others, and apart from Jonathan, who

> as a party to the action was present during all the evidence, all the witnesses gave evidence before or in the absence of the others, and they were all fully examined in chief about the events of the day. I found their evidence to be consistent, but not so consistent as to suggest collaboration, and I found them to be credible witnesses. Since their evidence relates to Mrs. Simon's capacity at the time of the will, it is, if true, of greater significance than all the other, inconclusive, evidence."

17. In my judgment that was the right approach. As the Court of Appeal of New South Wales pointed out in *Zorbas v Sidiropoulous* (No 2) [2009] NSWCA 197:

> "The criteria in *Banks v Goodfellow* [i.e. the requirements for testamentary capacity] are not matters that are directly medical questions, in the way that a question whether a person is suffering from cancer is a medical question. They are matters for commonsense judicial judgment on the basis of the whole of the evidence. Medical evidence as to the medical condition of a deceased may of course be highly relevant, and may sometimes directly support or deny a capacity in the deceased to have understanding of the matters in the *Banks v Goodfellow* criteria. However, evidence of such understanding may come from non-expert witnesses. Indeed, perhaps the most compelling evidence of understanding would be reliable evidence (for example, a tape recording) of a detailed conversation with the deceased at this time of the will displaying understanding of the deceased's assets, the deceased's family and the effect of the will. It is extremely unlikely that medical evidence that the deceased did not understand these things would overcome the effect of evidence of such a conversation."

18. The judge had already set out his approach to the evidence at [11] where he said:

> "The will that was executed by Mrs. Simon on 18th December 2005 was prepared and executed without her being medically examined, and without a solicitor being present. Since the persons present included Hilary and Jonathan, who benefited from the changes at the expense of Robert, who was not present, I was bound to approach the issue of knowledge and approval with care, but any initial suspicion was dispelled by their evidence and the evidence of other witnesses, which I find to be truthful and substantially accurate…"

19. In essence, therefore, the judge's findings about testamentary capacity and knowledge and approval are findings of fact, based on his appreciation of the evidence as a whole. As such an appeal court should be wary of interfering with them for all the reasons that I set out in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at [114].

The birthday party

20. The party began at 2 p.m. Mrs Murray had brought Mrs Simon to the house either the previous night or on the morning of the party; and she set up the usual buffet lunch. Mrs. Simon greeted everyone, opened presents, read out her cards, and was toasted and generally the centre of attention. Jonathan sat next to her for a time, and she asked about his health and how he was getting on at work and how his children were getting on, and what he was giving them for Christmas. She liked cards with verses, and read them out.

21. By 6 p.m. most people had left. A friend of Hilary's, Ann Schlachter, stayed on, and so did a friend of Jonathan's called Derek Basten. Hilary was also there, as was her husband Prof Woolley who lived in the house during the week and kept his laptop there. The judge set out the evidence, both written and oral, in great detail. It is important to recall that he found the evidence convincing and he accepted it.

22. Things began after tea when Hilary brought up the subject of inheritance tax. She said that her father would be appalled that 40 per cent of all that he had worked for would be taken by the taxman. The witnesses all agreed that Mrs Simon insisted that something should be done about it there and then. Someone suggested that she make a deed of gift. Ms Schlachter, who had been a legal secretary, used Prof Woolley's laptop to search the internet for a suitable form of words. The evidence about Mrs Simon's instructions about the content of the deed of gift was consistent in its thrust:

> "And she asked mother what it was that she actually wanted. And mother said that she wanted to - everything to be given equally between the four children. And Anne said, "Well, this is what I found. If you tell me what it is that you want, I will type it in". And that's what - mother sort of said that it was that she wanted. Ann typed in it. ...
>
> She said, "I want everything to be divided equally between my four children. And I don't want to pay inheritance tax."" (Hilary)
>
> "A. So I said, "Who do I do this? Who has what?" So she said, "Equal, my dear". So, I mean, I think I use the word "equal". As I say, I haven't seen these documents - I've seen my statement, but I haven't seen these documents -
>
> THE DEPUTY JUDGE: Before she said, "Equal, my dear" had anybody else said about who the property should be given or anything of that sort?
>
> A. No. Because it was all about the inheritance tax.
>
> THE DEPUTY JUDGE: Yes.
>
> A. Yes. So I think, you know - so I didn't, you know, think -
>
> THE DEPUTY JUDGE: When she said, "Equal, my dear", how did you know between whom the division was to be?

A. Well, the children, between the four children." (Ms Schlachter)

23. The deed of gift mentioned the St John's Wood House, the shares in the company (although the number of shares given was wrong), and some land in Malta. It did not mention the Westcliff flat. In fact the deed of gift was ineffective because it did not comply with the formalities for execution as a deed; but no one realised that at the time. As the judge said, logically everyone should have left at that point. But for whatever reason the question of the will then arose. Again the judge set out the evidence in great detail and again he found that the evidence, taken as a whole, was convincing. I set out some extracts:

> "During supper mother said that she was pleased that she had done the gift and that would obviate inheritance tax. And then she said something about, "You know, that will go with my will". It is a long time ago in terms of recalling what took place. Then she said something about, you know, that it was the same terms as the deed of gift. And I said "No, it's not". And she said, "Well, why not?" She said. So I said, "Well, it's not. I saw something at your house some time ago which said that Robert would inherit the flat and the shares." And she said "Well, I don't want that. I want it to be divided equally". ...
>
> She – when mother heard about that she said, "Well, I want to make a new will" and got quite agitated when we said that we didn't think it was a good idea and that she should go to a solicitor. ...
>
> ... Jonathan offered the services of his solicitor in Southend. But because it was a Sunday there was nothing we could do. And she banged the table and was adamant that she wanted to do a will there and then..." (Hilary)
>
> "And then I'm trying to think how we came into doing the will. I think - I'm almost sure Mrs Simon said something about "now everything is divided equally", and then Hilary had said, "Well, it isn't in the will, mother", "what do you mean, my dear?" She said, Well, the will I saw at Robert's house wasn't divided equally". And Mrs Simon said, no, no, no, I've made a will it is divided equally. She said, "Mother. I'm telling you it wasn't. In the will I saw at Robert's house it wasn't equal".
>
> So Mrs Simon was quite upset about this. And she could see she -- as I say, she was in intel - and you could see that she was thinking about this and not understanding because she obviously thought she had divided it equally, whatever will she had made. So then she said, "Well, if you want to do that, mother, we can my solicitor in the morning". She said, "No, I want to do it now". So –

> Q. When she said that, "I want to do it now" what was her demeanour, tone of voice, volume?
>
> A. It was a cross, I think, between concern and anger. I think, I mean, she's a very lovely person; and it surprised me actually that she - that you could see that she was thinking, I'm sure it is equal, but if it isn't I want it equal. It is very hard to tell if she was." (Ms Schlachter)

24. Jonathan's evidence was that his mother had said that she was not happy with her will. His evidence continued:

> "She said, "I'm not happy. I want to do it and I want to do it now". I said, "Look Mother, you can come back with us in the car; and I know a solicitor. You can stay with us overnight and we can go there".
>
> She said, no. I want to do it now". And she tapped her fingers or her hand like (indicates) on there and said, "No. I want to do it now". I said, "Look, you're very welcome to come back with us. I know a solicitor because he looks after my own affairs." That's how I knew him.
>
> And I said, you know, "Go and see him. Make an appointment and you can go there." She said: "No, I can't come back. I've got something on on Monday", because obviously this was held on the Sunday, "and I want to do it now". And when mother wanted to do something, you know, she was quite clear in her own mind that she wanted to do is there and then.
>
> She had the family round. She wanted to do it then. That was it. Yes. As I said before, quite happy to come back. She said, "No, I want to do it now. I can't come back with you on Monday. I've got something on". I don't know what that appointment was, but that is it. ..."

25. Prof Woolley had a CD which contained templates for will writing because he and his wife Hilary had been considering making their own wills. He offered the use of that CD; and he went to fetch it. He said that he was uneasy about making the will without the help of a solicitor, but that Mrs Simon was "pretty adamant that she wanted to do it then". The CD was then given to Ms Schlachter, who typed the will.

26. Ms Schlachter's evidence about that was as follows:

> "Mrs. Simon repeated that she wished to write a new will leaving everything equally to the four children. We cleared the table and I loaded the CD onto the laptop. I opened the template and as I read through it I checked it with the deed of gift so that her wishes were the same. As I was preparing the will with Mrs. Simon, Hilary said to her mother "Don't forget Mary Murray mother". Hilary then explained to Mrs. Simon in

my presence that her mother should consider leaving Mary Murray £20,000. Mrs. Simon gave Hilary a quizzical look but said nothing. I asked Mrs. Simon whether a gift to Mary Murray should be included in the terms of her will. She nodded and I provided that a gift of £20,000 should be given to Mary Murray.

I then read the draft from the laptop to Mrs. Simon in the presence of everyone. I then asked the family to leave the room, those remaining were myself, Derek and Mrs. Simon. I then read the will from the laptop to Mrs. Simon and again she said on my reading the paragraph containing Mary Murray's gift "Should she have that much when she has a good salary and a car?" I detected that this was a real concern to her. I left the room to speak to Jonathan and Hilary. I reported to Jonathan and Hilary that their mother was querying the amount to be given to Mary Murray. Hilary and Jonathan said to me that Mary had looked after them all as children and had been looking after their mother and was still doing so and that nobody would object to this gift to her.

I returned to the dining room and explained to Mrs. Simon what Hilary and Jonathan had said. Mrs. Simon said "If that is what they want I will agree" or words to that effect.

I then asked the family to return and I asked Martin to print off the will that I had typed. I read the will to Mrs. Simon in the presence of the family and before she signed it she read it through herself and again passed comment that it was sad that David had passed away but his share was to go to the family trust."

27. In her oral evidence she said:

"A. … I read it out loud with Mrs Simon and the family there.

Q. Right.

A. And then I said, "Is this what you wanted?" "Equal, my dear, yes". So I said "Fine".

Q. Who said, "Equal, my dear?"

A. Mrs Simon. ...I read all of it to her because, having worked in the solicitors, I sort of understood it has to be read and understood by the person.

Q. Did she appear to understand it?

A. She did.

Q. Why do you say that?

A. Because I said to her, "Is this what you want? It's for equal division of your estate to the four children" and she said, "Yes, but David's will go to the trust".

THE DEPUTY JUDGE: Who said that, you or her?

A. Mrs Simon."

28. There had also been discussion of who should be named as executors. At first Mrs Simon wanted one of the family, but Hilary said that it was not a good idea, and Jonathan proposed Mr Byford, a solicitor. Mrs Simon agreed. The name of his firm was typed in. Thus according to the evidence that the judge accepted (a) the draft will was read over to Mrs Simon in the presence of the family (b) it was read to her again with the family out of the room and (c) once it had been amended (to include the legacy to Mrs Murray) and printed off, it was read to her a third time, once more in the presence of the family. In addition she read it to herself before signing.

29. Mrs Simon then executed the will, which was duly witnessed. The will appointed a firm of solicitors as executors and trustees (in place of Mrs Murray and Robert). It continued with a legacy of £20,000 to Mrs Murray. Everything else was to be divided among her four children (or in David's case the David Simon Family Trust) in equal shares. Thus the substantive difference between the disputed will and the 1996 will was that the shares in the company and the Westcliff flat were to be divided equally instead of going to Robert.

30. Mrs Simon was also insistent that neither Robert nor Mrs Murray be told about the new will.

31. Based on his appreciation of the evidence (both expert and factual) the judge summarised his conclusions at [142] as follows:

"(a) that this was one of Mrs. Simon's "good" (i.e. better) days;

(b) that she understood that the effect of a will was to leave her property to its beneficiaries on her death;

(c) that it was her wish to leave all her property to her children equally subject, after some doubt, to the legacy to Mary;

(d) that she was not influenced or persuaded except, to a legitimate extent, as regards the gift to Mary;

(e) that Ann Schlachter took her carefully and conscientiously through the terms of the will and that she understood them;

(f) that Jonathan in particular pressed her to see a solicitor, but that she refused, pleading an engagement the next day (this shows either that she remembered it, or, more likely, that she had the wit to make it up as an excuse);

> (g) that she understood, from Ann Schlachter's reading back the terms that, by signing the will, she revoked her previous will;
>
> (h) that she knew that the previous will did not leave her property equally, but in some way benefited Robert – that was why she said he was not to be told, and neither was Mary, who would have passed it on to him."

32. The judge made one other important finding at [143]. While it was just possible that Mrs Simon's long-term memory enabled her to remember how her previous will benefited Robert and why, it was very unlikely. But he did think:

> "… that her mental capacity was sufficient for her, when told that her previous will did not, as she thought, leave her property equally, to ask to see it if that is what she had wanted. I consider that she took a conscious decision, consistent with her lifelong philosophy, that she wanted to divide her properly equally, and not to look back at past dispositions."

33. It is that finding that underpins his summary, earlier in the judgment at [13], that Mrs Simon "was not capable of remembering her reasons for preferring Robert in her previous will, or its terms."

The judge's conclusions

34. The judge set out a passage from the decision of this court in *Sharp v Adam* [2006] EWCA Civ 449 (itself quoting from the classic judgment of Cockburn CJ in *Banks v Goodfellow* (1870) LR 5 QB 549) to the effect that it is essential to the exercise of a power of disposition by will that a testator:

> "[a] shall understand the nature of the act and its effects; [b] shall understand the extent of the property of which he is disposing; [c] shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, [d] that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties…"

35. He then proceeded to make his finding as regards those ingredients. As to (a) he found that Mrs Simon was capable of understanding (and did understand) the nature of a will and the effect of this will, which was a very simple one. He considered that it was sufficient that she understood that David's share would go to his family trust without further details. She was capable, if she had wanted to know who the beneficiaries under the trust would be, of asking, but did not do so. As to (b) he found that Mrs. Simon was capable of understanding (and did understand) that her property included the house in Wellington Road, in which she was at the time, the Westcliff flat, reference to which was what triggered her wish to make a new will, and some shares in the Company (but not the correct number). He also found that she was capable of understanding (and did understand) that she owned other money and investments, but on the balance of probabilities that she was not capable without being told of

remembering the details. As to (c) although he considered that there might be cases in which that requirement can only be met if the testator is capable of understanding, and possibly only if she does understand, the different provisions of an earlier will, this was not such a case. He considered that that must be a matter of degree. In this case the previous will was 9 years earlier, and the differences were slight; the beneficiaries under both wills were the obvious ones, and all received substantial gifts under both wills. Nobody was omitted. He also considered that Mrs. Simon was capable of understanding the provisions of her previous will. She was reminded of the previous, unequal, will and could have asked to see it to remind herself of its provisions. So the judge considered that she was capable of accessing the information, which she would have understood, but chose not to do so. He also found that she did actually understand that her previous will benefited Robert in some way, but now wished to treat her four children equally. He also found that she knew and approved the contents of her will.

36. Accordingly, he pronounced in favour of the disputed will.

The grounds of appeal

37. There are three broad grounds of appeal:

i) The judge was wrong in his analysis and application of requirement (c);

ii) The judge was wrong to infer that Mrs Simon was capable of understanding the extent of her estate; and

iii) The judge set the requirements of establishing knowledge and approval too low.

38. Ms Reed QC fastens on the finding at [13] that Mrs Simon "was not capable of remembering her reasons for preferring Robert in her previous will, or its terms." She says that that finding "required a finding that [Mrs Simon] lacked testamentary capacity." She says that the judge was wrong to infer that Mrs Simon was capable of understanding the extent of her estate, because the purported deed of gift, signed on the same day as the disputed will, failed to mention the Westcliff flat. Since her professed intention was to give everything to her children, she must have forgotten about the flat. The judge made no specific finding to that effect. Finally it is said that since there were suspicious circumstances surrounding the making of the will, the judge should have required affirmative proof of Mrs Simon's knowledge and approval of the contents of the will.

Testamentary capacity

39. The general common law test for testamentary capacity is that laid down in *Banks v Goodfellow*, the essence of which I have already quoted. That is the applicable test in the present case, because the will was made before the Mental Capacity Act 2005 came into force. But it is important to emphasise that at this stage what we are dealing with is *capacity*, in other words with potential. The point was clearly made by Peter Gibson LJ in *Hoff v Atherton* [2004] EWCA Civ 1554; [2005] WTLR 89. The case concerned the will of Mrs Krol, who left her substantial residuary estate to her friend Mrs Atherton. That was a change from previous residuary gifts in earlier wills. Her

testamentary capacity was challenged. The disappointed legatees argued that the judge "erred in not requiring proof of an actual understanding of the nature of the act of making a Will, the nature and extent of the property being disposed of, and the people who might be expected to benefit". The contrary argument was that capacity to understand is a distinct concept from actual understanding, proof of which is unnecessary and is rarely found. Peter Gibson LJ, as I read his judgment, accepted the latter argument. He said that testamentary capacity must not be conflated with knowledge and approval of the contents of the will. The latter requires actual knowledge and approval. But the former "requires proof of the capacity to understand certain important matters". He quoted the observation of Cockburn CJ that it was essential that the testator "shall understand" the extent of the property of which he is disposing; but rejected the submission that it followed that the testator had to have actual understanding. He said at [34]:

> "If there is evidence of actual understanding, then that would prove the requisite capacity, but there will often be no such evidence, and the court must then look at all the evidence to see what inferences can properly be drawn as to capacity. Such evidence may relate to the execution of the Will but it may also relate to prior or subsequent events. It would be absurd for the law to insist in every case on proof of actual understanding at the time of execution."

40. In other words, capacity depends on the potential to understand. It is not to be equated with a test of memory. The point made by Peter Gibson LJ is not a new one. In *Harwood v Baker* (1840) 3 Moo PC 282 Erskine J giving the judgment of the Privy Council said:

> "… in order to constitute a sound disposing mind, a Testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard; but that he must also have *capacity to comprehend* the extent of his property, and the nature of the claims of others, whom by his will he is excluding from all participation in that property." (Emphasis added)

41. He did not say that the testator must actually remember the extent of his property. Mrs Simon did in fact remember the extent of her estate, partly as a result of executing the deed of gift, and partly as a result of the discussions that followed. In my judgment, when the judge said that Mrs Simon was not "capable" of remembering why her earlier will had benefited Robert, he meant no more than that she had forgotten. Once I knew the dates of all the Kings and Queens of England, and the formula for Hooke's law; and was "capable" of remembering them. Now I would have to look them up. The judge's important finding was not that Mrs Simon had forgotten the terms of and reasons for her earlier will. It was that she was capable of accessing and understanding the information; but chose not to. Her decision to benefit her children equally was a perfectly rational decision, which many parents would make even if their children were in different financial circumstances. As an expression of understanding the claims upon her bounty that seems to me to be unexceptionable. Ms Reed made something of the fact that Mrs Simon had to be prompted to remember to include the legacy in favour of Mrs Murray. But to my mind that tends to support the

proposition that once reminded of claims on her bounty she was able to make decisions about them. Not only did she include the legacy to Mrs Murray, but she also questioned its size, before she eventually agreed to it. That, to my mind, is clear evidence of an ability to weigh up claims upon her bounty. Since her primary purpose was to benefit her children equally, it also makes perfect sense that if her children agreed with the size of the proposed legacy, she would too. She also participated in discussions about who the executors should be. Ms Reed disclaimed any reliance on equating testamentary capacity with an ability to remember the terms of and reasons for the dispositions in the previous will. But she said that Mrs Simon was incapable of going through the thought processes that had led her to leave the Westcliff flat and the shares to Robert. However, in order to go through those thought processes, Mrs Simon would have had to have remembered the reasons for those dispositions; so in my judgment her submission does amount to a requirement of actual memory. I do not consider that the judge made any error in his evaluation of requirement (c).

42. For similar reasons I do not consider that the fact (if it be a fact) that Mrs Simon had forgotten that she owned the Westcliff flat when the deed of gift was written means that she was *incapable* of understanding the extent of her estate. She had forgotten: that is all. So, for that matter, had her daughter Hilary and her son Jonathan. But Hilary's evidence which the judge accepted was that when the subject of the will came up Hilary had told her mother that under her previous will Robert would inherit the Westcliff flat and the shares; and that Mrs Simon had said that she did not want that, but wanted everything to be divided equally. There is no reason to suppose that with that prompt Mrs Simon was incapable of understanding what she had been told. Indeed the judge found as a fact that not only that she was capable of understanding, but also that she did understand that her property included the Westcliff flat.

43. Ms Reed's more substantial point was that by dividing her shareholding equally between her children Mrs Simon must have overlooked the reason why in her earlier wills she had left them all to Robert. Although she might, with the help of an explanation, have been able to understand why she had done that, in the absence of an explanation she could not. Thus while she might have understood that she owned the shares (as was apparent from the deed of gift) she did not understand their significance. Their significance was that if they all went to Robert then deadlock in the company would be prevented; whereas if divided equally among the children deadlock was possible. While it would have been open to Mrs Simon to change her mind about the desirability of leaving all the shares to Robert, she did not have capacity to do so without first understanding the consequences of doing that. This was not simply a failure of recollection. It was an inability to replicate the thought processes that had led her to her earlier disposition.

44. Although Ms Reed did not put in quite this way it seems to me that the question that divides the parties is whether a testator or testatrix must not only be capable of understanding what assets are at his or her disposal and the persons who have claims on those assets, but must also understand not simply the direct consequences but also the collateral consequences of disposing of them in one way rather than another. In the present case on the judge's findings:

    i) Mrs Simon knew that she had shares in the company (because they were mentioned in the deed of gift);

ii) She knew that she wished to distribute her assets equally among her children, and that included the shares;

iii) She knew that that was a departure from her previous will;

iv) She knew that the departure was detrimental to Robert (which is why she did not want him to be told about the new will);

v) Thus she understood that the direct consequence of her decision was that her children would participate in the shares equally.

45. I do not believe that previous authority goes to the length of requiring an understanding of the collateral consequences of a disposition as opposed to its immediate consequences. Nor do I think it desirable that the law should go that far. As Mummery LJ put it in *Hawes v Burgess* [2013] EWCA Civ 74; [2013] WLR 453 at [14]:

> "The basic legal requirement for validity are that people are mentally capable of understanding what they are doing when they make their will and that what is in the will truly reflects what they freely wish to be done with their estate on their death."

46. The significance of the shares on their own was slight. What gave them significance (at least to Robert) was the fact that, combined with his existing shareholding in the company, acquisition of Mrs Simon's shares would give him the power to avoid deadlock. But that would have required Mrs Simon to have understood (and remembered) not only what her own estate was, but also what Robert's assets were. I do not think that any of the authorities requires as a condition of testamentary capacity that the testator should understand or remember the extent of anyone else's property. Again, what Ms Reed's submission really amounts to is a memory test. In fact the classic formulations of testamentary capacity (quoted above) limit themselves to requiring the testator to understand no more than the *extent* of his property. They do not require him to understand the significance of his assets to other people.

Knowledge and approval

47. When we move on to knowledge and approval what we are looking for is actual knowledge and approval of the contents of the will. But it is important to bear in mind that it is knowledge and approval of the actual will that count: not knowledge and approval of other potential dispositions. Testamentary capacity includes the ability to make choices, whereas knowledge and approval requires no more than the ability to understand and approve choices that have already been made. That is why knowledge and approval can be found even in a case in which the testator lacks testamentary capacity at the date when the will is executed. The reason for this requirement is the need for evidence to rebut suspicious circumstances: *Perrins v Holland* [2010] EWCA Civ 840; [2011] Ch 270 at [25]. Normally proof of instructions and reading over the will will suffice: ibid at [25]. The correct approach for the trial judge is clearly set out in *Gill v Woodall* [2010] EWCA Civ 1430; [2011] Ch 380. It is a holistic exercise based on the evaluation of all the evidence both factual and expert. The judge's starting point in our case was one of "initial suspicion", given that the

disputed will was prepared and executed without a solicitor and without Mrs Simon having been medically examined: see [11]. But having heard the evidence he held that his initial suspicion had been dispelled. He found it clear that Mrs Simon knew that she was making a will, took a conscious decision to make it and approved its terms. This conclusion was, in my judgment, fully supported by the evidence that the judge accepted. In particular he accepted the evidence of Ms Schachter that she read the draft will to Mrs Simon twice; and having typed the will, she read it again to Mrs Simon who appeared to understand it. She did that because, as a former legal secretary, she understood that the will had to be read and understood by its maker. Mrs Simon also read it to herself. Given that the will was relatively simple, and that the judge had found that Mrs Simon had testamentary capacity, his finding of knowledge and approval is in my judgment unassailable.

Result

48. I would dismiss the appeal.

Lord Justice McFarlane:

49. I agree.

Lord Justice Sullivan:

50. I also agree.