Neutral Citation Number: [2025] EWHC 2494 (Ch)

Case No: PT-2023-BRS-000062

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Bristol Civil Justice Centre,
2 Redcliff Street, Bristol BS1 6GR

Date: 06/10/2025

Before :

MR JUSTICE MICHAEL GREEN

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Between :

(1) STEVEN MAILE	**Claimants**
(2) JOHN MAILE	
- and -	
(1) RUTH ELIZABETH MAILE	**Defendants**
(2) SHEILA MARY KEMPTHORNE (as executrix and beneficiary of MARY ELIZABETH STEVENS deceased)	
(3) GEMMA MARIE KEMPTHORNE	
(4) PIPPA ELIZABETH SMITH	
(5) PETER MAILE	

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Mr Thomas Dumont KC (instructed by **Stevens Scown LLP**) for the **Claimants**
Mr Alexander Learmonth KC (instructed by **Michelmores LLP**) for the **Second Defendant**
Mr Aidan Briggs (instructed by **Ashfords LLP**) for the **First and Fifth Defendant**
The Third and Fourth Defendants were not represented

Hearing dates: 1st – 10th July 2025

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Approved Judgment

This judgment was handed down remotely at 2pm on 6 October 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE MICHAEL GREEN:

A INTRODUCTION

1. The inheritance of family farms gives rise to many problems, some of which are particularly difficult for testators to resolve. Certain family members may work on the farm in the expectation that one day they will inherit it. But the testator or testatrix who owns the farm has to reconcile their wish for the farm to continue to be run by the family with the overriding desire to be fair to the whole of their close family.

2. It seems that the testatrix in this case, Mrs Mary Elizabeth Stevens (the "**deceased**") was wrestling with this issue throughout the latter years of her life. She died on 22 March 2020 aged 96. She owned the farmhouse, land and farm buildings known as West Hook Farm, Okehampton, EX20 1RL (the "**Farm**"). The Farm extended to some 170 acres, has a 6-bedroom farmhouse and a number of outbuildings. It was and is a mixed arable and livestock farm. According to the deceased's last will, the Farm fell into residue and was therefore left to her two daughters, Mrs Ruth Maile (the First Defendant – "**Ruth**") and Mrs Sheila Kempthorne (the Second Defendant – "**Sheila**") equally. Unfortunately, her family have been unable to agree how her estate should be distributed.

3. The deceased's grandsons, Mr Steven and Mr John Maile, the Claimants, ("**Steven**" and "**John**" respectively) who are the sons of Ruth and Mr Peter Maile (the Fifth Defendant – "**Peter**"), have brought two claims in respect of the Farm:

    (i) They seek to set aside two codicils executed by the deceased: on 18 February 2016 (the "**2016 Codicil**"); and on 24 August 2017 (the "**2017 Codicil**"). The effect of the 2016 Codicil was to revoke a Codicil made on 8 June 2011 (the "**2011 Codicil**") which left the Farm to the Claimants, and to revert to the will dated 30 March 2006 (the "**2006 Will**") which, after leaving the live and dead stock to the Claimants and making certain other pecuniary legacies, left the residue of the estate, including the Farm, to the deceased's daughters, Ruth and Sheila, equally. The Claimants say that, in respect of the 2016 and 2017 Codicils, the deceased lacked testamentary capacity, and/or did not know and approve their contents, and/or was subject to undue influence.

    (ii) They also bring a proprietary estoppel claim based on alleged representations by the deceased that the Farm would be left to them on her death, in reliance on which they say they have suffered detriment.

4. The principal Defendant is Sheila, as both the executrix of the deceased's estate, she having extracted a grant of probate on 18 July 2021, and as a beneficiary of the estate. She denies her nephews' claims and furthermore says that they do not come to the court with "clean hands". She has also pursued a counterclaim against the Maile family, ie the Claimants and their parents, Peter and Ruth, for possession of the Farm (they all continue to live there, as they did before the deceased died) and for mesne profits and/or damages for their unlawful use and occupation.

5. It is unfortunate, to say the least, that this case has had to come to trial and could not be settled out of court. It has even led to allegations that the deceased's signature was forged on certain documents that led to the Maile family extracting more funds from the deceased than they were entitled to or to which the deceased agreed. Surely it should

have been possible for the huge amounts of money spent on this litigation to have been put to better use by doing what the deceased always wanted her family to do, which was to ensure a fair split of her estate.

6. This is an unusual case where there is no evidence that the deceased fell out with any members of her family. It is also curious in the sense that it is a claim by the relatively young second generation, rather than the first, meaning that there would have been far less of their lives devoted to the Farm, and still a lot more of their lives to live without having allegedly wasted much of their time in getting to the present position. In other words, it is not the usual case of a farmer's child or children claiming that they gave up most of their working lives on the strength of promises made to them, but which were ultimately not reflected in the will. Furthermore, so far as the Claimants are concerned, this is not the only relevant Farm, as they were also in partnership with their father in relation to the neighbouring farm owned by Peter ("**Agistment Farm**") at which they worked the majority of their time and would expect to inherit in due course, together with whatever was left to them by their mother.

7. It is important to keep in focus the wider picture and context. That includes the fact that in relation to the Farm the Claimants entered into a partnership with the deceased in 2015 for inheritance tax reasons. That conferred significant benefits on the Claimants including an option to acquire the Farm on the deceased's death. Whether or not that featured in the deceased's thinking at the time of the 2016 and 2017 Codicils is not clear but it meant that there was a route by which the Claimants could have secured the Farm for themselves on favourable terms, if they were not to inherit under the deceased's Will.

8. The Claimants were represented at the hearing by Mr Thomas Dumont KC; Sheila was represented by Mr Alexander Learmonth KC; and Peter and Ruth were separately represented by Mr Aidan Briggs. The Third and Fourth Defendants, Mrs Gemma Kempthorne ("**Gemma**") and Mrs Pippa Smith ("**Pippa**"), are the daughters of Sheila and her husband James Kempthorne. They are beneficiaries under the 2006 Will, but receive the same pecuniary legacy of £10,000 whichever of the Codicils remain in force. They were not represented before me but they both gave evidence on behalf of their mother.

9. I am grateful to Counsel and the parties for their helpful submissions, both oral and written, and for the manner in which this trial was efficiently conducted within the pre-set timetable, despite the almost unbearable heat in the courtroom. As is common in these cases, I will refer to the family members by their first names, as they did throughout. No disrespect is intended.

B SUMMARY BACKGROUND AND ISSUES

10. As noted above the deceased owned the Farm. She lived at the Farm from her marriage until her death. The Claimants lived at the Farm all their lives, their parents having been there for most of their married life together.

11. On the Farm there are also three holiday cottages, called: Clover, Daisy and Meadowsweet (also known as 1, 2 and 3 East Hook respectively). The deceased had a

50% interest in each of the cottages. From 2006 onwards, Ruth owned the other 50% interest in Clover and Daisy; and Sheila owned the other 50% interest in Meadowsweet. References to the Farm do not include the cottages, and under all versions of the deceased's Wills, her 50% interest in them fell into residue and are therefore to be divided equally between Ruth and Sheila.

12. Under the 2006 Will, the Claimants were left all the deceased's live and dead stock. The Farm however fell into residue. The 2011 Codicil left the Farm and the live and dead stock to the Claimants. This was revoked by the 2016 Codicil which reverted to the 2006 Will and the Farm fell into residue. By the 2017 Codicil the deceased left a particular meadow, Hook Meadow, to Sheila, but otherwise left the provisions of the 2006 Will in place. As stated above, Gemma and Pippa received a £10,000 pecuniary legacy each.

13. Agistment Farm, which neighbours the Farm, was owned by Peter and his parents and he inherited it after his parents' shares in it after they died, his mother dying in 2012. Then in 2013, Peter went into the E. A. Maile Partnership with his sons to farm Agistment Farm (the "**Maile Partnership**").

14. In or around 1988, the deceased and her husband Mr Kenwyn Stevens, entered into an oral tenancy arrangement with Peter for him to farm 86 acres of land on the Farm (the "**Tenancy**"). As part of the negotiations for the partnership that was entered into by the Claimants and the deceased in 2015 (the "**Partnership**"), predominantly for inheritance tax purposes, Peter surrendered the Tenancy in 2014. The Partnership between the Claimants and the deceased was constituted by a written Partnership Agreement dated 12 February 2015 ("**Partnership Agreement**"). As the deceased was putting the Farm into the Partnership, the Partnership Agreement provided that it was special capital held by the deceased. As stated above the Partnership Agreement also provided for an option to purchase the Farm (the "**Option**") on the death of a partner by serving a notice within 3 months of the Grant of Probate. The Option allowed the surviving partners to have 5 years to pay for the Farm. However the Claimants never exercised the Option.

15. A single joint expert was appointed to value the various areas of land that formed part of the deceased's estate. This showed that the market value of the Farm as at 22 March 2020 (date of death) was £1,730,000; and as at 7 April 2025 it had increased in value to £1,945,000. Adding in the deceased's 50% interest in the cottages and Hook Meadow and certain other land, the total value of the land in the estate is: as at 22 March 2020, £2,305,000; and as at 7 April 2025, £2,650,000.

16. The Claimants' probate claim is to set aside the 2016 and 2017 Codicils on the basis of lack of testamentary capacity, want of knowledge and approval and/or undue influence by Sheila and/or the deceased's solicitor, Mr Clive Smale of Peter, Peter & Wright who was involved in the preparation and giving of advice in relation to all three Codicils. It is right to say at this stage that I find it extraordinary that such an allegation was made and pursued against a solicitor who did not stand to gain from the deceased's Will, nor was he pressing for one side of the family to benefit over the other.

17. Sheila denies all three bases for the probate claim. It is an unusual feature of this case that both sides' old age psychiatrist experts agreed that there was nothing in the deceased's medical history or the contemporaneous documents that suggested that she lacked testamentary capacity. Those contemporaneous documents include transcripts

of various conversations that John, in particular, had with the deceased in 2016 and which he decided secretly to record. He also recorded a conversation between Sheila and the deceased and a long meeting on 2 June 2016 between the deceased, the Claimants, Ruth and Mr Smale at his offices to discuss whether the deceased wanted to stick with her 2016 Codicil. I will consider those transcripts in due course, but it is indicative of John's personality and strength of feeling on this issue that he was prepared to do something like this in relation to his grandmother. As to testamentary capacity, the Claimants have to get past the expert evidence that is clearly against them. They say that it is a matter for me to decide based on all the evidence. They say that Mr Smale did not follow the so-called golden rule of obtaining a capacity assessment at the time of execution of the 2016 Codicil.

18. As for knowledge and approval, the Claimants rely principally on the deceased's apparent confusion as to what she had done in the 2016 Codicil as evidenced both by Mr Smale's attendance notes and the transcripts and other witness evidence. Sheila says that the involvement of Mr Smale, an experienced will drafting solicitor, who took great care to ensure that the deceased knew what she was doing and confirmed this on a number of occasions subsequently and in detailed and accurate attendance notes, is an insuperable obstacle to the claim. She also points out that the Claimants and their parents actually rely on the fact that the deceased had capacity and knew what she was doing in various other financial transactions entered into during the relevant period.

19. The proprietary estoppel claim is based on the Claimants' assertion that the deceased made various representations that the Farm would be left to them on her death, including after she had apparently changed her mind as to that in the 2016 Codicil. They claim that, in reliance on such representations, they suffered detriment insofar as they worked for free on the Farm and gave up other opportunities to pursue work and to live elsewhere, they invested in the Farm and their father, Peter, gave up the Tenancy. They say that this detriment was of a transactional nature and that the minimum equity to do justice in the circumstances is to transfer the Farm in its entirety to them. Alternatively they pleaded that because of their efforts and investment in the Farm and the detriment suffered because of the deceased's representations, the estate should hold the Farm on constructive trust for them. This was not separately pursued by Mr Dumont KC and I will say no more about it.

20. Sheila challenges each element of the proprietary estoppel claim. She says that there was no clear representation or assurance by the deceased that they would inherit the Farm and certainly after she changed her mind in the 2016 Codicil, which the Claimants knew about at the time, there could have been no reliance by them on any such representation or assurance. They always knew that it was open to the deceased to change her Will. Furthermore, the deceased more likely was expressing her wish to the Claimants that they would be able to continue to farm the Farm after her death but that could have been because of an arrangement sorted out between both sides of the family, pursuant to some sort of tenancy arrangement or under the Partnership Agreement. As to detriment, Sheila says that the Claimants did not change their position in reliance on anything said by the deceased and in any event, they and the Maile family received various substantial benefits from the deceased in return for their work on the Farm, including free board and lodging, wages and drawings from the Partnership, the benefit of the Option and ultimately a substantial inheritance tax saving. It is the net detriment that is relevant in this context.

21. By way of further defence to the proprietary estoppel claim, Sheila avers that the Claimants effectively contracted out of any estoppel rights by entering into the Partnership Agreement with the benefit of the Option in the event of the deceased's death. She also argues that the Claimants do not come to the Court with clean hands, as expert handwriting evidence obtained by both sides indicates that it is likely that the deceased's signature was simulated on four particular occasions which she alleges resulted in the Maile family obtaining funds from the deceased. While this has perhaps received disproportionate attention by the parties, it is a serious allegation to have made, and Mr Briggs, in particular, on behalf of Ruth took exception to the way it was pleaded and pursued, with the insinuation, unsupported by evidence he says, that the signatures had been forged by Ruth for her family's benefit.

22. Under the Partnership Agreement, the Claimants were required to give up occupation of the Farm within 12 months of the deceased's death. However both they and their parents have continued to live at the Farm. Sheila as executrix of the estate, counterclaims against them for possession of the Farm and for mesne profits and/or damages for use and occupation. (The Partnership is separately to be wound up, and an account of Partnership dealings will be taken in due course.)

23. If the Claimants do not succeed on their claims, Mr Dumont KC confirmed that they do not defend the counterclaim. Peter and Ruth however do defend the counterclaim on various bases, including that they had the express permission and licence of the deceased, and/or the Claimants as the partners in the Partnership, and/or of Sheila. They also challenge the quantum of the claim.

C FACTUAL WITNESSES

(i) The Claimants' witnesses

24. The Claimants both gave evidence and they came across very differently. Steven, who is three years older than his brother, gave evidence first. From the outset, he appeared to give very straight and short answers to the questions put to him by Mr Learmonth KC. He accepted that he and his brother did not spend a great deal of their working time at the Farm and were mainly working on Agistment Farm. He also made it quite clear that he worked on the Farm, at least in the early years, not in any expectation of inheriting it but because he was a naturally helpful person who wanted to assist the family, in particular his grandmother as she got older. He acknowledged that he would probably have acted in the same way if he thought that his mother would be inheriting half of the Farm from his grandmother.

25. Such frankness was not replicated by Steven when his evidence resumed the next morning. He became more guarded and seemed much less willing to make concessions against the Claimants' interests. He claimed not to remember many more things. Nevertheless, I had the strong impression that he is a very different character to his brother, far more reserved and reluctant to challenge things to avoid confrontation, even if it might be in his best interests to do so. It also appears from what he said in the transcripts of the recorded conversations that he was more prepared to accept if his grandmother decided to be fair to both sides of the family and ultimately opted to leave everything to her daughters equally. He was not the person driving this claim, it seemed

to me, but he was prepared to support it. His witness statement went too far in doing so, for instance when he suggested that his grandmother told him that "*Aunt Sheila and her family get the nice holidays now, and you will get the farm in the future*". He could not confirm that his grandmother had said that, rather than his mother. He also attributed to Sheila that she said to her mother, the deceased, that "*if you're leaving it all to Steven and John there's no point in me or my family coming up to see you again*." There are other statements too that are hard to believe and it seems unlikely that he would have such a specific recollection of them. In short I am more prepared to accept what Steven said in his oral evidence by way of admission than anything said in his witness statement unsupported by contemporaneous documentation.

26. John was a far more confident and determined person and witness. I could see that his persistence could be somewhat intimidating, certainly for a person like his grandmother in her 90s. It appears from his secretly recorded conversations (which I have listened to), that he was quite prepared to let his grandmother know that he was upset that she had decided not to leave the Farm to him and his brother and there is a hectoring tone to what he was saying to her. He did not raise his voice (he knew he was recording the conversation) but he was clearly pushing her to say something that he knew she would say and which he therefore wanted recorded. That is quite scheming of him. And that appears to be part of his nature.

27. In his witness statement and oral evidence, John tried to give the impression that before the Partnership whatever work they were doing on the Farm (it was not very much because most of the Farm was subject to the Tenancy in favour of their father, and on the remaining part of the Farm there was only a small flock of sheep) they were effectively doing so for free. However it emerged in cross examination that John had received from the deceased £12,700 in 2013 (this appeared as contractors' fees in the deceased's accounts) but he had not said anything about this in his written evidence. Knowing what his brother had said about working on the Farm irrespective of whether they were to inherit it, John said that he would not have helped as much as he did, if he knew the Farm was not being left to them, and he probably would not have entered into the Partnership. But the Partnership was to save inheritance tax on whoever inherited the Farm, including their mother. So his evidence on this made no sense.

28. There are many apparent recollections in his witness statements of conversations with his grandmother at odd times or places (such as the piggery in 2011 and the deceased showing him the original auction catalogue for the Farm in 1927), which are obviously impossible to disprove. It does seem unlikely that he could recollect these conversations from so long ago, and I pay little regard to such self-supporting evidence unless corroborated by documentary evidence. He also included in his witness statement various stories about his aunt, Sheila, intended to disparage her. These were entirely irrelevant and John was unable to explain why he had put them in his witness statement. (The same could be said of other witnesses who included prejudicial insinuation in their witness statements that was entirely irrelevant.) But John's memory seemed very selective. Despite remembering short undocumented conversations with family members that took place more than 10 years ago, he claimed not to remember the reason why he took to recording secretly conversations involving his grandmother.

29. My overall impression of John is that this litigation was largely being pressed by him, probably together with his mother and he is very determined to get what he believes is rightfully his and his brother's. It emerged in cross-examination that there was some

sort of agreement or understanding within the Maile family that John would get the Farm, whereas Steven would inherit Agistment Farm. His evidence was given in a combative and determined manner but, unlike his brother, he was not prepared to accept anything that was put to him and I found him to be evasive in a number of respects. I am not prepared to accept any statements of his that are uncorroborated by contemporaneous documentation or admitted facts.

30. The Claimants also put in witness statements from some more minor witnesses who knew the deceased. Mr Learmonth KC only wished to cross examine three of them: Mrs Eva Briggs is a friend of Ruth and used to help the deceased with cleaning the cottages principally and sometimes the Farmhouse; Mrs Anne Parsons, who is the sister-in-law of Sheila, but had fallen out with her brother, Mr Kempthorne, over something unrelated to this case, and so she chose to give evidence against Sheila; and Ms Janet Lyle, who was a schoolfriend of Ruth and is a hairdresser who had done the deceased's and Ruth's hair for 50 years.

31. All three witnesses said in their witness statements that they recalled conversations with the deceased about leaving the Farm to the Claimants but this really was unsupported by any contemporaneous documentation and because of their close association with or desire to support the Maile side of the family, I was unconvinced by their evidence, and do not feel I can rely on it. Mrs Briggs also seemed to be putting forward some evidence to support the Claimants' case on lack of capacity, saying for example that in the latter 3 years of her life, 2017 to 2020, the deceased could not tell whether it was raining or sunny. Under cross-examination, she admitted that any such incident might have been just after the deceased had woken up and was a bit confused. By contrast, Mrs Briggs' evidence also indicated that in 2019 the deceased was fully aware of where the Maile family were and what they were doing which suggests that she was capable of understanding matters.

32. The other witnesses whose statements were admitted without cross-examination were: Ms Maria Cooper, who is a stock controller at the Mole Avon Country Stores in Crediton which the deceased would go to regularly; Mr Alan Parsons who is the husband of Mrs Anne Parsons, the sister-in-law of Sheila; and Ms Jane Austin who is a retired bookkeeper who lived on a farm close by the Farm and would visit the deceased every six weeks or so. I can understand why Mr Learmonth KC did not wish to cross-examine these witnesses as they do not seem to have any evidence that is relevant to the issues in this case.

(ii) Peter and Ruth

33. The Claimants' parents both gave evidence in their own defence to the counterclaim and also partially to support their sons in their claim.

34. At times it was difficult to watch Ruth giving evidence. She became upset and raised her voice when she realised what was being put to her and that her evidence had become inconsistent. And that was after Ruth had denied Sheila's evidence, supported by her daughter Pippa, that she was often shouting and getting irate, and even banging tables, and that this was directed at the deceased. I take on board what Mr Briggs said in relation to this manner of giving evidence, that his client is facing allegations of the most serious kind, namely forging her mother's signature and extracting value from her mother's estate in her final years, that she was likely to lose her temper at some point.

He submitted that Sheila and her daughters had targeted Ruth, casting nasty and personal aspersions on her, and that this might explain her performance in the witness box.

35. I agree that I should not let her loss of self-control overly affect my view of her as both a person and a witness. She is 73 years old, and she has lived at the Farm for most of her life, and in her mother's latter years, she was her full-time carer. But even making those allowances I am left with the strong feeling that Ruth is, together with her son John, the driving force behind this claim. From the moment she found out that her mother had changed her mind about her Will and was not going to gift the Farm to her sons, there was a concerted effort to see if they could get the deceased to change her mind again. Although the transcripts show that they were careful to say that this was the deceased's decision and they were only trying to ensure that she knew what she was doing, the taking of the deceased back to see Mr Smale on 2 June 2016, with Ruth and her sons there as an intimidatory presence, was quite a pressurising and possibly bullying thing to do. Ruth clearly thought that her sons should be entitled to inherit the Farm.

36. There were a number of occasions in her oral evidence where she contradicted what she said in her witness statement. When she realised this, she said that the witness statement was the correct position as that was what she had written having thought about the point carefully and that her oral evidence should be ignored. There are other instances where she was unable to support what she had said in her witness statement, for example where she said that she had seen her mother sign the M&G withdrawal forms (the ones with the allegedly forged signatures) but which she admitted in oral evidence that she could no longer recall that. There were many inconsistencies in relation to the payments received from her mother which she found impossible to reconcile, despite keeping her mother's books. She also had a tendency to create documents after the event to establish the narrative in their favour: she did this with a diary entry on 18 February 2016 to support their case that the deceased had come back from executing the 2016 Codicil allegedly saying "*I've done something I shouldn't have*…"; and in relation to the approval of the change in profit share of the Partnership she prepared a note suggesting that this had been approved by the deceased and advised by Ms Campbell.

37. One thing that is curious about Ruth's evidence is that she did not deal in her witness statement with her mother's alleged incapacity. One would have thought that if she had had concerns about that, she would have said so, including to certain people at the time.

38. In short I do not consider Ruth to be a reliable witness, and feel that I can only accept her evidence when it is corroborated by documentary or other independent evidence.

39. As for her husband, Peter, he was far less involved in the relevant events. As will be seen, it appears that the deceased did not have a good relationship with Peter and she did not want him to have anything to do with the Farm, even though he was living there with her and the rest of the Maile family. She thought of him as not a real farmer (he was ex-army) and in any event he had his own farm at Agistment which his parents had bought. In his witness statement he did give some evidence that was related to the deceased's capacity but this was in such general terms - "*gradually becoming forgetful and confused*" and sometimes not remembering who a person was – as to be virtually worthless.

40. Peter was the only person to allege that at several Sunday lunches the deceased referred to the Farm passing to the Claimants (the Particulars of Claim had referred to only one such incident). But then he was the only member of the Maile family not to refer to the deceased's alleged mutterings when she returned from executing the 2016 Codicil. Peter gave unconvincing evidence about how his sons were able to put so much money into the Maile Partnership. In general I found Peter to be an underwhelming witness with little to offer in terms of real evidence and was simply seeking to help his sons as best he could.

(iii) Sheila's witnesses

41. Sheila gave evidence to support her case. It is unfortunate that this dispute has led to a total breakdown in relations between her and her sister's family. That led her to make unfounded allegations in her witness statement, some of which she graciously withdrew from in her oral evidence when pressed about them. An example was the suggestion that she knew nothing about the 2011 Codicil and that she believed that this had all been arranged secretly by her sister, including by ensuring that she would not come round to the Farm while Mr Smale was there with the deceased. This was pure supposition on her part and should not have appeared in her witness statement. It was also untrue that she did not know about the 2011 Codicil as an email revealed that she had spoken to her mother and then Mr Smale about her mother's intention to leave the Farm to the Claimants.

42. The same accusation that Sheila made against her sister was made by the Claimants against her, namely that she secretly arranged for the deceased to see Mr Smale on 18 February 2016 in order to change her Will back to the original terms. Her suggestion that she did not know what her mother had done in the 2016 Codicil and that they had not discussed on the 1-hour long journey back from Mr Smale is a little hard to believe. Nevertheless it is clear from the attendance note that the Codicil itself was not discussed when Sheila was present. She was invited into part of the meeting and the Claimants allege that she steered her mother away from gifting the Farm to her grandsons by raising a point about her daughter's potential use of the "big room" in the Farmhouse for dance lessons.

43. Sheila was also cross-examined by Mr Briggs in relation to her allegation that the Claimants and their mother had sought to extract as much value from the deceased during her life after they had found out about the 2016 Codicil. I was unclear if she was withdrawing the allegation but she did seem to accept that, on analysis of the available figures, substantial sums were also passing to her side of the family and that the deceased's money was being distributed to the family towards the end of her life. She maintained however that she was suspicious of her sister and in particular the fact that she controlled their mother's finances and opened all her post.

44. I therefore consider that Sheila was in some respects an unsatisfactory witness, embellishing her witness statement with argument and supposition and making unfounded allegations. Nevertheless she struck me as a very different character to her sister, far less combative, and willing to change her evidence and accept that she had gone too far and made mistakes. While the dispute had probably driven her to see fault in everything that her sister's family were doing, she came across as more reasonable and willing to compromise. Given the infelicities and errors in her witness statement, I

cannot say that her evidence is completely reliable and I will base my assessment of it on its consistency with the available contemporaneous documentary evidence.

45. Sheila's daughters, Gemma and Pippa, also gave evidence. They too sought to argue the case for their mother and tried to paint a picture of what the Maile family was like including their relationships with the deceased. This was particularly done by Pippa who had rather derogatory things to say about the Claimants and her aunt, Ruth, which was unnecessary and pointed, but she claimed it was what she observed and she stood by it. Gemma seemed more willing to back off arguing the case and I felt that she gave careful and truthful answers in her oral evidence. Pippa was also a patently honest witness, saying it as she saw it. But their evidence was of limited relevance as it was only really general background information about the family as they saw it and more particularly their grandmother's character and generosity.

46. Mr Smale is an experienced private client solicitor with over 40 years of practice in Devon. He was at the time part of the probate team but he also was involved in rural matters such as farming partnerships. That was why he was not only instructed in relation to the deceased's Codicils but also to deal with the setting up of the Partnership and inheritance tax planning.

47. Mr Dumont KC attacked his evidence and submitted that he was an unreliable witness. He said that he was defensive and too ready to argue Sheila's case rather than offering neutral evidence for the assistance of the court. Mr Dumont KC criticised the attendance notes, as he was bound to, they being the crucial documents in the case, but not for their substantive accuracy, only for minor alleged defects such as not showing who arranged the meeting or who was there.

48. I firmly disagree with Mr Dumont KC's characterisation of Mr Smale's evidence. He came across as a totally straight and clearly competent solicitor who was doing his best, in a calm and measured way, as a witness to recollect with the benefit of his attendance notes what had happened at the important meetings he had had with the deceased. I do accept that in a couple of instances he went too far in his witness statement in seeming to argue the case for Sheila (in particular where he was surmising as to her knowledge of the contents of the 2011 and 2016 Codicils) and he also was wrong in his interpretation of the golden rule as only requiring the involvement of a medical practitioner if he had cause for concern, which he did not. But there can be no credible suggestion that Mr Smale was supporting one side of the family over the other and he was involved in the 2011 Codicil when Ruth was present for some of the initial meeting and with Sheila for some of the meeting in relation to the 2016 Codicil. He was acting professionally and reasonably throughout.

49. It is in any event his attendance notes that are the important evidence as these show long discussions with the deceased where her instructions were taken and decisions made about what she wanted to do in her will. I have no hesitation in accepting Mr Smale's evidence that those notes were prepared immediately after the meeting or telephone call took place and are an accurate record of the discussions and the decisions made. In a sense that is all that matters, but I did in any event find him to be an honest and credible witness, whose evidence on relevant matters could be relied on.

50. Ms Mary-Jane Campbell is an agricultural accountant at Simpkins Edwards in Exeter. She has practised as an accountant since 1998. Her firm had acted for the deceased and

her husband for many years but Ms Campbell became involved in advising the family from around 2012, regarding inheritance and succession planning and the setting up of the Partnership. She attended various meetings with the deceased at that time, but was obviously not involved with the various Codicils, although she did know, because the deceased had told her during the Partnership discussions that she was expecting her grandsons to inherit the Farm. She did not accept in cross-examination that this was important for the strategy they had adopted but said that it was consistent with it. Ms Campbell gave her evidence in a professional, assured way and insofar as it is relevant, I consider her to be a reliable witness.

51. The same can be said for Ms Johanna Merritt who is a rural practice chartered surveyor at Robert H Hicks & Co. She was also involved in advising as to estate planning and valuation at the time of the surrender of the Tenancy and the formation of the Partnership. She therefore attended various meetings during 2013 to 2015. Her evidence was barely challenged in cross-examination and she came across as honest and confident and I consider her to have given reliable evidence.

D DETAILED FACTUAL NARRATIVE

(i) Family background

52. The deceased was born in 1923 and she married Mr Kenwyn Stevens (known to the Claimants as "Gan-Gan") in 1950. Ruth was born in 1952 and Sheila in 1956.

53. The Farm had been acquired by Mr Stevens' parents in 1929. He took it over on his father's retirement and it was formally conveyed to him and his wife, the deceased, on 8 December 1956. Mr Stevens worked on the Farm all his life. The deceased was also actively involved in farming, in particular with the sheep, chickens and other animals.

54. Sheila married in 1981 and moved out to her husband's family farm in Cornwall, some 30 miles from the Farm. Her daughters were born in 1982 (Gemma) and 1986 (Pippa). Gemma has two children, Jasmin and Charlie; Pippa has three, Dustyn, George and Fern.

55. Ruth married Peter in 1982. Steven was born in 1985; and John in 1988. Apart from a few months in 1982 when she lived with her new husband in one of the cottages, Ruth remained in the farmhouse and has basically lived there all her life. The same is true of the Claimants, both of whom are unmarried.

56. On 10 August 2001, Mr Stevens died. By his will dated 23 September 1988, the deceased was appointed as his executrix, he made a nil-rate band gift to his two daughters in equal shares, and left the residue of his estate to the deceased, or if she were to die before him, to his two daughters equally (or their children).

(ii) The 2006 Will

57. After having taken some inheritance tax advice, and making some equal gifts to her daughters, the deceased made the 2006 Will. Mr Smale was not involved in this Will and there is no real documentation concerning its preparation. As stated above it was in

simple terms based on strict equality between the family, save that she left the "*live and dead farm stock*" to her grandsons, the Claimants, in equal shares (they were then aged 20 and 17 respectively). They had been working on the Farm from a young age and clearly the deceased was starting to think about who might take over the farming when she was gone. She balanced that gift to her grandsons with pecuniary legacies of £10,000 each to her granddaughters. But in relation to the Farm itself, this fell into residue and was left to her daughters in equal shares. The deceased's intention, at least at the time of the 2006 Will, was of equality between her two daughters' families.

58. There were insufficient funds in Mr Stevens' estate to satisfy the nil-rate band gift to Ruth and Sheila, so the deceased agreed to divide Mr Stevens' half share in the cottages between their daughters. Ruth was given the half shares in Clover and Daisy Cottages; and Sheila was given the half share in Meadowsweet Cottage. The other half share was owned by the deceased. Because the half shares in Clover and Daisy Cottages were worth considerably more than the Meadowsweet Cottage half share, the deceased paid Sheila a balancing payment of £96,000, as agreed by all. This preserved the equal outcome intended by Mr Stevens' will.

59. In 2008, the Farm was re-registered in the joint names of the deceased, Ruth and Sheila. The deceased remained the sole beneficial owner.

(iii) The 2011 Codicil

60. Mr Smale started to become involved with the family and in particular estate planning. In an attendance note of his dated 27 August 2009, he records that the deceased had recently told him that she wanted to review her Will. Following a meeting on 10 September 2009, Mr Smale wrote to the deceased on 18 September 2009 referring to the fact that she wanted to look at her Will (although he did not know in what respects) and also whether she should transfer her half interest in the Cottages to her daughters. Mr Smale reminded her of her wish to treat her two daughters equally. During 2010, there were various meetings and advice in relation to inheritance tax planning.

61. The first meeting when changes to the deceased's 2006 Will were discussed was on 8 April 2011 when Mr Smale called on her at the Farm. The attendance note records that Ruth joined the meeting part way through and the deceased wanted her to stay. Ruth said she did not recall this and maintained that she was not involved in arranging the meeting. She also said that she did not know the contents of the 2011 Codicil at the time, or even until after the deceased's death. I find all aspects of that evidence difficult to believe.

62. The attendance note then goes on to record the following:

> "In clause 4 of your existing Will you want that gift to include the farmhouse buildings and 168 acres and single payments etc.
>
> You then are not quite sure what to do about your granddaughters and Sheila etc.
>
> Left it that you would look out your various financial paperwork and work out what you are worth and I could assist when I next visit and we would go from there."

There followed some discussion about the Cottages and inheritance and capital gains tax.

63. The deceased seemed to recognise the imbalance with Sheila's side of the family if the Farm was left to the Claimants. It was left that she would look at her other assets to see if it were possible to ensure that both daughters' families were treated equally and fairly.

64. The deceased must have visited Sheila on the following Sunday and told her that she was in the process of reviewing her Will and that she wanted to leave the Farm to her grandsons. Sheila then rang Mr Smale on 13 April 2011 to talk about this. Mr Smale's attendance note states as follows:

> "I enquire as to whether she said what she wanted to do. You tell me she is wanting to give the farm to her 2 grandsons (being sons of your sister Ruth) which you can understand and see is sensible.
>
> Your mother has always been fairly close about her monies but you know she has been spending money on the farm and cottages recently.
>
> We agree that there is probably little point in doing anything with the cottages.
>
> You are in agreement as to try and improve matters with regard to the farmhouse and the tenancy arrangement at Hook Farm."

65. Sheila had suggested in her witness statement that she never discussed with her mother any Will or anything to do with her estate. She said that her mother always said that it would be up to her daughters to sort out everything after she died and Sheila said that she assumed that meant her mother was leaving everything to her daughters equally. However this is difficult to reconcile with this attendance note, as Sheila had clearly discussed with her mother what she was proposing to do in her Will, specifically to leave the Farm to her grandsons. Mr Dumont KC put to Sheila that she was upset by this, which was why she had telephoned Mr Smale. I am not sure that that is borne out by the note as Sheila does not seem to have tried to persuade Mr Smale to advise the deceased against this. On the contrary, she commented that it seemed to be a sensible decision.

66. On 13 May 2011 Mr Smale again dropped round to the deceased at the Farm (his parents lived nearby) where she confirmed her instructions. His attendance note says as follows:

> "You confirm instructions to amend Will so as to give life [sic] and dead stock plus the farm to your 2 grandsons.
>
> You do want to look at your other investments but don't want to trouble with that right now.
>
> I said okay I will deal with the Will as step 1 and then we can meet again."

Again, while the deceased confirmed her instructions about the Farm, she was still mulling over how to balance things out.

67. On 17 May 2011, Mr Smale wrote to the deceased to tell her that he had prepared a draft Codicil to reflect her instructions and explaining that to her. In the course of the letter he said as follows:

> "Clause 4 of the Will is now replaced by what is clause 2 of the Codicil.
>
> In this you give to your two grandsons the farm plus the live stock and dead stock.
>
> I have said that they are to pay any inheritance tax (IHT) due in respect of it otherwise it strikes me that it would be unfair on Ruth and Sheila.
>
> As we have discussed before, there are a few things you might usefully do to minimise the IHT.
>
> I consider the most simple and beneficial would be for your son in law Peter to surrender his tenancy and that you and your grandsons then farm the whole of West Hook in partnership.
>
> This would ensure 100% agricultural property relief (APR) on all the land and increase the prospects of getting the maximum APR on the farmhouse.
>
> In practice the APR on the house is most likely to be restricted to 70% of its value but with the present arrangement, there is a risk that the position may be worse."

68. Mr Smale was following the deceased's instructions while also rebalancing in part by requiring the Claimants to bear the inheritance tax incurred on the Farm. Mr Smale then began the discussion about how to minimise that inheritance tax liability and started the ball rolling with the partnership idea for the whole Farm, including that part that was then subject to the Tenancy in favour of Peter.

69. There was a telephone conversation on 6 June 2011 between Mr Smale and the deceased during which she confirmed she was happy with the Codicil. They arranged for Mr Smale to come round on 8 June 2011 for the 2011 Codicil to be executed.

70. The 2011 Codicil was executed by the deceased and witnessed by Mr Smale and his wife Lynda Smale. It was in the following terms:

> "1. I revoke clause 4 of my Will
>
> 2. I give to my grandsons Steven Edward Maile and John Peter Maile absolutely in equal shares or wholly to the survivor of them subject to their paying any inheritance [sic] payable in respect of such gift
>
> 2.1 All my freehold farmhouse buildings and about 168 acres of land known as West Hook Farm Okehampton together with all my single payment entitlements or the benefit of any replacement scheme or any other agricultural quotas or entitlements held or partly held by me in relation to all or any part of the farm and
>
> 2.2 All my live and dead farm stock at West Hook Farm
>
> 3. In all other respects I confirm my said Will"

71. This was straightforward to understand and no one is challenging the validity of the 2011 Codicil. The Claimants accepted, as they wanted to uphold it, that the deceased had testamentary capacity and knew and approved the contents of the 2011 Codicil. They and their parents accepted that they knew at the time that the deceased had decided to leave the Farm to her grandsons.

(iv) The Partnership

72. In 2012, Peter's mother died and he inherited Agistment Farm. The farmhouse at Agistment Farm was left empty because Peter and Ruth chose to stay at the Farm, and although the Claimants suggested in their evidence that they considered moving out of the Farm to Agistment Farm, that never happened. They said it was because their grandmother wanted them to stay at the Farm because she was leaving it to them.

73. From 1 April 2013, Peter and his two sons, the Claimants, entered into the Maile Partnership, and it appears from the accounts that substantial sums were introduced by the Claimants by way of capital. From then until 2020, the accounts show approximately £122,000 as capital introduced by the Claimants to the Maile Partnership. Peter was rather vague in his evidence as to where he thought the money came from, but it was apparently from their savings that had built up over the years, starting with children's bonds taken out by their parents and grandmother when they were very young. There were also sums introduced later into the Maile Partnership that had come from the Claimants' drawings out of the Partnership

74. At the same time as the Claimants were beginning in the Maile Partnership with their father, discussions began in relation to the Partnership with their grandmother. This was in the context of resumed inheritance tax advice that had begun before the 2011 Codicil. It was anticipated that as things stood at the time, there was a potential £400,000 inheritance tax liability on the deceased's estate. It was therefore important to put the farm into a position whereby 100% agricultural property relief ("APR") could be claimed. In order to ensure that business property relief could also be claimed on the Farmhouse it was necessary to show that more than 100 acres of the Farm was being farmed. As some 86 acres of the Farm was subject to the Tenancy, leaving only 54 acres being farmed by the deceased, it was thought necessary for the Tenancy to be surrendered and for the Partnership to be entered into, because the deceased would have difficulty demonstrating that she alone was farming more than 100 acres. The low level of farming activity is demonstrated by what Ms Campbell said in a letter dated 13 January 2014 to the deceased that contained an estimate of the potential inheritance tax liability:

> "You were keen for your grandsons to be involved in the business if possible. Since you all live in the house this would help support the case for claiming agricultural property relief on the house. Currently one keeps some sheep on your land and they both help you with the farming tasks. I also note payments to John for contact [sic] work in the 2013 accounts"

75. There were various meetings with the professionals involved – Mr Smale, Ms Campbell and Ms Merritt – with many members of the family, including Peter and Ruth, Sheila, the Claimants and the deceased attending. There appear to have been no concerns expressed about the deceased's capacity to understand what was going on or in her ability to decide what to do.

76. On 29 September 2014, Peter surrendered the Tenancy to the deceased. On the same date a new one-year Farm Business Tenancy was entered into between the deceased and the Maile Partnership at a rent of £5,000pa. (although there was no signed tenancy agreement).

77. On 12 February 2015, the Partnership Agreement was executed by the deceased and the Claimants. Its commencement date was 1 November 2014. The split of profits was: 60% to the deceased; and 20% each to the Claimants. The Farm was introduced as a Partnership asset but specifically designated as "special capital" and wholly credited to the deceased. The terms of the Option were set out in detail in clause 16.

78. Both Claimants said they read through the Partnership Agreement before signing it. But they were not told to get independent legal advice and although they saw the special capital clause and Option in the Agreement, they assumed that they were standard form clauses that did not really apply to them. They said that this was because they were being left the Farm by the deceased. Mr Dumont KC submitted that everyone knew that the Farm would be left to the Claimants and that this was the basis for the advice to structure matters in this way. While it seems that both Mr Smale and Ms Campbell did know that that was the deceased's intention at the time (there is doubt over whether Ms Merritt knew), it does not feature in the discussions and it was really irrelevant to what was being advised. The inheritance tax savings by surrendering the Tenancy and entering the Partnership (100% APR and 100% business property relief on the value of other assets in the farm business) would enure to the benefit of the estate, and even though, as things stood at the time with the 2011 Codicil, it would principally benefit the Claimants who were responsible for inheritance tax on the Farm, it would similarly benefit other beneficiaries if the deceased changed her Will.

79. Furthermore, there were considerable benefits conferred on the Claimants by the deceased: they were given a free share of the Partnership profits; they had the right to continue to occupy the farmhouse free of charge; and they had a potentially valuable Option. So far as the deceased was concerned, the Partnership ensured that her grandsons, who she clearly trusted, would farm the Farm and would have the right to do so after she died.

80. On 19 February 2015, Mr Smale wrote to the deceased enclosing a copy of the signed Partnership Agreement. He also enclosed a copy of the 2006 Will and the 2011 Codicil and suggested that the deceased might want to think about a further codicil to deal with her share of the Partnership. That appears not to have been taken further forward.

(v) The 2016 Codicil

81. On 18 February 2016, Sheila came to visit her mother to take her out. Unbeknown to the rest of the family, Sheila took her to see Mr Smale at his Bideford office, about an hour's drive away. Sheila maintained that this was a regular visit to see her mother and she had not made any arrangements to hold a meeting with Mr Smale. She said that when she arrived at the Farm, her mother asked her to take her to Mr Smale at his Bideford office. Furthermore Sheila insisted that on both the journey there and back, she did not discuss with her mother why she wanted to see Mr Smale or anything to do with her Will or estate. That seems unlikely but it is possible that the deceased may not have wanted to discuss such things at that time.

82. Sheila came under sustained attack by Mr Dumont KC in relation to this evidence. He suggested that this had all been secretly arranged by Sheila and she knew exactly what she was taking her mother to Mr Smale for. I do not think that is borne out from the evidence I heard from Sheila and Mr Smale or the contemporaneous documents, principally Mr Smale's attendance note of the meeting. That attendance note does not say who arranged the meeting. It simply stated that: "*You call as arranged*" ("*You*" being a reference to the deceased). Sheila did not attend the first part of the meeting and waited in reception. I accept that Sheila did give some unfortunate evidence about why the Maile family had not asked where she was taking her mother that day. She had actually told her sister before she came that she was taking their mother back to the farm at Trefrank and to Cliston. This was what Ruth had written in her diary. There was nothing about a trip to Bideford to see Mr Smale. But Sheila might not have known until the day.

83. Mr Smale's evidence was completely dependent on his attendance note. He had assumed that the deceased had arranged the meeting, having been prompted by his letter to her of 22 January 2016 notifying her that he was closing his file on the Partnership matter and that they were holding any wills or deeds for her in their Deeds Store. When pressed in cross-examination on the basis that the deceased was difficult to talk to on the telephone because she was hard of hearing, Mr Smale accepted that it could have been Sheila who had arranged the meeting on her mother's behalf. Whoever had arranged it, he was aware that it was about the deceased's Will as he had the 2006 Will and 2011 Codicil with him from the start of the meeting.

84. Mr Dumont KC also suggested that there was something suspicious about the fact that the meeting was taking place in Bideford, when the deceased had previously had Mr Smale come round to the Farm. I think what Mr Dumont KC was trying to establish was that Sheila wanted it to take place away from the Farm because the Maile family were there and would no doubt be curious as to whether the deceased's Will was going to be changed so that they would not benefit to the extent they did from the 2011 Codicil. But as Mr Smale explained, his parents lived in Okehampton, so it was convenient when he was visiting them to arrange to come round to the Farm. But by 2016 both his parents had died, so he was not in Okehampton so often. (The meeting on 2 June 2016, arranged by the Maile family, was also held in Bideford.) Therefore I do not think that was suspicious.

85. Furthermore there is no indication that the deceased was being forced or pressured by Sheila to go to see Mr Smale about her Will. In my view, the deceased would only have done that if she had wanted to. After all the changes in the setting up of the Partnership and the reminder from Mr Smale that she might want to have a review of her Will, bearing in mind that she had said at the time of the 2011 Codicil that she would want to look at her finances and possibly rebalance the provision so that it would be fair to Sheila's side of the family, it would not be improbable that she did actually want to revisit the gift of the Farm to her grandsons. It was possibly playing on her mind that the principles of equality that had shaped her, and her husband's, attitude up until the 2011 Codicil, had now gone over very much to one side.

86. The meeting itself, according to the attendance note, the accuracy of which is not challenged by the Claimants, lasted about an hour, and had four stages:

(1) A meeting between Mr Smale and the deceased, without Sheila, the conclusion of which appears to have been that the deceased would probably not be changing her Will;

(2) Sheila was invited into the meeting and there was further discussion, in part about the use of one particular room in the farmhouse, and concluding with the deceased wanting the distribution of her estate to be sorted out after her death by her daughters;

(3) There was then further discussion between Mr Smale and the deceased in the absence of Sheila at which the deceased concluded that she wished to cancel the 2011 Codicil;

(4) The 2016 Codicil was then drawn up by Mr Smale and it was executed by the deceased there and then with Mr Smale and a partner at the firm, Ms Anne Slade, as the witnesses.

87. Mr Dumont KC sought to pick apart the various stages of the meeting, continuing his theme that it was all highly suspicious. He said that the conclusion at the end of the first stage should have been the end of the meeting as the deceased had decided, after discussing it with Mr Smale, that she wanted to leave the gift of the Farm to her grandsons in the 2011 Codicil in place. But after Sheila was invited into the meeting and they had the discussion about the large room, the deceased seemed to pivot away from her original decision and ended up wanting to revoke the 2011 Codicil.

88. However close scrutiny of the attendance note demonstrates that Mr Smale took care and time to make sure that he understood fully what the deceased wanted to do. He is a competent and experienced country solicitor who had no allegiance to one side or the other. Once the attendance note is accepted as an accurate record of what was discussed and decided on at the meeting, it is difficult to see how Mr Smale can be criticised or that he could have so misunderstood the deceased's instructions that she ended up doing the opposite of what she intended. It is helpful to track through the actual words of the attendance note, as this is the most critical document in the case, it seems to me.

89. Stage (1) was without Sheila and it reads as follows:

> "You call as arranged.
>
> We leave Sheila in reception.
>
> I talk through very carefully the contents of the Will and Codicil of 2011.
>
> You tell me of the main interest of Steven and John with the sheep and the machinery etc and that neither have shown any signs of getting married in particular and certainly not Steven.
>
> After a long chat concluding perhaps that you are content with what you have and nothing to be done.
>
> You ask me a few times what you could do different.

> I explain that you could tilt the balance a little more in favour of the Kempthorne side as it is very loaded towards the Maile side.
>
> I say you could split the property or impose a condition on Steven and John that they pay something to their cousins.
>
> You did not seem to feel that was something you wanted to do.
>
> Concluding therefore that nothing to be done if you are intent on leaving the farm to the grandsons."

90. From this, it appears clear that the deceased wanted to talk about her Will and in particular whether she could rebalance it so that it was not so much in favour of her grandsons. She was still wrestling with the fundamental issue of wanting her grandsons to farm the Farm while being fair to both sides of her family, as she recognised at the time she made the 2011 Codicil. It was nothing to do with falling out with anybody. It was all about fairness. Mr Smale's initial suggestions did not appeal to the deceased, perhaps because it placed an obligation on her grandsons. While the conclusion at that stage seems to have been not to change anything, that was partially qualified by Mr Smale recording that the deceased was "*perhaps*" content with not doing anything and only "*if you are intent on leaving the farm to the grandsons*".

91. At stage (2) the following was recorded:

> "Agreed that we invite Sheila in.
>
> Explaining that mum has had a good look at what we have got and seems content to leave things as they are.
>
> Sheila raises the question of the large room. Apparently it was a library in the days when Hook was owned by the Oaklands estate and when Sheila got married it was all done out nicely and you had part of your reception in it as it measured some 30 by 20.
>
> This prompted a conversation generally by Mrs Stevens as to whether or not Gemma who is a dance teacher could be allowed to use the big room for dance lesson etc.
>
> Sheila makes the point about your wanting to keep the house in order and in the family.
>
> Mrs Stevens says to Sheila that it will be all down to her and Ruth.
>
> Without divulging the contents of anything I say to Mrs Stevens that that would not be quite the case and pointed to the codicil and suggesting whether or not she should tell Sheila what it says.
>
> Further conversations around the same kind of topic and trying to explain things are not quite as you leading Sheila to believe.
>
> Suggesting that perhaps it might be good if you could all sit down as a family and talk it all through.

> Sheila decides to excuse herself leaving CS to speak further with Mrs Stevens."

92. This shows Mr Smale being careful about what he disclosed about the 2006 Will and 2011 Codicil to Sheila in case she did not know what they contained and the deceased would not have wanted her to know. But following on from the discussion about the big room and enabling her granddaughter Gemma to hold dance lessons there, the deceased implied that it would be for her daughters to sort out after she died. As Mr Smale knew that the 2011 Codicil did not actually do that, he subtly tried to make the deceased aware of that. He sensibly suggested that the family needed to sit down together and sort it out but in the meantime he decided to try to explain to the deceased that as things stood at present she was not leaving it to her daughters to sort out.

93. So stage (3) was as follows:

> "Sheila decides to excuse herself leaving CS to speak further with Mrs Stevens.
>
> Explaining that if you want Sheila and Ruth to sort things out then we need to effectively cancel the codicil made in 2011.
>
> We have a long discussion stirring the idea of cancelling the codicil or not around.
>
> You eventually decide that perhaps that would be the right thing to do.
>
> I offer to do it now or you can think about it. You decided you would like to get it done now."

94. Mr Smale realised that the way the deceased was speaking when Sheila was present indicated that her wishes appeared now not to be consistent with the 2011 Codicil. It may have been the discussion about the big room that caused the deceased to conclude that she wanted to make sure that there was a fair distribution of her estate and that that could only be achieved by leaving it to her daughters to sort out the details on her death, but the starting position being that both sides of the family would receive equal value. I do not detect that there was some cunning plan by Sheila, even less so by Mr Smale, to persuade the deceased to move away from the 2011 Codicil. But Mr Smale's "*long discussion*" in the absence of Sheila was about how best to give expression to the deceased's apparent testamentary intention. The cancellation of the 2011 Codicil would indeed leave it to the deceased's daughters to sort out but with the overarching principle of equality to apply.

95. The final part of the meeting was the execution of the 2016 Codicil and Mr Smale recorded this as follows:

> "Printing the codicil which you read through and sign in the presence of me and Anne Slade.
>
> Agreed we would send you a copy and I explain it might not be until my return from holiday.
>
> Engaged in total say 1 hour."

96. Mr Smale said that he wanted another solicitor, not just anyone from the office, present to witness the deceased's execution of the 2016 Codicil. And both he and Ms Slade saw

the deceased reading through the 2016 Codicil before signing it. Mr Dumont KC said that there was no evidence that Ms Slade took any steps to satisfy herself that the deceased had capacity or that she did know and approve the contents of the 2016 Codicil. That is true but I can see that it provided some comfort to know that two experienced solicitors, one of whom had known and acted for the deceased for a decade or so, were able to assess the deceased at the time she executed it.

97. Like the 2011 Codicil, the 2016 Codicil was, on its face, simple to understand, although Mr Dumont KC did not accept that. It was in the following terms:

> "1. I revoke all the provisions of the First Codicil to my Will dated 08 June 2011
>
> 2. I reinstate the terms of clause 4 of my Will dated 30 March 2006
>
> 3. In all other respects I confirm my said Will which shall now be read and construed as if I had never made the First Codicil to it"

98. Mr Dumont KC submitted that because the 2016 Codicil did not set out what the 2006 Will or the 2011 Codicil contained, simply by reading and knowing the contents of the 2016 Codicil would not tell the testatrix, and in particular someone with the capacity of the deceased, what the actual effect of it was. But this was what the "*long discussion*" and the "*stirring the idea of cancelling the codicil or not around*" was all about. It was fairly straightforward: the 2006 Will split the Farm, and the rest of the residuary estate equally between the deceased's daughters; the 2011 Codicil gave the main asset in the estate, the Farm, to the Claimants. The latter gift was cancelled and the Will reverted to the exact terms as originally intended in the 2006 Will. This was explained to the deceased by Mr Smale.

99. Mr Smale confirmed this effect in a letter he wrote to the deceased the following day. He enclosed copies of all three testamentary documents. In the letter he said:

> "I refer to our meeting on Thursday afternoon.
>
> I enclose a copy of the Codicil that you signed along with the Codicil that has now been revoked and a copy of the 2006 Will which has now effectively been reinstated as it was.
>
> The combined effect of the enclose [sic] documents, is that after giving the live and deadstock to Steven & John and legacies of £10,000 to each of Gemma and Pippa, everything else that you own will pass equally to Ruth and Sheila.
>
> In addition they are the executors.
>
> Whilst we did for some time talk around whether or not you were happy that Steven and John should have the whole farm under the 2011 codicil or not and the possibility of some kind of arrangement in relation to the house, on balance you felt happiest in the knowledge that Ruth and Sheila would be in charge and have control over what became of the farm.
>
> Accordingly as things are now following the signing of the codicil on the afternoon of 18 February, they are in control and can agree how things are sorted out when the time comes.

> This does seem to have a greater degree of fairness about it given all the circumstances.
>
> On this basis, I consider we can safely ignore attempting to make any specific provision in relation to the "big room" and Ruth and Sheila will be able to come to an arrangement over the land and farmhouse etc that sits most comfortably with them when it passes into their hands."

(vi) Events following the execution of the 2016 Codicil

100. Mr Dumont KC submitted that whether the deceased knew and approved of the terms of the 2016 Codicil has to be judged by reference to what she said in the weeks and months following her execution of it. By contrast, Mr Learmonth KC said that this was largely irrelevant because it was only what the deceased thought or said or knew at the time she executed the 2016 Codicil that was relevant. That is of course correct, although it may be that what she said subsequently provides some evidence as to what she knew at the relevant time. Having said that, it is for the Claimants in effect to show that Mr Smale made a huge mistake in his understanding of the instructions he was receiving from the deceased.

101. It was during this period that John took the decision to record secretly conversations involving the deceased which the Claimants assert show that the deceased did not realise that she had changed her Will so that the Farm was going to her daughters equally rather than to her grandsons, the Claimants.

102. The first point to note is that the Maile family knew almost immediately that the deceased had executed the 2016 Codicil. That is because Ruth opened her mother's post and read her letters, she said with her authority. Steven had said in his witness statement that his mother opened the deceased's post and that he thought he therefore found out about it shortly after the letter from Mr Smale dated 19 February 2016 arrived. In fact he said that his mother opened the letter and then passed it to him, saying "*you ought to see this*". John did not disagree with this, and this is presumably what inspired him to start his campaign of recording conversations with his grandmother. It is curious that Ruth suggested in her witness statement that her mother told her much later that she had received the letter of 19 February 2016 and that she wanted to go back to see Mr Smale. Ruth did not refer to the fact that she had actually opened the letter and discussed it with her sons. I do not accept her evidence and find that the Maile family knew almost immediately after it had happened that the deceased had decided to change her Will and not to leave the Farm to the Claimants.

103. What the Maile family's evidence was united on (although Peter did not refer to this) was that they remembered clearly the deceased coming back after being out for the day with Sheila saying words to the effect of: "*I think I've done something I should not have done…*" Both Claimants said in their witness statements that the deceased kept mumbling these words amid some confusion and distress. However Ruth maintained that the deceased just said this once, soon after Sheila left on 18 February 2016. Somewhat strangely, Ruth created a document after the event by putting an entry in her diary that said as follows:

> "18th FEBRUARY 2016 IS THE DATE OF THE SECOND CODICIL.

> SHEILA NEVER TOLD ME THAT SHE TOOK NAN TO PETER, PETER, WRIGHT, SOLICITORS TO SEE CLIVE SMALE AT BIDEFORD THAT DAY.
>
> AT THE END OF THAT DAY WHEN SHE GOT UP FROM HER CHAIR TO GO TO BED SHE SAID AND PETER, STEVEN, JOHN AND MYSELF ALL HEARD "I THINK I HAVE DONE SOMETHING I SHOULDN'T".

104. Mr Learmonth KC cross-examined the Maile family witnesses about all of this and in particular how they were able to say that the deceased had been saying this on 18 February 2016. Ruth in her witness statement had said that it was only "*at a much later date*" that they had realised that this was the date when her mother was concerned at what she had done. But this was presumably to tie in with her non-contemporaneous addition to her diary. John had said that they realised much closer to the 18 February 2016 because they saw Mr Smale's letter as soon as it arrived a few days later.

105. In my view, this evidence really went nowhere. If the deceased had really thought she had done something that she should not have done, I do not understand why she would not have explained this to her daughter and grandsons, or why they would not have tried to find out what it was. And why did she not ask them to help her to sort the problem out? I actually find it difficult to accept that this is what she would have said. More likely is that this has been reconstructed by the Maile family to fit their narrative that the deceased had not really wanted to change her Will and still intended the Farm to be left to the Claimants. But even if it is true, it shows that the deceased was aware that she had made a change to her Will, but then, as we shall see, decided to stick with that change, despite the pressure being applied from the Maile family.

106. That pressure is evident from the secret recordings made by John. Apart from the meeting on 2 June 2016, John seems to have started to record after he had begun to converse with his grandmother, perhaps when he thought she might say something useful. Therefore, useful context is missing and it is impossible to tell how the discussion had got to that stage. It is also unclear if there were other conversations recorded by John that may have been deleted. The other members of the Maile family maintained that they had no idea that John was secretly recording the deceased but I do not see why he would not have told them possibly after the event as it was relevant to their shared concerns about the change in the deceased's Will.

107. John's tone was imposing and persistent. He did not raise his voice (he knew of course that he was recording the conversation), but he was clearly upset about the situation and did not shy away from confronting his 92 year old grandmother about the fact that she had decided not to leave him and his brother the Farm. This would have been incredibly uncomfortable for the deceased.

108. It is not necessary to go through the transcripts in any great detail. Mr Dumont KC said that they showed that quite soon after the execution of the 2016 Codicil, the deceased had not understood that she had changed her Will so that the Farm was no longer being left to her grandsons, but instead was going to her daughters equally as part of her residuary estate.

109. The first recorded conversation was between John and the deceased on 8 March 2016. It opened with the deceased asking: "*Be you sure about that*?", to which John said: "*Yeah. Me or Steven don't have any of it*." Before the recording started, John had clearly

been reminding her of what she had done in the 2016 Codicil, and he was making out as though the deceased was leaving them nothing. John knew all about the 2016 Codicil by this stage and presumably had been going on about it to her on a number of occasions. The deceased then suggested, as she always did, that that could not be right, to which John told her that she should go back to see Mr Smale – "*We'll have to speak to him and go down there and see him and sort it out*". Interestingly, the deceased remembered that Mr Smale was on holiday (she said it twice), which she was told at the meeting on 18 February 2016. She used that to deflect John's insistence that she have another meeting with Mr Smale. She said: "*Well, it's naturally, that it goes to you and Steven. That's where it got to go*." She also remembered that they were in partnership together, showing that she recognised that they would continue to run the farming business, such as it was. It ended with the deceased saying that: "*it will be straightened out anyway, John, and naturally you are going to have it*."

110. A week later, on 15 March 2016, there was another chat between John and the deceased. The recording started in the middle when they were talking about Mr Smale and again she reminded him that Mr Smale had been away, but that when he was back she would arrange for him to come round to "*sort it out*". John was continuing to harass her about it and her defence mechanism seems to have been to accept that she intended for the Claimants "*to have it*" but she wanted that to be sorted out at a meeting with everyone there, including Sheila (but not Peter, who she seemed to have taken against). She made clear to her grandson that she was going to be living for some time yet as she had a "*healthy body*" and "*me mind and everything's alright*". She was basically telling him to leave it to her and that she would sort it out.

111. The next recording in time was when Sheila visited her mother on 7 April 2016. John appears to have left his phone recording secretly somewhere but he only turned it on some way through the conversation. This was a long conversation talking about various things. The main relevant theme concerned Peter and the deceased, totally unprompted, mentioned a few times that she did not want him to have anything to do with the Farm. She did make reference to the Claimants getting "*Hook*", but this was always after her saying that she did not "*want Peter to have it*". She said: "*I've given Hook to these two…Steven and John*"; and "*I want that good and plain. It's Steven and John's. I've given it to Steven and John, not Peter…he's Agistment, that's where he belongs*." And later: "[Peter] *must not have any of the farm…you must make sure of that…it's Steven and John's, nothing to do with Peter. Peter's got his own business up Agistment*". She was really quite forceful about this. Sheila was not leading her on or even asking about these matters.

112. Whatever the reason for her antipathy towards Peter (there was a suggestion in the transcript that she considered him not to be a proper farmer) the interesting point about this conversation is why she was telling Sheila this. It seems to me that it is a reflection of the fact that she was aware that she was leaving her estate to her daughters to sort out fairly within the family but on the understanding that she wanted her grandsons to continue to run the farming business and therefore to have the Farm. But she was worried that Peter may have got his hands on some of the farm, either via his wife or his sons, so the deceased wanted Sheila to ensure that did not happen. It certainly indicates that the deceased was reasonably well aware of what she wanted and what she was doing.

113. On 15 May 2016, John had a further recorded conversation with his grandmother. After they had again got onto the subject of their inheritance, John said that he had been trying to arrange a meeting with Mr Smale "*to sort this out*." Quite why he thought it was for him to arrange that meeting when the deceased had said earlier that she would arrange it, is a little presumptuous and pressurising. John was rather curtly suggesting that Mr Smale needed to come to the Farm for a meeting (the deceased had said they could maybe meet him at a country show, indicating how seriously she was treating this) and he would need to draft some kind of tenancy agreement for him and his brother because they were not getting the Farm and would otherwise be losing money if they continued farming it. When the deceased queried this, John said "*Well Aunty Sheila and Mum have the farm. Me and Steven don't have anything to do with the farm*." To which the deceased said: "*That's news to me, John, I didn't know that mum and Sheila got it. I thought it was you and, you and Steven got the farm.*" And then a few moments later: "*I don't think there was anything changed like that. Did you, and the farm's given to you anyway, when I pass on. I don't think there's anything else, anything gone wrong…I mean it's all down in black and white. Clive Smale knows all about it*."

114. The deceased was actually adeptly playing her grandson in the sense that she was trying to get him to stop badgering her about this. She flatly denied that the change to her Will was wrong. She wanted to avoid any more of this sort of confrontation. She probably knew that he was not going to leave it there and that she would have to attend another meeting with Mr Smale to ensure that what she had done is what she intended to do. But she was trying to end this particular awkward conversation with her grandson and she succeeded in doing so. It is notable that at no point did John claim to his grandmother that she had promised him and his brother that she would leave the Farm to them in her Will.

(vii)The 2 June 2016 meeting with Mr Smale

115. That takes us to this meeting with Mr Smale on 2 June 2016. The meeting was arranged by the Maile family to take place at the Bideford office, like the meeting that Sheila took her to on 18 February 2016. The meeting was kept secret from Sheila, despite she and Ruth taking their mother out the day before for her 93rd birthday. Sheila had no idea that this meeting had taken place until disclosure in these proceedings. The Claimants, Ruth and the deceased all attended the meeting. That seems to me to have been an intimidating environment for the deceased to have been able calmly to consider who she wished to leave her assets to, particularly where it was only one side of the family and they were all very disappointed with the deceased's change of mind.

116. There are three records of this meeting:

(i) Mr Smale's attendance note;

(ii) John's secret recording of parts of the meeting; he could not have recorded the private discussions Mr Smale had with the deceased and he does not seem to have kept the recording going for when the Maile family were alone;

(iii) A note prepared by Ruth after the meeting (I will not refer further to this note).

117. Mr Smale's attendance note is the only record of the whole meeting as he had two sessions with the deceased alone. The rest of his note is largely corroborated by the recording transcript, showing the accuracy and reliability of his attendance notes generally. Mr Smale sensed that this was an uncomfortable situation for the deceased and therefore had the two private discussions with her, the first of which was some 12 minutes long, after an approximately 20- minute general discussion. In terms of satisfying himself as to her testamentary intentions, these were the most important parts of the meeting for Mr Smale, because she was untrammelled by the pressure of having the Maile family in the room. Mr Smale's attendance note records this discussion as follows:

> "Reminding her [the deceased] that when we met at the beginning of the year she reverted back to the Will which gave the live and deadstock to the grandsons, legacies to the two granddaughters and the rest to Sheila and Ruth equally.
>
> I said the assets comprise the farm and your share of the cottages.
>
> You confirm that your idea of fairness is between Ruth and Sheila as your daughters and you confirm that is your wish.
>
> I am quite happy and content that she understands what the Will is saying and that it will be down to Ruth and Sheila to sort things out between themselves when the time comes."

118. Mr Smale was therefore satisfied that the deceased understood what her Will was saying and doing and that her intention was to be fair as between her daughters' families. What preceded the private discussion was a suggested "*review*" of the current situation, meaning mainly the operation of the Partnership and the old Tenancy. That was working well and Mr Smale emphasised its importance for inheritance tax purposes. Then Steven raised the issue of the 2016 Codicil and whether that affected the Partnership when "*the land is going half between you* [Ruth] *and Sheila*". He was concerned about whether he and his brother should continue to work for and invest in the Farm, to which Mr Smale assured them that they should, that it would all be accounted for and that it was important for inheritance tax that they kept the Partnership going.

119. After the deceased said that she did not want to fall out over her Will ("*as long as it's fair and everybody's happy about it, that's the main thing*"), and Mr Smale suggested a private discussion, John made clear that he remained concerned about whether he would continue in the business of the Partnership if he was not inheriting the Farm. The deceased seemed to be troubled about pleasing John. She said: "*I've never been bothered…concerned about it. John was the one stirring it up a bit that I mean, I don't know, as long as it's shared out equally, that's all that…John and…that John's satisfied. I don't know whether he is or not.*" John then expressed his dissatisfaction, claiming (wrongly) that he and his brother had put in all of their life savings to the Farm (they had put most of their savings into their father's farm at Agistment), and then might get nothing out of it. He threatened to walk away from the Farm and find work elsewhere, claiming that they had wasted their time at the Farm. When Mr Smale said that their time had not really been wasted and they still had their work and potential right to inherit Agistment Farm, Ruth chipped in by questioning whether it was best to leave half the Farm to Sheila. Steven seemed far more accepting of the situation,

pointing out that they would anyway be getting their mother's half of the Farm. I feel that Mr Smale sensed that the discussion was becoming tense and so he then went and had his private session with the deceased.

120. When they returned to a plenary meeting, Mr Smale explained that the deceased was happy with what she had done and considered it to be fair. John was apparently not happy with what he had just heard and so the deceased, seeing that, said: "*Well I think it's quite fair. John what do you think about it? Are you happy now*", to which he responded: "*Well, it's up to you, isn't it? Not really up to me.*" The deceased then said: "*Well, I can't…I don't want nothing of it John. I mean, there's bound to be yours and Peter's. So your's and Steven's. Nobody else wants it.*" In my view the deceased was desperate to please and be fair to everyone. Ruth also seemed to appreciate that. But John continued to emphasise that he and his brother were not receiving any interest in the Farm. The deceased then asked: "*Can't the boys be in a share of the land then?*" to which Mr Smale was forced to clarify that that would be contrary to what she had confirmed to him privately. After a discussion about the cottages, the discussion went as follows:

> "MS So what can we improve?
>
> CS Well, I think from my understanding of your perspective just now, then nothing is the short answer. You're content with where the pot goes as it were, at the end of the day. And yeah, is that right?
>
> MS Well, I mean I can't take it with me. I think it's all sorted out. Yes, I'm happy that the boys…have it.
>
> JM We'll have the livestock, not the land. That's…that's how it is at the moment.
>
> MS Well, who's having the land?
>
> CS Well, that's part of the pot, isn't it? You know, part of the, everything else that's…goes to your daughters then.
>
> MS Well, the land ought to be shared as well, didn't it Ruth? What do you think?
>
> RM Well, I understand at the moment that the land is half for me and Sheila. Is that right? Is that…
>
> CS Well…she basically…yes.
>
> SM I don't think she still, you know, understands that.
>
> CS But she did just now, I think. But then she confuses the issue.
>
> RM It's quite difficult for her.
>
> CS It's certainly a distinction between live and dead stock on the one hand, and that's not an issue now.
>
> RM No, no, no.

CS And everything else on the other hand.

RM Yeah.

CS And to use your word, you want to be fair between your daughters.

MS Well yes, this is it.

CS And so from that perspective, it fits the bill perfectly.

MS The daughters come first, and that's [sic – then] my grandsons…

CS Yeah

MS …You see, I mean they've got a father and he's got his farm."

121. John and Ruth remained unhappy, particularly as they envisaged Sheila wanting to realise her half share in the Farm and as they would not be able to buy her out, it meant in their minds that the Farm would have to be sold away from the family. The deceased thought that this was most unlikely. But eventually the discussion was brought to a close, with the deceased commenting on the fact that John was not happy with the situation, ie that the Will stayed as it was, but with Steven recognising that they should accept their grandmother's decision. This was said at the end:

"RM They want to farm Hook. That's all they want to do, is to have the opportunity to farm Hook. That's all they, you know…

MS Yeah, well that's…

RM They've lived there all their lives and they want to, you know, continue.

MS Well yes. They can continue to. I can't do much about it.

RM No, no, but it's…it's what Sheila wants. It's Sheila's position, isn't it? If Sheila is going to have…if Sheila has a half, if we were equal, Sheila's going to have as much say in what happens as me. It's not what being what I want, will it?

MS Well you have to see Sheila then. That's all I know. Talk to Sheila then. I can't do much about it then, can I?

CS I'll, I'll have a quiet word with…Mum…Well, as I say, you probably…

RM Yes, yeah I don't want to worry her. I don't want her to worry. I don't want her to be worried.

CS No, no.

MS It's alright, Steven and John are the ones to have Hook."

122. Again, sensing a certain element of confusion in what the deceased was saying, Mr Smale wanted to ensure that he had understood correctly her intentions in relation to her Will. His attendance note recorded as follows:

> "Just having a quiet word again with Mrs Stevens.
>
> Making the point that it is down to her entirely but my understanding is that she wants to be fair between her daughters and what she has in place in the way of Will achieves that. She agrees.
>
> She says she is not quite sure why John is so concerned and feels that Steven is less so.
>
> I explain that Ruth and Sheila can always sort matters out by way of partitioning up the assets and Sheila could have all the cottages etc and part of the land and Ruth the rest which might be roughly 50/50 etc.
>
> You are content to leave matters as they are."

Mr Smale also added a further note as follows:

> "NOTE – whilst Mrs Stevens makes certain comments which on the face of it sound unhelpful as being suggestive of her wanting the grandsons to inherit, her overriding principal [sic] remains as to be fair as between Ruth and Sheila and is content to allow them to sort things out between them when the time comes.
>
> She was not minded to appease the wishes of her grandsons or perhaps John in particular to make changes by gifting the land to them.
>
> I am content as to her capacity despite some unhelpful lapses in her comments suggestive of something other then [sic] a 50/50 split between Ruth and Sheila.
>
> It may well have been the case that I was a little more informative to the whole meeting then [sic] I might normally be but the situation needed some clarification in view of the comments being made and on looking to Mrs Stevens for implied consent that I might do so took her murmurings as consent to proceed."

123. The latter point is about Mr Smale breaching confidentiality of his private discussions about the Will with the deceased. But he was adamant in his oral evidence that the deceased was quite clear about her intentions in relation to the Will and her overriding desire to be fair. She understood that it would be for her daughters to work out what to do with the Farm and they would know that she wanted it to remain in the family and that the only way that could happen would be if her grandsons had the Farm.

124. There was one final partially recorded conversation on 11 June 2016 between John and the deceased. This was just over a week after the 2 June 2016 meeting at which the deceased had confirmed her Will. John remained riled by that and the recording started with him suggesting to his grandmother that maybe he and his brother could buy some of the Farm off her and in effect divide up the Farm. This had not been discussed before and was guaranteed to upset the deceased. Maybe that was why he started recording then.

"MS Well why would you want to buy it?

JM cause else we're not going to have it else are we once it's all divided up

MS What do you mean divided up?

JM well auntie Sheila is having half and mum's

MS who said so

JM Clive Smale

MS When?

JM the other day when we went down to see him because we needed to know what was happening and he said it's all being divided up…

MS well I didn't hear that

JM Well that's what he said and that's what he said you wanted

MS I didn't want that anyway. I've given the farm to you and Steven.

JM No you haven't given anything to us

MS Yes I have

JM no no no me. Steven and I are in partnership with you with the sheep and the arable and that with the business. But nothing to do with the land. You own the land and you've given it to Auntie Sheila and mum

MS I haven't, I'm sure that's wrong."

She continued in that vein, maintaining that she intended the Farm to go to the Claimants. And at the end of the transcript there is the following exchange:

"MS I don't think you've got nothing to worry about. I'm sure about that. I give the farm to you. Steven and John, you two. Nobody else wants it. Sheila don't want it. They don't want it, they don't want it. Ruth don't want it. Nobody else. They've got the cottages down there to tend to. Tis all wrong anyway. I don't think they got that right. I give the farm to you and Steven. I'm sure it's in black and white. I'm sure I signed to that years, well a long time ago.

JM Yes, it's all been signed to change it there a few months ago so that's now they've gone, they've got rid of that.

MS Well who got rid of it?

JM I don't know whether Clive Smale changed it and that I don't know.

MS They shouldn't have got rid of it anyway…I'll sort it out now…"

125. However, the deceased never did try to change her Will back so as to leave the Farm to the Claimants. John's displeasure at the removal of the gift of the Farm to him and his brother is palpable and I believe was felt by the deceased. She was already sensitive to John's unhappiness with the situation, but I think she knew what she was doing. She was saying things to placate her grandson but had no intention of changing her mind. Mr Learmonth KC submitted that there were two possibilities. The deceased may have genuinely forgotten what she had done, as it was a finely balanced decision and she could not remember which way she had gone. Sheila's old age psychiatrist expert, Dr Hugh Series, said in cross-examination that this was possible. Alternatively, the deceased was playing dumb and stalling. In order to avoid a serious confrontation over something that John did not appear to want to let go, the deceased could have been pretending that she did not realise that she had changed her Will to leave the Farm to her daughters instead of her grandsons, and therefore said that she would sort it out if that was what she had done. I favour the latter explanation as it seems to me from the transcripts in general that the deceased did appreciate what was going on, but she wanted to avoid offending whoever she was with, particularly if that took the form of constant harassment on that subject. In any event the focus must necessarily be on what the deceased knew and understood at the time she executed the 2016 Codicil.

(viii) The 2017 Codicil

126. The 2017 Codicil is, as Mr Dumont KC said, "*very strange indeed*". Its substance does not really affect the Claimants, unless they succeed in setting aside the 2016 Codicil. It potentially affects their mother more if the 2016 Codicil stands. In my view its relevance lies in there being a further confirmation to and by Mr Smale of the deceased's testamentary intentions as expressed in the 2006 Will and 2016 Codicil.

127. An appointment was made for the deceased to see Mr Smale on 24 August 2017 at his Holsworthy office. No one could remember who or how the appointment was made. Sheila accepted that she could have made it at the request of her mother. She took her mother to the meeting but did not stay in the meeting and claimed not to have known what the meeting was about.

128. Mr Smale's attendance note is the important document. It is clear that nothing had been said in advance about what the meeting was to be about, save that it was to do with her Will. The attendance note reads as follows:

> "I ask what it is you would like to talk about or do in relation to your Will. Ascertaining that you want to give the meadow known as Hook Meadow adjoining Meadow Sweet Cottage to Sheila.
>
> You say it is the only field on that side of the road and it is not part of the farm in particular.
>
> Offering and you accept to do a codicil why [sic] you wait.
>
> I reiterate that I would do a codicil which means bolting on an additional gift and that everything else in the 2006 Will is basically as it is i.e. live and dead stock to grandsons, legacies to granddaughters and the rest to Sheila and Ruth equally.
>
> You are happy with that.

Preparing the Codicil which you then sign."

129. The 2017 Codicil says as follows:

> "1. I give to my daughter Sheila Mary Kempthorne the field known as Hook Meadow which adjoins the cottages particularly the cottage known as Meadow Sweet
>
> 2. In all other respects I confirm my said Will."

130. The simplicity of the 2017 Codicil meant that the Claimants do not say that the deceased did not know and approve its contents. They do maintain that she did not have capacity, relying on the inadequate reasons for making this specific gift, and they claim it was procured by Sheila exercising undue influence over her. It is difficult to see how that can run when the deceased met Mr Smale alone and told him exactly what she wanted to do. And he was satisfied that there was nothing untoward about the request.

131. It is hard to know what the deceased's thinking was behind this new gift to Sheila and it is probably not helpful to speculate. Sheila suggested that she may have been thinking about the imbalance in the cottages, whereby Ruth had a half share in two whereas Sheila only had a half share in Meadowsweet. She may have forgotten about the balancing payment made some 15 years earlier of £96,000 made to Sheila. In fact the values as at the date of death shows that there remained a substantial imbalance in the respective cottages, and although the deceased would not have known that, maybe she recognised that she had paid more in respect of Ruth's cottages over the years, including in relation to roof repairs where she paid more than Ruth did, and thought that Hook Meadow would be suitable compensation to Sheila.

132. The reasons that she gave to Mr Smale were not wholly accurate. There was another field on that side of the road and Hook Meadow had always been considered and farmed as part of the Farm since the Stevens family bought the Farm in 1929. But it was close to the cottages and in particular Meadowsweet (as referred to in the 2017 Codicil itself) and that was possibly why the deceased made the decision that she did.

133. Mr Dumont KC submitted that, assuming the deceased realised that she was leaving the Farm to her two daughters equally, as she was at that time, there was no reason to have preferred Sheila over Ruth, and she should have let them sort it out, as she apparently intended in relation to the Farm and her grandsons. As I have said, it is probably best not to speculate and all that is clear is that this is what she decided to do and Mr Smale was happy that she knew what she was doing and had capacity. Mr Smale could perhaps be criticised for not probing as to why she had changed her mind about strict equality between her daughters, but she clearly came with clear instructions that this was what she wanted to do.

134. Mr Dumont KC also suggested that the stated reason for the gift may indicate that the deceased actually thought the Farm was not going to her daughters but to her grandsons and that therefore she was trying to rebalance a bit by giving what she considered to be an irrelevant part of the Farm to Sheila. But this would be a wholly inadequate balancing if the whole of the rest of the Farm was going to the Claimants.

135. As I said above, I think the real significance of this episode is that it gave Mr Smale a further opportunity to discuss the deceased's testamentary intentions with her in private. He could assess again her ability to understand what she was doing and he could explain what the effect of the documents she had executed was. He said that in his attendance note, making clear that everything except the live and dead stock and the legacies to the granddaughters was going to her daughters equally. She could not have failed to appreciate that that included her main asset, the Farm. She specifically confirmed her 2006 Will in the executed 2017 Codicil.

(ix) Events following the 2016 and 2017 Codicils

136. It is Sheila's case that after the disappointment of the deceased deciding not to change her Will again to leave the Farm to the Claimants, the Maile family set about seeking to extract as much value as possible from the deceased. There is a complicated analysis of money going into and out of the Partnership, and overlapping with gifts and loans in relation to both the Farm and the cottages that Mr Learmonth KC has performed in order to show that the Claimants, or the Maile family as a whole, did not suffer any detriment even if the Claimants did rely on representations from the deceased. The Claimants and the Maile family refute this analysis. Insofar as it is necessary to do so, I will deal with that evidence under the proprietary estoppel claim below. It is fair to point out that the Claimants did continue to work on the Farm despite their disappointment over the change in the Will.

137. As noted above Sheila also raised an issue over whether the Claimants bring their claims to court with "clean hands", alleging that four signatures of the deceased were forged and that this was for their benefit. Two of the allegedly forged documents were withdrawal forms from an M&G Investment account that the deceased had. The forms are dated 3 November 2018 and were in the total amount of £58,354.63. The monies were paid into the Partnership and credited to the deceased's capital account. Sheila alleges that this was linked to payments made to the Claimants and Ruth in 2019. Ruth strongly denies forging her mother's signature but the Claimants cannot explain away the forensic evidence.

138. The other two documents are the Partnership Balance Sheets as at 31 March 2017 and 31 March 2018, dated respectively 19 January 2018 and 19 January 2019. Those documents are the only documentary evidence that the deceased agreed to a change in the Partnership shares to 20:40:40 in the Claimants' favour, save for a later set of accounts signed by the deceased shortly before her death.

139. A year or so after the 2017 Codicil, on 7 September 2018, the deceased had a fall and was taken to hospital by ambulance. The ambulance report referred to her "*struggling with her memory*" but then went on to state that she had never had a formal diagnosis of dementia. This was the only mention in her medical records of any issue with her memory. But she was 95 and had just had a fall.

140. On Sunday 22 March 2020, right at the start of the Covid pandemic first lockdown, the deceased passed away peacefully in her sleep, aged 96 years.

141. On 25 June 2021, the letter of claim was sent on behalf of the Claimants. It did not seek to set aside the 2016 or 2017 Codicils and so did not allege that the deceased lacked

testamentary capacity and/or want of knowledge and approval and/or undue influence. The only basis for the claim was proprietary estoppel.

142. On 18 July 2021, Sheila obtained a Grant of Probate for the 2006 Will, as amended by the 2016 and 2017 Codicils. Following an unsuccessful mediation in 2022, this claim was issued on 19 May 2023.

E THE PROBATE CLAIM

143. The difficulty with the probate claim is that the 2006 Will, to which the deceased reverted by the 2016 Codicil, is conspicuously fair and reasonable. The Claimants' case is really dependent on the notion that the deceased was effectively obliged, because of her alleged representations to them, to leave the Farm to her grandsons. That is the subject matter of the proprietary estoppel claim. But it seems to me to be the premise of their probate claim because they are saying that her departure from the gift of the Farm in the 2011 Codicil can only be put down either to her not being able to understand what she had done (testamentary capacity), or not understanding what she had done (want of knowledge and approval), or alternatively being coerced into doing it (undue influence).

144. In cases of this kind it is normally clear from the face of the will that someone has been unfairly treated. In this case, it is only if one accepts that the deceased had irrevocably decided that she was going to leave the Farm to the Claimants, that one can see that there may need to be an explanation for that not happening. In fact, the original 2006 Will, which was consistent with the deceased's and her late husband's intentions in his will, was to split their estates equally between their two daughters. The 2011 Codicil strayed from that common intention and it is clear from Mr Smale's attendance notes at the time that the deceased realised this and wanted to look at ways of rebalancing to ensure fairness to Sheila's family. She was obviously concerned about the Farm remaining in the family, but ultimately decided that she should divide her estate equally and leave her daughters to come to a sensible solution that would enable that to happen.

145. Unfortunately that has not worked out. Hence this claim. I will deal with each of the three probate claims in turn and I think it is logical first to look at testamentary capacity.

(a) Testamentary Capacity

(i) Legal Principles

146. There was little dispute on the law in relation to testamentary capacity. The four-limbed common law test set out over 150 years ago by Cockburn CJ in *Banks v Goodfellow* (1870) LR 5 QB 549 still applies. The issue is whether the testator was able to understand what they were doing at the time they executed their will or codicil; it is not whether they did actually understand that will or codicil, although such actual understanding would presumably establish capacity.

147. In this case therefore, and following the formulation of the relevant questions by Asplin LJ in *Hughes v Pritchard* [2022] Ch 339, the issues to be considered are as follows:

(a) Was the deceased able to understand the nature of the act of making the 2016 and 2017 Codicils and their effect?

(b) Was the deceased able to understand the extent of the property of which she was disposing?

(c) Was the deceased able to comprehend and appreciate the claims to which she ought to give effect?

(The fourth limb, a disorder of the mind preventing a just and rational disposition of the estate is not applicable to this case and is not relied upon by the Claimants.)

148. Joanna Smith J has helpfully summarised the more recent authorities on testamentary capacity in *Leonard v Leonard* [2024] EWHC 321 ("***Leonard***") at [152] and the following subparagraphs seem to me to be relevant to this case:

"d. the *Banks* test concerns the ability or capacity to understand the matters identified therein; it does not require actual understanding or recollection and it is not to be equated with a test of memory. There is no requirement that the testator actually remembers the extent of his property and deficiencies of memory are not the equivalent of incapacity. If there is evidence of actual understanding and recall 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. (See *Hoff v Atherton* [2004] EWCA Civ 1554 per Peter Gibson LJ at [33]-[34]; *Simon v Byford* at [40]-[41] and *Hughes v Pritchard* at [98]-[99]).

e. Relevant evidence may relate to the execution of the will, "but it may also relate to prior or subsequent events" (*Hoff v Atherton* at [34]).

f. When considering testamentary capacity, the court is concerned with the ability to make decisions, not merely the ability to understand a given transaction, or a particular choice that has already been made, which are issues to be considered under "knowledge and approval" (see *Perrins v Holland* [2010] EWCA Civ 840 at [64] and *Simon v Byford* [2014] EWCA Civ 2080 at [47]).

g. When evaluating limb 2 of the *Banks* test, there is no need for the testator to be able to compile a mental inventory or valuation of all his assets disposed of by his will, but merely to have "a general idea" of those assets (see *Todd v Parsons* [2019] EWHC 3366 (Ch) per HHJ Paul Matthews at [144]). He does not lack testamentary capacity because he is mistaken about, or fails to ascertain full details of his property (see *Minns v Foster* Ch, 13 December 2002 (unreported) at [115]). Furthermore, there is no need for knowledge of the actual value of assets (see *Blackman v Man* [2007] EWHC 3162 at [118] per Sir Donald Rattee J and *Schrader v Schrader* [2013] EWHC 466 (Ch) per Mann J at [81]).

h. When evaluating limb 3 of the *Banks* test, the testator must have capacity to comprehend the nature of the claims of others, whom by his will he is excluding from all participation in his property (See *Banks* at 568-70 where Cockburn CJ refers with approval to *Harwood v Baker* (1840) 3 Moo PCC 282 at 291). Reference to the terms of a previous will may be a helpful safeguard when seeking to confirm that the third limb is satisfied, but the relevance of any changes and hence the

enquiry about them will depend on the facts of the case (*Hughes v Pritchard* at [94]). A testator who forgets family members' names will not necessarily lack testamentary capacity (*Edkins v Hopkins* [2016] EWHC 2542 (Ch) at [46]), although a testator who could not remember the identity of close friends or family members, or could not recognise them, has been found to lack it (*Couwenbergh v Valkova [2008] EWHC 2451 at [278][279]).*

i. A testator is not required to be able to recall the terms of a past will, or the reasons why it provided as it did, provided he is capable of accessing that information (if needed) and understanding it if reminded of it (see *Hughes v Pritchard* at [99]). The fact that a testator forgets a promise previously made about the disposition of his estate does not mean that he does not have capacity to appreciate moral claims on his estate (see *Todd v Parsons* [2019] EWHC 3366 (Ch) at [147]).

j. There is no requirement that a testator understands the collateral consequences of a disposition, as opposed to its immediate consequences (*Simon v Byford* at [45]), just as there is no requirement that the testator should understand or remember the extent of anyone else's property or the significance of his assets to other people (*Simon v Byford* at [46]).

k. The question with which the court is concerned when considering the *Banks* test is transaction and issue specific. The testator must have the mental capacity (with the assistance of such explanation as he may have been given) to understand "the particular transaction and its nature and complexity" (see *Hoff v Atherton* at [33] and *Hughes v Pritchard* [2022] Ch 339 at [65]). This would appear to encompass not only the complexities in the will itself (limb 1), but also the complexity of the testator's property (limb 2) and of the moral claims on his estate (limb 3)."

(Mr Learmonth KC took issue with the last sentence in k. about understanding the complexities in the will itself which he said was applicable only to knowledge and approval, not capacity. He may be right about that but it is not relevant to the issues I have to decide.)

149. In my view the important points for this case are that the test for capacity is not a memory test. The fact that certain matters have been forgotten, even shortly after they have happened, does not necessarily mean that the testator lacked capacity at the relevant time. People forget things, more so as they get older, but that does not mean that they were unable to understand that they were making an important decision at the time or what it was about.

150. Mr Dumont KC relied on the so-called "golden rule" for solicitors in preparing wills for aged or seriously ill testators that a capacity assessment should be made by a medical practitioner at the time. Even though it is referred to as a "rule" it is really a principle of best practice, as explained by Briggs J, as he then was, in *Key v Key* [2010] EWHC 408 (Ch) at [7] and [8]:

> "7. The substance of the golden rule is that when a solicitor is instructed to prepare a will for an aged testator, or for one who has been seriously ill, he should arrange for a medical practitioner first to satisfy himself as to the capacity and understanding of the testator, and to make a contemporaneous record of his examination and findings: see *Kenward v Adams* The Times, 28 November 1975; *In re Simpson, decd* (1977) 121 SJ 224, in both cases per Templeman J, and subsequently approved in *Buckenham v Dickinson* [2000] WTLR 1083, Hoff v

> Atherton [2005] WTLR 99, *Cattermole v Prisk* [2006] 1 FLR 693 and in *Scammell v Farmer* [2008] WTLR 1261, paras 117—123.
>
> 8. Compliance with the golden rule does not, of course, operate as a touchstone of the validity of a will, nor does non-compliance demonstrate its invalidity. Its purpose, as has repeatedly been emphasised, is to assist in the avoidance of disputes, or at least in the minimisation of their scope. As the expert evidence in the present case confirms, persons with failing or impaired mental faculties may, for perfectly understandable reasons, seek to conceal what they regard as their embarrassing shortcomings from persons with whom they deal, so that a friend or professional person such as a solicitor may fail to detect defects in mental capacity which would be or become apparent to a trained and experienced medical examiner, to whom a proper description of the legal test for testamentary capacity had first been provided."

151. As to burden of proof, where a will has been duly executed and appears rational on its face, the persons challenging the will have the initial burden of raising and proving incapacity. The burden might shift back to the propounder of the will if a "*real doubt as to capacity*" is shown by the challenger – see *Leonard* at [158]. In this case, I do not think that such an initial "*real doubt*" has been shown, and so the burden remains with the Claimants.

(ii) The Expert Evidence

152. In *Leonard*, Joanna Smith J correctly said at [158] that: "*Although expert evidence may be of assistance, the issue as to testamentary capacity is a decision for the court*." That was why the Claimants persisted in their allegation that the deceased lacked testamentary capacity in the face of both experts' conclusions, based on the medical records and Mr Smale's attendance notes and the video and audio recordings, that the deceased was likely to have had testamentary capacity to execute the 2016 and 2017 Codicils. The deceased had never been suspected to have or been diagnosed with any mental disorder.

153. The Claimants' expert old age psychiatrist was Professor Alistair Burns CBE, MD, FRCP, FRCPsych. From 1993, Professor Burns was Professor of Old Age Psychiatry at the University of Manchester (since October 2023, Emeritus Professor). From 2010 to October 2023, he was the National Clinical Director for Dementia (and Older People's Mental Health) for the NHS in England. In 2015, he was awarded a CBE for services to Dementia.

154. Mr Learmonth KC did not seek to cross examine Professor Burns on his report dated 12 September 2024. That was because his conclusion was almost the same as Sheila's expert, Dr Hugh Series DM, FRCPsych, LLM, MA,, MB, BS. Dr Series has practised as a consultant in the psychiatry of old age since 1995. He is approved under section 12 of the Mental Health Act 1983, has trained as a Deprivation of Liberty assessor and is a medical member of the First Tier Tribunal (Mental Health). From 1991 to 2014 he was an honorary senior clinical lecturer in the Department of Psychiatry at the University of Oxford. He is also a member of the Faculty of Law at the University of Oxford. Mr Dumont KC did wish to cross examine Dr Series on his report dated 3 October 2024 and this was conducted remotely.

155. Both experts are leaders in this field and I have no hesitation in accepting their clear and helpful evidence in relation to the deceased's testamentary capacity. Professor Burns also made a comment on the deceased's knowledge and approval of the 2016 and 2017 Codicils, but I disregard this as the Claimants were not permitted to adduce expert evidence on that issue; it is not a matter for expert evidence and is inadmissible.

156. Professor Burns' summary in his report said as follows:

> "2.2 Mrs Stevens had some memory difficulties later in her life but no formal diagnosis of dementia. She had poor vision and was registered partially sighted.
>
> 2.3 I can find no evidence in the medical notes that Mrs Stevens had a condition which would have affected her testamentary capacity.
>
> 2.4 There is non-medical evidence to suggest that she was not aware of the implications of the codicils in relation to her grandsons. If accepted by the Court, this would be consistent with Mrs Stevens' mild memory problems."

157. Professor Burns' analysis of the medical evidence led him to conclude that the deceased had "*mild memory problems and some variability in her recall of events around the material time*" and that this may have been due to mild cognitive impairment, mild delirium, age associated memory impairment or mild dementia. After looking at the non-medical evidence, including the attendance notes and the recordings, he opined on the *Banks* tests that, on the balance of probabilities, the deceased understood the effect of signing the Codicils, the extent of her estate and although there was some confusion later as to what she had done in the 2016 Codicil, this would be consistent with her having some cognitive impairment.

158. Dr Series expressed his conclusion in the following way at [1.1.1] and [9.1.14]:

> "In my opinion, on the balance of probability, Mary was not suffering from any disorder of the mind which would have been likely to affect her testamentary capacity. The attendance notes of 2016 and to some extent of 2017 suggest that she understood that she was making codicils which would affect the disposition of her estate, she was able to comprehend and appreciate the claims to which she ought to give effect, and she was able to understand at least in general terms the extent of her assets. There is nothing to suggest that she was experiencing any delusions. For these reasons I think that on the balance of probability it is more likely than not that she had testamentary capacity when she made both 2016 and the 2017 codicils."

159. Dr Series focused on the difficulty that the deceased appeared to have with reconciling the fact that she wanted her grandsons to continue to farm the Farm and wanting to be fair as between her two daughters' families. From the attendance notes, he said that it appeared to him that the deceased, after having considered and discussed it at length with Mr Smale, came to "*a clear decision on the matter and gave instructions to that effect*." Mr Dumont KC challenged this in cross-examination suggesting to Dr Series that the attendance notes showed a complete change of mind after the private discussion with Mr Smale, when the "big room" was discussed with Sheila and that this was indicative of someone lacking cognitive capacity. Dr Series disagreed and said that the "big room" discussion was more likely a point that brought home to the deceased the

implications of favouring her grandsons over her granddaughters and what the effect of such a will would be. He said that this was probably emotionally difficult for her. And she continued to be torn by the irreconcilable dilemma that she faced.

160. In his report, Dr Series referred to the meeting on 2 June 2016 and said:

> "9.1.10 …The solicitor recorded that she wanted to be fair to her two daughters, although there were points during the interview when she seemed to think that the grandsons would have the land, although it is not clear to me from the note whether she had misunderstood the effect of the codicil or thought that Ruth and Sheila would sort it out between them. Nevertheless her final position is that she wanted to be fair to her daughters.
>
> 9.1.11 On the basis of the attendance note discussed above, if the note is accepted as an accurate record, in my opinion it is more likely than not that the deceased had testamentary capacity on that date. It may be that several weeks or months later she had forgotten what she had done, but in my understanding that does not alter her testamentary capacity on the date that she signed the codicil."

161. Mr Dumont KC cross-examined Dr Series on the transcripts of the 2 June 2016 meeting and the 11 June 2016 conversation with John, suggesting that this showed that the deceased had completely misunderstood what she had done. He put to Dr Series that there were essentially two options from this evidence: either the deceased had misunderstood; or she was contemplating that her grandsons would ultimately receive the Farm when her two daughters sorted out the estate and enabled this to happen (and which was what she wanted to happen). Dr Series agreed that, if it was a misunderstanding, then that would be evidence going to capacity; but that, if it was the latter, then it shows that she was understanding the situation and the effect of her Will, and there would not be a capacity issue. Dr Series also made the point that this was some months after the 2016 Codicil was made and when the attendance note indicated that, after much discussion, Mr Smale was satisfied that he had received clear instructions as to what to do. The later meeting and conversations show that she had continued to mull things over, trying to reconcile the alternatives, but also may indicate that, when faced with a somewhat hostile section of her family who had made clear their displeasure at the way she was going, she had a tendency to try to keep the peace by saying things to placate those present. She was in a very uncomfortable position at the 2 June 2016 meeting, and what she appears to have said privately to Mr Smale without the Maile family being there looks to have been quite different to what she was telling them when she was with them. If anything, it showed an awareness of the problem and a rather shrewd way of dealing with them in the circumstances.

162. Mr Dumont KC has also relied on Dr Series' estimate that either one-third or one-quarter of the population aged over 90 suffer from dementia. But that can also be looked at as saying that it is still far more likely that a nonagenarian was not suffering from dementia. It is not surprising that someone of that age would have an ever-poorer memory. But her GP had noted on 17 July 2018, a year after the 2017 Codicil, that "*initial memory assessment OK*".

(iii) Factual Evidence

163. It is very curious that not only did the Claimants not raise any issue of testamentary capacity in their letter before action, but also that their mother, Ruth, did not mention in her witness statement that she had any concerns that her mother lacked capacity or even give examples of forgetfulness or confusion. Ruth was her mother's primary carer and if anyone would have had evidence as to her alleged lack of capacity, she would have been expected to be that one. Ruth's evidence actually contradicted the Claimants' case as it was to the effect that the deceased made, and was capable of making, various financial decisions almost up to the time of her death. Furthermore, the Claimants, and everyone else, considered that the deceased had capacity to enter into the Partnership agreement in 2015, and alter the Partnership shares in 2017.

164. Perhaps most significantly, the Claimants and their mother never suggested to Mr Smale, say at the 2 June 2016 meeting, that they had concerns about the deceased's capacity to have made the 2016 Codicil or generally. Nor did they say anything to Ms Campbell when they were setting up and dealing with the Partnership. On the contrary, they must have considered that the deceased was able to give instructions for and understand her testamentary decisions, which is why they took her back to see Mr Smale on 2 June 2016. Mr Dumont KC referred to an episode in 2015 when he said the deceased did not seem to understand why Peter was no longer paying her rent after the Tenancy had been surrendered. However this was explicable as the position was confusing and the Maile Partnership had entered a one-year Farm Business Tenancy after the Tenancy had been surrendered as part of the overall tax saving arrangements.

165. The Claimants' answer to this was that the deceased had good and bad days (although this point was not pleaded in the Particulars of Claim), even suggesting that she sometimes did not recognise family members (this was discredited in cross-examination). Most people in their nineties have good and bad days, as Dr Series confirmed, and while it can be a feature of dementia, it can also happen because they are affected by some physical pain or whether they had slept well. There is no evidence as to whether she was on a good or bad day when she executed the 2016 Codicil, save for Mr Smale's attendance notes suggesting she seemed to him to have capacity.

166. It is really those attendance notes that are the crucial documents. Their accuracy is not challenged (indeed they were confirmed by the recording of the open parts of the 2 June 2016 meeting) and they are the only record for the calm and careful discussions that Mr Smale had with her, one-on-one, when she was not subject to the stress of having to justify her decisions to the Maile family. He is a private client practitioner of 33 years' experience, and he had acted for the deceased for nearly a decade by the time of the 2016 Codicil. He dictated the notes straight after the meetings and they provide a reliable record of the salient points discussed at the meetings and what he thought immediately afterwards. Of course they are not verbatim accounts of the meetings but he does refer to a "*long chat*" and "*stirring things around*", which are clear indicators that these were actual discussions with the deceased in which he was helping her to think about the various options and to come to a considered decision. If she lacked capacity in any way to participate in these discussions or to understand what she was making a decision on, this would surely have been apparent to Mr Smale. There would be no reason for Mr Smale to accept testamentary instructions from someone who might lack capacity.

167. Mr Dumont KC heavily criticised Mr Smale for not following the golden rule. He was correct to say that Mr Smale had got the golden rule slightly wrong in suggesting that

it would only apply if he had cause for concern about a testator's capacity. According to the cases it arises whenever an "aged testator" wishes to instruct a solicitor to make a will for them. Nevertheless, Mr Smale was right to say that it is a counsel of perfection and, if a medical practitioner had to be involved for every will of an aged testator, the medical profession could well be overrun. Mr Smale took an informed decision not to seek a capacity assessment based on the facts that: he had known and acted for the deceased for a decade; he had taken instructions for and drafted the 2011 Codicil; he had advised her through 2013 to 2015 on inheritance tax, the Tenancy and the Partnership; and he had a full understanding of the family, the Farm, the business of the Partnership and the financial situation.

168. Mr Smale referred to the deceased's capacity in his attendance note of the 2 June 2016 meeting and considered that he had no concerns. So he did specifically address his mind to it at the time. It is also likely that if he had referred the deceased to her GP, that there would have been a positive response, as there was in the GP's notes in 2018. In my view, I can rely on Mr Smale's honest and informed assessment at the time, as the experts did, on the basis that his attendance notes were accepted by the court.

169. The other professionals who had contact with the deceased at the relevant time (and were independent of either side of the family) did not perceive any problem with her ability to understand even quite complex arrangements. Ms Campbell had many meetings with the deceased and others from October 2012 in relation to tax planning. In her witness statement she said that she had "*no concerns as to Mary's capacity or ability to take in or receive information and advice. She asked sensible questions, and I never felt as though she was being led or influenced by anyone else. She gave the impression that she was in control of her affairs*." Later in the statement she said that: "*She always appeared to me to have a good grasp of her affairs and her money…she clearly understood the rationale for the advice…I did not think she was out of it or forgetful*". This was not really challenged in cross-examination. Ms Merritt thought that the deceased, even though she tended "*to avoid making hard decisions and trying to please everyone*", never gave the impression that she lacked capacity and did not "*have any difficulty understanding the decision she was making*."

170. Sheila said that she never had any concerns about her mother's capacity. During 2016 and 2017, she visited her mother at least once a week and she was "*switched on, would eat well, engage in good conversation and appeared happy throughout*." This seems to have been confirmed by the long, recorded conversation between the two of them on 7 April 2016. Sheila's daughters said pretty much the same in their witness statements. There was an internal email to Mr Smale dated 5 September 2014 recording the fact that Sheila had rung about the land tenancy agreement and had asked for an update "*as her mum is failing fast and she is worried that if matters are not dealt with soon then it will be too late*." Sheila was pressed on this in cross-examination but she explained that it was probably a physical issue, possibly pneumonia, that the deceased had at the time, but that it turned out not to be so serious. Ruth had not even taken the deceased to hospital. There is no real suggestion that in 2014, when the Partnership and surrendering of the Tenancy was being negotiated, the deceased lacked capacity. The email was considered by the experts and neither thought it of any significance to their overall conclusion. I too do not think it affects Sheila's evidence as to her mother's capacity.

(iv) Conclusion on testamentary capacity

171. In my judgment, the Claimants have not come close to proving that the deceased lacked testamentary capacity at the time she executed the 2016 and 2017 Codicils. Their only evidence is the video and audio recordings after the 2016 Codicil had been executed which they say showed that she had not understood what she had done or what she had been told or advised by Mr Smale. But whether she understood what she had done or not is the issue for knowledge and approval. It may provide some evidence that the deceased was unable to understand what she was told, but if that is the only evidence in relation to capacity, it is wholly insufficient. Looking at the evidence as a whole, including the expert evidence which took into account the recordings of the deceased, I find that the deceased had testamentary capacity to make both the 2016 and 2017 Codicils.

172. Taking the three *Banks* test questions set out above in turn:

(1) The deceased was able to understand the nature of the act of making the 2016 and 2017 Codicils and their effect. She clearly knew that she was executing the Codicils and that this was to provide for what would happen to her estate after she died. She was wrestling with that very decision, even agonising over it, as to whether she should leave the Farm directly to her grandsons or divide her estate equally between her two daughters and leave them to ensure that the grandsons would continue to be able to run the Farm. I am in no doubt, particularly from Mr Smale's attendance notes, that the deceased appreciated that that was what she was considering and deciding at the time she executed the 2016 Codicil. The discussion about the big room shows that she was considering the effect of not changing her Will and the potential unfairness to the other side of her family. Mr Smale's attendance notes show long and detailed discussions between him and the deceased alone and he was left satisfied that he had received clear instructions as to what she wanted to do in her Will. In the 18 months to the 2017 Codicil there was no identified deterioration in the deceased's mental capacity and its clear from Mr Smale's attendance note that she knew exactly what she wanted to do by leaving Hook Meadow to Sheila in her Will. The fact that her stated reason may not have been a good one does not affect that she knew exactly what she was doing.

(2) The deceased was able to understand the extent of the property of which she was disposing. It was all about the Farm, as she knew, but she was also well aware of her half interest in the cottages and that she had other investments. Mr Dumont KC alighted on her question in the 2 June 2016 meeting transcript as to: "*who owns the land*?", but the context is important as it is part of a discussion about the Partnership and then Ruth and John putting to her that the land itself was not part of the Partnership. A few moments earlier the deceased had said, after asking John whether he was happy with what she had decided, which was to leave the Farm to her daughters to sort out, said the Farm was "*<u>bound</u> to be yours and... Steven's. Nobody else wants it.*" That indicates, in my view, her desire that her daughters sort matters out after her death which would in all likelihood mean the Farm going to the Claimants. In any event, Mr Smale clearly explained to her what her estate contained at that meeting. And it is in any event what she thought at the 18 February 2016 meeting that is important and that was obviously all about who the Farm should be left to.

(3) The deceased was able to comprehend and appreciate the claims to which she should give effect. There is clear reference in the attendance notes to the daughters,

the grandsons and the granddaughters. Those are all the people that she had to consider and she clearly knew this. In the end her final position when she executed the 2016 Codicil was to be fair to her daughters and hoping that they would be able to sort out a way of transferring the Farm to her grandsons.

173. While some of the things that the deceased said after executing the 2016 Codicil indicate a certain element of confusion on her part, this could have been affected by forgetfulness (not uncommon for someone of her age, as confirmed by Dr Series), the fact that she was still working out whether she was happy with what she had decided or that she did not want to upset the person who was confronting her. I am satisfied that this confusion does not affect whether the deceased had capacity at the time she executed the 2016 and 2017 Codicils.

(b) Knowledge and Approval

(i) Legal Principles

174. Again there is not much dispute between the parties as to the legal principles in relation to knowledge and approval. Both referred to my judgment in *Reeves v Drew* [2022] EWHC 159, at [336] to [342], and at [404], where I set out those principles. Joanna Smith J also set out a summary of the law in this area at [166] to [169] of *Leonard*. The core requirement is that the will represents the testatrix's testamentary intentions.

175. As explained in those cases, originally this issue was approached by the courts as a two-stage process with a series of presumptions and counter-presumptions. But since the Court of Appeal decision in *Gill v Woodall* [2011] Ch 380 ("***Gill***") the question has become a unitary one with the burden remaining on the propounder of the will to prove on the balance of probabilities that the will represented the testatrix's actual testamentary intentions. The fact that the testatrix has capacity, has read the will and it has been properly executed are very strong factors in favour of their knowledge and approval. *A fortiori* where an experienced solicitor is involved in taking instructions, drafting and witnessing the will. It is as well to repeat what Lord Neuberger MR, as he then was, said in *Gill* at [14] – [15]:

> "14 Knowing and approving of the contents of one's will is traditional language for saying that the will represented [one's] testamentary intentions: see per Chadwick LJ in *Fuller v Strum* [2002] 1 WLR 1097, para 59. The proposition that Mrs Gill knew and approved of the contents of the Will appears, at first sight, very hard indeed to resist. As a matter of common sense and authority, the fact that a will has been properly executed, after being prepared by a solicitor and read over to the testatrix, raises a very strong presumption that it represents the testatrix's intentions at the relevant time, namely the moment she executes the will.
>
> "15 In *Fulton v Andrew* (1875) LR 7HL 448, 469, Lord Hatherley said that
>
> > "when you are once satisfied that a testator of a competent mind has his will read over to him, and has thereupon executed it … those circumstances afford very grave and strong presumption that the will has been duly and properly executed by the testator…"

> This view was effectively repeated and followed by Hill J in *Gregson v Taylor* [1917] P 256, 261, whose approach was referred to with approval by Latey J in *In re Morris, decd* [1971] P 62, 77F-78B. Hill J said that "when it is proved that a will has been read over to or by a capable testator, and he then executes it", the "grave and strong presumption" of knowledge and approval "can be rebutted only by the clearest evidence." This approach was adopted in this court in *Fuller* [2002] 1 WLR 1097, para 33 and in *Perrins v Holland* [2010] EWCA Civ 840, para 28"

176. Neither the 2006 Will, nor the Codicils were complicated documents. Mr Dumont KC submitted that the 2016 Codicil, while simple to read and understand on its face, does not actually state that the gift of the Farm to the Claimants in the 2011 Codicil was being revoked. All that the 2016 Codicil said was that the deceased was revoking the 2011 Codicil and reinstating clause 4 of the 2006 Will. Without more, the deceased would not have understood what that meant. And Mr Dumont KC said that this was demonstrated by what she said after the 2016 Codicil had been executed in the various recorded conversations. That will be explored below. But it seems to me that Mr Dumont KC may be right in suggesting that for a Codicil like this, it is insufficient to show that the deceased simply read it and therefore knew and approved its contents. If it was truly to represent her testamentary intentions, it must be shown that she knew that the effect of the 2016 Codicil was to revoke the gift of her main asset, the Farm, to her grandsons and to leave it instead to her daughters equally.

(ii) The evidence

177. I have set out above in some detail my findings of fact in relation to the 18 February 2016 meeting and the execution of the 2016 Codicil. Mr Smale's attendance note really is the critical document on this issue. It shows that the deceased had remained uncomfortable about the 2011 Codicil and its unfairness to one side of the family. That I believe is why she wanted to see Mr Smale in 2016 about her Will. While it is right to say that, having gone through the issues initially, the deceased appeared to have "*perhaps*" decided to leave things as they were, after the discussion with Sheila including about the "*big room*", and after a "*long discussion stirring the idea of cancelling the codicil or not around*" with Mr Smale, he understood that the deceased had decided to cancel the 2011 Codicil. In other words, she had reverted to strict equality, as she could not reconcile the unfairness to Sheila's family of giving her main asset to the other side. She could have been in no doubt what she was deciding; and it is plain that Mr Smale was satisfied that she understood what she had decided.

178. If the attendance note was the only evidence as to the deceased's decision, there could be no question as to her knowledge and approval. The attendance note spoke for itself and showed the deceased agonising over the decision (and so understanding it) but then making a decision which was immediately brought into effect by the execution of the 2016 Codicil. Even if the 2016 Codicil itself did not spell out the effect of the revocation of the 2011 Codicil, the deceased was well aware that she was deciding either to leave the gift of the Farm to her grandsons in place or to be fair to Sheila's family, to split the whole of her estate equally between her two daughters.

179. Given the significance of Mr Smale's attendance note, Mr Dumont KC put forward his clients' case on knowledge and approval on two main bases:

(1) He said that the meeting was all secretly arranged by Sheila to get her mother to change her Will, and that the surrounding circumstances, including the facts that the deceased decided this dramatic change so quickly after deciding the reverse and the failure to follow the golden rule, were all highly suspicious; and

(2) He said that the recorded conversations and the meeting on 2 June 2016 consistently demonstrated that the deceased did not understand that she had given the Farm to her daughters equally and she instead thought that she had given it to the Claimants.

180. As to (1), I do not consider that there was any devious scheme by Sheila and Mr Smale to persuade the deceased to change her Will, so that Sheila would get half of the Farm, worth approximately £1million. This is perhaps more relevant to the Claimants' undue influence allegation which would be in any event inconsistent with an allegation that the deceased did not know and approve the contents of the 2016 Codicil; either she was coerced or persuaded to do something and that may have been because of undue influence; or she did not actually make a decision at all, in which case there may have been a lack of knowledge and approval.

181. The attendance note is fairly conclusive evidence that there was no such scheme. If Mr Smale was party to such a conspiracy, he would have been unlikely to record faithfully that after the initial discussion he had with the deceased, she had decided not to change the gift of the Farm to the Claimants. Clearly the deceased remained concerned about that as she was looking for ways of being fairer to Sheila's side. I agree with Mr Learmonth KC that the attendance note shows a competent and experienced solicitor making sure that he had understood the deceased's instructions correctly and that it would be extraordinary for him to have drafted the 2016 Codicil and witnessed its execution when he was not sure that this was what his client wanted. He made all this clear in his letter to the deceased the following day.

182. Furthermore I do not believe that the deceased would have signed a document, with all the formalities around that, if she had actually decided not to change anything and to leave things as they were. She knew she was signing a document that changed her Will and the only thing that could have changed, following the discussion that they had had was the gift of the Farm to her grandsons. I think that the deceased had always felt that the 2011 Codicil had not finally resolved the issue of fairness satisfactorily, and in the end she realised that it was best to revert to the original plan, agreed with her husband, to split their estates equally between their daughters and to let them sort out the Farm after she died.

183. The alleged suspicious circumstances, which I do not accept really existed to any great degree, do not affect the clear evidence of Mr Smale's attendance note and his letter of 19 February 2016. She made a decision knowing what the issue was and the terms of the 2016 Codicil, which she read, properly reflected the decision she had made. The 2016 Codicil was duly executed the same day. In my judgment, the deceased knew and approved the contents of the 2016 Codicil at the time and it properly reflected her then current testamentary wishes.

184. I therefore agree with Mr Learmonth KC that what happened subsequently, and her apparent, though perhaps not real, confusion about what she had done, are essentially irrelevant to this question. That evidence, to be relevant, would have to demonstrate that both Mr Smale and the deceased had made a huge mistake in executing the 2016

Codicil, because that was not what the deceased intended to do. But the evidence comes nowhere near establishing that. On the contrary, what happened is that both Mr Smale and the deceased reconfirmed that the 2016 Codicil was what the deceased had decided to do and to stick with it at both the 2 June 2016 meeting and when the 2017 Codicil was executed a year later. When Mr Smale saw the deceased on her own, away from the Claimants and Ruth, he was able to explain to her what she had decided and why and she understood and agreed the decision she had made.

185. As I have said above, I interpret the recorded conversations as showing the deceased adopting a defence mechanism when confronted by the Maile family with what she had done. When talking to John, she did not like his tone and was keen to please him as she appreciated that he was upset with what she had done. She tried to deflect the conversation by assuring him that she would speak to Mr Smale, but she was sharp enough to remember that Mr Smale had told her at the 18 February 2016 meeting that he was away on holiday. She was quite effective in playing for time. She was still probably continuing to mull things over, as it was a difficult decision for her, but she was aware that it was her decision.

186. The conversation with Sheila on 7 April 2016 is different from the others because the deceased was not being harangued on what she had done to her Will (although she does express some concern that John is lurking around the house). Sheila never raised the question of her Will. Instead it was the deceased who constantly mentioned Peter and not wanting him to have any part of the Farm. As I said in [112] above, I think her telling Sheila that this was because she knew that Sheila would hold sway after she died with where the Farm was to go. She made it clear that she wanted the grandsons to get it, but what she was saying was a recognition of the fact that she knew that her Will was leaving the Farm to her two daughters to sort out, but for them to arrange, in whatever way possible, for the Farm to go to the Claimants and not Peter.

187. I have analysed the attendance note and transcript of the 2 June 2016 meeting in [115] to [125] above. Mr Smale was satisfied in both of his private discussions with the deceased, away from the unhappy Maile family members, that she understood the decision she had made in the 2016 Codicil and that she wished that position to remain. She was obviously concerned that John, in particular, was deeply upset by this and tried to mollify him by reassuring him that they would eventually get the Farm, but that the principle of her Will was fairness as between her daughters. She was also probably a little confused as to how the Partnership worked with her Will, and she remained keen for her grandsons to run the Farm so that it would stay within the family. That was the recurring dilemma that she was trying to resolve.

188. But the important point is that, by the end of the meeting, no one was in any doubt that the deceased was sticking to her 2016 Codicil that meant that Sheila would be getting half of her estate including the Farm. It would be for her and her sister, Ruth, to sort out how the Claimants could continue to run the Farm and whether the whole Farm would be transferred to them outright, with Sheila being bought out. Even though this was not discussed, the Claimants would also have the Option under the Partnership Agreement which would enable them to buy the Farm under favourable terms from the estate.

(iii) Conclusion

189. In summary the later events, namely the recorded conversations of the deceased, do not undermine the strong evidence of Mr Smale's attendance note of the 18 February 2016 meeting when the 2016 Codicil was executed and his letter to the deceased of the following day. These show that the deceased knew and approved the contents of the 2016 Codicil, and I so hold.

190. The Claimants do not pursue a claim that the deceased did not know and approve the contents of the 2017 Codicil.

(c) Undue Influence

191. This allegation was half-heartedly pursued by Mr Dumont KC and he hardly made submissions on it. But such a serious allegation, particularly one made against a solicitor, should not be made lightly and, if pursued, should be done so with conviction. I agree with Mr Learmonth KC that the allegations should never have been made and they should at least have been withdrawn before the trial.

192. All that Mr Dumont KC relied on in both his skeleton argument and closing submissions was Mr Smale's attendance note of the 18 February 2016 meeting when the 2016 Codicil was executed. He submitted that this showed that after the first stage of the meeting, the deceased was happy with the gift she had made in the 2011 Codicil that the Farm would go to her grandsons and had rejected Mr Smale's suggestions as to how she could balance out the disposition of her estate more fairly to Sheila's family. He then made a huge leap in suggesting that: "*a combination of her daughter Sheila and Mr Smale overpowered that volition, and brought about a result she did not want: a gift of the Farm, to Ruth and Sheila*." This is a reference to the discussion about the "*big room*" for the dance lessons which Mr Dumont KC seems to have been alleging was part of some cunning plan between Sheila and Mr Smale to force the deceased into leaving the Farm to her daughters equally. It overlooks the fact, as recorded in the attendance note, that Mr Smale had a further "*long discussion*" about what to do, in the absence of Sheila, that ended up with her decision to revoke the 2011 Codicil.

193. Mr Dumont KC referred to the classic definition of undue influence in *Hall v Hall* (1868) LR1 P&D 481: "*overpowering the volition, without convincing the judgment*". While it is correct to say that it is not a requirement to prove that force was used or threatened, the test for probate cases has recently been restated by the Court of Appeal in *Rea v Rea* [2024] EWCA Civ 169. Nothing short of coercion must be proved on the balance of probabilities by the party alleging undue influence. As explained by Newey LJ in [20] – [32], undue influence is inherently improbable and appeals to "*affection, gratitude or even persuasion*" by potential beneficiaries do not amount to coercion. It does not have to be shown that the facts or circumstances "*are necessarily inconsistent with any alternative hypothesis*", but "*on the other hand the circumstances must be such that undue influence is more probable than any other hypothesis*."

194. The Court of Appeal in *Rea v Rea* overturned the trial judge's finding of undue influence on the basis that the factors relied on were more likely to have been a legitimate form of persuasion, rather than coercion, of the testatrix. Similar allegations were made in that case in relation to the undue influence claim as are made in the pleadings in this case. Thus the Claimants alleged that the deceased was elderly and

vulnerable and liable to have her views overridden. They also relied on the same alleged suspicious circumstances around Sheila's involvement in the making of the 2016 Codicil. I have effectively rejected those points above but in any event it is clear from *Rea v Rea* that they could not in themselves amount to coercion sufficient to establish undue influence.

195. There was also an allegation in the pleadings that Sheila had attempted to coerce her mother prior to the 2016 Codicil by threatening never to see her mother again unless she changed her Will and left the Farm or a share in it to her. That was not even put to Sheila in cross-examination and I have no hesitation in rejecting it. I do not believe that Sheila would have said something like that. She continued to visit her mother regularly after she knew that her mother was intending to leave the Farm to her grandsons. Further insinuations were made about Sheila in the Claimants' evidence as to her alleged deviousness which were also not put to her and should never have been made.

196. My findings in relation to Mr Smale's attendance note of 18 February 2016 and his letter the following day, including in particular that the deceased, after thinking long and hard about it, and discussing it thoroughly with Mr Smale, decided to revoke the gift of the Farm to her grandsons and leave it to her daughters equally, make it inevitable that the undue influence allegation could not succeed. Normally undue influence is pursued where the will seems on its face to be surprising or unfair. The deceased's 2016 Codicil restored her 2006 Will and the principle of strict equality and it could only be said to be surprising in that it was revoking what she had decided to do five years earlier. The attendance note, and indeed the recording of the 2 June 2016 meeting show that Mr Smale was very careful not to impose his views on the deceased. Even when the Maile family was bearing down on her, she decided to stick with the 2016 Codicil.

197. In reality there is no evidence at all of the exercise of coercion or undue influence by either Sheila or, in some sort of coordinated attack, with Mr Smale. Mr Dumont KC made it clear in opening, when invited to withdraw the allegation, that he was not going to do so but that it was only a fall-back position of the Claimants if they did not succeed on the other probate claims. There may be some cases where, contrary to a party's primary contention, a testator has capacity and knew and approved the will, undue influence becomes the most likely explanation for the will. But there still must be a credible basis in the evidence for alleging undue influence in those circumstances and that it the more likely hypothesis on the facts.

198. It was also persisted in for the 2017 Codicil although virtually nothing was said about this in submissions. There is no evidence at all that Sheila forced the deceased to leave her Hook Meadow. As pointed out above, the execution of the 2017 Codicil was another occasion on which Mr Smale was able to confirm with the deceased that she was happy with leaving her estate to her daughters equally. There is an allegation in the Particulars of Claim that that confirmation was procured by the undue influence of Mr Smale, but this was rightly not pursued at the trial.

199. Accordingly I dismiss the claims that the 2016 and 2017 Codicils were procured by undue influence. That means that the probate claim fails in its entirety.

F THE PROPRIETARY ESTOPPEL CLAIM

(i) Introduction

200. I now turn to the Claimants' alternative claim, based on the same facts, in proprietary estoppel. In my view the parties have over-complicated the analysis of this claim, particularly in focusing on the issue of detriment and whether the Claimants have received countervailing benefits, such that they did not suffer any "net" detriment in the end, even if they did rely on representations made by their grandmother that they would inherit the Farm. But one only gets to the question of detriment if the first two elements of a proprietary estoppel claim, an assurance of sufficient clarity and reliance on it, are present. I propose to concentrate on those elements of the claim.

201. Again the legal principles in play are not in much dispute, with the twin House of Lords/Supreme Court authorities of *Thorner v Major* [2009] 1 WLR 776, [2009] UKHL 18 (on the nature of representations) and *Guest v Guest* [2024] AC 833, [2022] UKSC 27 ("***Guest***") (on remedy) dealing with many of the issues, and the most recent Court of Appeal case being *Winter v Winter* [2024] EWCA Civ 699 ("***Winter***").

202. The typical proprietary estoppel claim in relation to a farm was explained by Lord Briggs JSC in [1] to [2] of his judgment in *Guest*. This would normally be an assurance by a farmer to his son that the farm would be his and that son then spends most of his working life on the farm, for very low wages and living there on the basis that he would eventually succeed his father in owning the farm. Many years later the father and son fall out and the son and his family have to move out, he has to find alternative work and he is cut out of his father's will. The courts will find a way of remedying this situation because the father's conduct was unconscionable. Under the legal rules of contract and inheritance the father was free to renege on his promise to the son and to change his will. But equity provides a remedy in those circumstances.

203. However the classic case set out by Lord Briggs JSC is not this case for the following reasons:

(1) There was no falling out between the Claimants and the deceased; they were not evicted or prevented from working on the Farm. Actually the deceased wanted them to continue to live and work at the Farm and put in place the Partnership that both enabled them to do so and to acquire the Farm after she died via the Option. The only thing that happened was that the deceased changed her Will in early 2016. The Claimants knew this but continued both to live at and work on the Farm as they had done since before the 2016 Codicil.

(2) This is not a claim by a child against their parents. It is the second generation, the grandsons, and they are partly in effect claiming against their own mother's half interest in the Farm. In due course they will expect to inherit that half interest, so they have not really been disinherited.

(3) As the deceased was well aware, the Claimants will also likely inherit the larger neighbouring Agistment Farm from their father. They spent the majority of their working time at Agistment Farm in respect of which they both invested their own money and went into partnership with their father. Clearly they did not commit their whole lives to the Farm.

(4) The Claimants' alleged detriment is nowhere near the scale of the typical case. The Claimants are still young and have not spent "*the best part of*" their working lives in reliance on the alleged promise. They have their lives ahead of them. In any event, it seems to me that the only period that they could be said to have been relying on any such promise was from the time of the 2011 Codicil to its revocation by the 2016 Codicil. They knew that the deceased had changed her Will so that they would not then inherit the Farm directly when the deceased died. And they knew that she did not thereafter change her mind again and that was how her Will remained. Therefore there could have been no reliance on any alleged promise from that moment on. That means that the reliance issue can be tested by reference to what they did after the alleged promise had been withdrawn.

(5) While the deceased was alive, including at the meetings with the professionals like Mr Smale and Ms Campbell, the Claimants and their parents never once suggested that the deceased had made an unequivocal representation to them that they would inherit the Farm. At the long meeting on 2 June 2016 neither of them, nor their mother, said that they had been promised the Farm by the deceased and that that was the reason why it would be unfair for her to change the Will. If they had a cause of action in proprietary estoppel, it would have been complete at that stage and they could have sued their grandmother. But that was of course not contemplated, and probably because they always knew that she was entitled to change her mind, and in any event, that an equal split of her estate between her daughters was a fair outcome.

(6) It also emerged from the cross-examination that there was some sort of informal agreement between the Claimants that Steven would inherit Agistment Farm and John, the Farm. While this might explain why John seemed more upset at the time at the deceased's change of mind, it is also contrary to the pleaded case that they were both relying on an alleged promise to them that they would both inherit the Farm.

204. The relevant period for the operation of an estoppel in this case is therefore relatively short. I need to examine whether, during that period, there really was a clear assurance by the deceased that the Claimants reasonably relied on to their detriment. Before looking at the facts, I will set out some of the uncontroversial legal principles in play here.

(ii) Legal Principles

205. Both parties referred to the summary of the law at [38] of the judgment of Lewison LJ in *Davies v Davies* [2016] EWCA Civ 463, which is set out below:

> "Inevitably any case based on proprietary estoppel is fact sensitive; but before I come to a discussion of the facts, let me set out a few legal propositions:
>
> (i) Deciding whether an equity has been raised and, if so, how to satisfy it is a retrospective exercise looking backwards from the moment when the promise falls due to be performed and asking whether, in the circumstances which have actually happened, it would be unconscionable for a promise not to be kept either wholly or in part: *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 at [57] and [101].

(ii) The ingredients necessary to raise an equity are (a) an assurance of sufficient clarity (b) reliance by the claimant on that assurance and (c) detriment to the claimant in consequence of his reasonable reliance: *Thorner v Major* at [29].

(iii) However, no claim based on proprietary estoppel can be divided into watertight compartments. The quality of the relevant assurances may influence the issue of reliance; reliance and detriment are often intertwined, and whether there is a distinct need for a "mutual understanding" may depend on how the other elements are formulated and understood: *Gillett v Holt* [2001] Ch 210 at 225; *Henry v Henry* [2010] UKPC 3; [2010] 1 All ER 988 at [37].

(iv) Detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial. The requirement must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances: *Gillett v Holt* at 232; *Henry v Henry* at [38].

(v) There must be a sufficient causal link between the assurance relied on and the detriment asserted. The issue of detriment must be judged at the moment when the person who has given the assurance seeks to go back on it. The question is whether (and if so to what extent) it would be unjust or inequitable to allow the person who has given the assurance to go back on it. The essential test is that of unconscionability: *Gillett v Holt* at 232.

(vi) Thus the essence of the doctrine of proprietary estoppel is to do what is necessary to avoid an unconscionable result: *Jennings v Rice* [2002] EWCA Civ 159; [2003] 1 P & CR 8 at [56].

(vii) In deciding how to satisfy any equity the court must weigh the detriment suffered by the claimant in reliance on the defendant's assurances against any countervailing benefits he enjoyed in consequence of that reliance: *Henry v Henry* at [51] and [53].

(viii) Proportionality lies at the heart of the doctrine of proprietary estoppel and permeates its every application: *Henry v Henry* at [65]. In particular there must be a proportionality between the remedy and the detriment which is its purpose to avoid: *Jennings v Rice* at [28] (citing from earlier cases) and [56]. This does not mean that the court should abandon expectations and seek only to compensate detrimental reliance, but if the expectation is disproportionate to the detriment, the court should satisfy the equity in a more limited way: *Jennings v Rice* at [50] and [51].

(ix) In deciding how to satisfy the equity the court has to exercise a broad judgmental discretion: *Jennings v Rice* at [51]. However the discretion is not unfettered. It must be exercised on a principled basis, and does not entail what HH Judge Weekes QC memorably called a "portable palm tree": *Taylor v Dickens* [1998] 1 FLR 806 (a decision criticised for other reasons in *Gillett v Holt*)."

It was accepted that the last four subparagraphs would have to be applied now in accordance with *Guest* (see [40] of the judgment of Zacaroli J, as he then was, in *Winter v Winter* [2023] EWHC 2393 (Ch)).

206. In [25] of *Winter*, Newey LJ referred to the overarching principle of unconscionability:

> "Earlier, in *Gillett v Holt* [2001] Ch. 210, Lord Walker (as Robert Walker LJ) had noted at 225 that "the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine" and that "[i]n the end the court must look at the matter in the round". The "fundamental" concern with unconscionability may bear on the level of detriment that is needed to succeed in a proprietary estoppel claim: as Lord Walker observed at 232, "[w]hether the detriment is sufficiently substantial is to be tested by whether it would be unjust or inequitable to allow the assurance to be disregarded - that is, again, the essential test of unconscionability". In *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55; [2008] 1 W.L.R. 1752, Lord Walker, at paragraph 92, expressed the view that unconscionability "does … play a very important part in the doctrine of equitable estoppel, in unifying and confirming, as it were, the other elements" before saying, "[i]f the other elements appear to be present but the result does not shock the conscience of the court, the analysis needs to be looked at again".

207. In the context of testamentary promises, because they are inherently revocable as both testators and potential beneficiaries know, it seems to me that any such promise must be both clear and unequivocal but also any alleged detriment must be substantial enough to establish the requisite reliance and causal connection. In other words, a testator should be able to realise that their then current testamentary intention as disclosed to the beneficiary, was being treated as a binding promise and being acted on.

208. There is no doubt that it is net detriment that counts (see subparagraph 38(vii) of *Davies* quoted above), taking account of countervailing benefits received by the claimant. Problems may arise where such benefits are financial whereas the detriment may be less susceptible to financial valuation. Nevertheless the court has to do the best it can in assessing the overall net detriment suffered by the claimant and whether it is substantial enough for it to have been unconscionable for the promisor to have withdrawn their clear and unequivocal promise.

209. A further issue in relation to detriment arises in this case and that is whether detriment suffered by a third party can be taken into account. The Claimants say that their father's loss of the Tenancy should be considered part of the detriment they have suffered. The authorities are not clear on this – see *Snell's Equity* (35th Ed.) fn.405 in Ch 12, which includes reference to a decision of mine as a deputy High Court Judge in *Brent LBC v Johnson* [2020] EWHC 2526 (Ch) where I opined that such third party detriment should not be taken into account. I agree with Mr Learmonth KC's submission that the "real world" approach required by the notion of unconscionability means that if the wider family's detriment is to be taken into account, so too should any countervailing benefits received by other members of the family, such as in this case, Ruth inheriting half of the Farm. In other words the Maile family cannot have it both ways.

210. There are other matters relied on by the parties, such as the equitable defence of "clean hands" and satisfaction of the equity and contracting, in respect of which I will deal with the law as necessary when I get to those topics.

(iii) Representations

211. The Claimants' case is that their grandmother made clear and unequivocal repeated representations that they would inherit the Farm after her death. They allege that she had made these assurances to them from when they were very young. Their evidence

of this is purely their oral testimony. The representations were never reduced into writing, save perhaps in the form of the 2011 Codicil, but the Claimants say they never saw that.

212. Both in their Particulars of Claim and their witness statements, they asserted that their grandmother constantly said words to the effect of: "*one day this will all be yours*"; "*who else would it go to*"; "*you can do it your way when I'm gone*"; "*this is your farm here and I am leaving it to you*". John referred to conversations he said he could remember happening in the late 1990s when he was 10 or 11 years old. He said he remembered conversations from his teens about worm farming and his chickens during which his grandmother said that sort of thing. He claimed to recall a conversation that the deceased had had with Sheila 15 years ago about a new shed that had been put up at the deceased's expense and Sheila was allegedly complaining about her daughters not getting any benefit from that. He gave more examples of conversations, such as the one in the piggery or when his grandmother handed him the original 1927 auction catalogue for the Farm. Steven similarly said that he remembered many such conversations.

213. But the trouble with this evidence is that even if it is accepted that these sorts of generalised statements were made by the deceased, I do not believe they could reasonably have been interpreted as meaning that they would directly inherit the Farm from their grandmother. Their parents were still very much fit and alive and there was, for some time before the Partnership, a pre-existing farming relationship between the deceased and the Claimants. The deceased obviously wanted to encourage the Claimants to take over the running of the Farm business, so that it would remain within the family. But they do not seem to me to amount to unequivocal representations that the deceased would herself be leaving the Farm to the Claimants; and I do not believe that two teenage youths would have interpreted what their grandmother had said in this way. They could reasonably have thought that they would in due course inherit the Farm through their mother and aunt. At that time, the 2006 Will did not leave the Farm to the Claimants.

214. The Claimants do not seem to have relied on the 2011 Codicil as a representation to them. They do not plead it as a representation in the Particulars of Claim and they say that they did not see it, or know about it at the time it was made. Their evidence was that they found out that their grandmother had made a Will that left the Farm to them during the course of the meetings with the professionals in 2013 and 2014. However John's evidence that Ms Merritt had asked the deceased at one of the meetings in relation to inheritance tax planning because she needed to know who was going to inherit the Farm was firmly denied by Ms Merritt. In her witness statement she said that the deceased may have said that "*she would like the boys to be able to farm, but she definitely did not say that she wanted the boys to have it on her death nor did she promise to give it to them*". She also said that the deceased "*was definitely cagey about everything and perhaps this was an attempt by her to keep everyone dangling so that everyone looked after her…she was trying to keep them all happy without making promises*." In cross-examination Ms Merritt was clear that she did not ask the deceased what was in her Will and she did not need to know that for the purposes of giving inheritance tax advice. That is obviously correct and I accept Ms Merritt's evidence over John's.

215. The suggestion at the heart of the Claimants' case, that the setting up of the Partnership was predicated on the Farm being left to them, does not stack up. The inheritance tax would be saved via the Partnership and the surrender of the Tenancy whoever inherited the Farm from the deceased and so the £400,000 saving benefited Ruth and Sheila equally under the Will. Mr Dumont KC submitted that the provision in the 2011 Codicil that the Claimants would be responsible for the inheritance tax on the Farm is significant, but that does not affect who benefits from the inheritance tax saving if the Will was changed.

216. Mr Smale said that he did not disclose anything about the 2011 Codicil during the meetings; and Ms Campbell, although she accepted in cross-examination that she may have been made aware that the deceased intended to leave the Farm to the Claimants, did not hear any promise to such effect and it did not feature in any of the discussions about the Partnership nor affect it in any way. There is no mention of this in any of the letters and attendance notes from the meetings that took place then. After the Claimants found out about the 2016 Codicil, they and their father went to see Ms Campbell on 15 March 2016. Her attendance note recorded them mentioning that the deceased had changed her Will to leave the Farm to her daughters. There was no suggestion from them that this changed anything or that it was unreasonable or unfair or was contrary to a promise or the basis for them entering into the Partnership.

217. Nor was this suggested at the meeting on 2 June 2016 with Mr Smale, the deceased, the Claimants and their mother or in any other of the recorded conversations. The Claimants do not rely on any representations by the deceased after the making of the 2016 Codicil but it is highly significant, in my view, that they are careful never to say that the deceased had promised to leave them the Farm in her Will and that they had shaped their lives around that. On the contrary, and maybe because they knew the conversations were being recorded, they always said that it was the deceased's decision – "*it's up to you*" – and that she was free to do whatever she wanted. In other words, she was not breaking any irrevocable promise by changing her mind to what she then considered was the fair thing to do. In the circumstances, it is difficult to see how that decision could be described as "*unconscionable*" or "*gut-wrenching*" (as Lord Briggs put it in *Guest*) even leaving aside any detrimental reliance that is established.

218. This is the trouble with proprietary estoppel cases based on an alleged representation as to what a testator intends to do in their will. Everyone knows that wills can be changed for all sorts of reasons. Therefore it does seem to me that any such representation by a testator needs to have been very clear and to have a certain quality of immutability about it. Unless the testator can appreciate that their representation is going to be relied upon by the beneficiaries such that their lives would be shaped around their receipt of the promised inheritance, it cannot really be said to be unconscionable for the testator to change their mind later. I accept the distinction that has been drawn in recent cases between statements as to the testator's then current intention in relation to their will and those which amount to an irrevocable assurance that that is what they will do and they will not change their mind: see *James v James* [2018] EWHC Civ 386, at [24] per HHJ Matthews sitting as a deputy High Court Judge; *Horsford v Horsford* [2020] EWHC 584 (Ch) at [45] to [48], per Mr Murray Rosen QC, sitting as deputy High Court Judge; and *Gladstone v White* [2023] EWHC 329 (Ch) at [19], per Trower J.

219. After the Claimants knew of the 2016 Codicil, there was no active representation that they could have relied on, and none was alleged. They knew that the deceased did not change her mind again at the 2 June 2016 meeting or at any time thereafter. The period of any alleged operative representation as to the deceased's testamentary intention was very short. The vague representations that I have referred to above when the Claimants were young and had only just started getting involved in helping on the Farm did not amount to a clear and unequivocal representation that they could reasonably have relied upon. Then the discussions in relation to the Partnership actually showed that the deceased was making alternative provisions as to what should happen to the Farm. The fact that it was put into the Partnership as special capital and the Option granted (without objection from the Claimants who said that they thought the Farm was coming to them anyway) showed the possibility being left open that the deceased would change her Will but the Claimants could still have acquired the Farm on favourable terms. Mr Dumont KC said that the Partnership Agreement was on standard terms and there was no negotiation in relation to it. Nevertheless both Claimants said they read it and yet they did not protest that they had been promised the Farm (see [127] of *Horsford v Horsford*, supra, making the same point and in which there was an identical partnership agreement).

220. The Claimants pleaded that, at a Sunday lunch, the deceased said that the Farm "*would pass to the Claimants and one asked the deceased if she was sure; to which she said she was*". This could perhaps be said to be the clearest representation, if made. However neither Claimant referred to this incident in their witness statements. The only evidence in support came from Peter who exaggerated the one Sunday lunch to it occurring on "*several occasions*" but that he recalled one particular Sunday lunch "*in or around 2016*" when the question posed in the pleading happened. This is very weak evidence, unsupported by any other members of the Maile family. Even if it did happen, it was very shortly before the deceased changed her mind in early 2016 and so could not have materially affected the Claimants' behaviour. It confirmed that the period we are examining here was very short. But the fact that she made the 2016 Codicil at that time undermined the credibility of Peter's evidence.

221. In summary, I find that there were no clear and unequivocal representations or assurances that the deceased would be leaving the Farm to the Claimants in her Will. In order to try and establish that the alleged representations were of a transactional nature the Claimants said that they were made conditional on the Claimants continuing to work on the Farm for the rest of the deceased's life. However there was no evidence whatsoever that the deceased imposed such a condition on the Claimants. No such deal was made; nor could the Claimants have reasonably assumed that it had.

(iv) Reliance

222. The element of reliance, if present, provides the causal link between the representations and the alleged detriment suffered as a result. The Claimants have to show that they would not have acted as they did if the representations had not been made. The less certain the representations are, the less likely they could have reasonably been relied on. This is what I have already found.

223. But even if I am wrong about that, and there were sufficiently clear and unequivocal assurances given that the Claimants would inherit the Farm from their grandmother,

there are two main obstacles in the way of them showing that they relied on such assurances:

(1) Steven honestly admitted in his evidence that he would have acted in the same way, in particular entering the Partnership, even if he had not received those assurances about inheriting the Farm. He would have continued to work on the Farm so that the inheritance tax saving would benefit whoever was inheriting the Farm. He would have helped out his family, including his grandmother, because that was the sort of kind person he was. John was not prepared to admit that but agreed that he would do what was asked of him. His main concern was that he did not want Sheila to benefit from their efforts when she was not contributing anything.

(2) They continued to work on the Farm and act in the same way in relation to the Farm both before and after they knew of the deceased's change of mind in the 2016 Codicil.

224. Both in their Particulars of Claim and their witness statements, the Claimants have put forward what they say amounts to reliance. This includes the following:

(a) The Claimants had worked on the Farm from a very young age, becoming more involved from around 2003 (although they were still teenagers then); they received little to no pay;

(b) They have lived at the Farm all their lives; they could have moved to Agistment Farm in 2012 when their other grandmother died but stayed because the deceased wanted them to; John said that he would have wanted to spend a few years travelling and learning other farming techniques abroad; Steven said that he would have wanted to develop his farming career away from the Farm, possibly in America;

(c) They have had to continue with old-fashioned farming methods because the deceased wanted them to, telling them that they could modernise when the Farm was theirs;

(d) They replaced old-style sheep pens with hurdle pens and they sheared the sheep two days a year from the end of 2010;

(e) They received no real remuneration from the Partnership for its first two years, but they worked hard to ensure that it was a fully functioning farm for the purpose of APR; they also invested some of their own money in the Partnership;

(f) John said that he decided not to purchase other accommodation, having made inquiries as to how to do so, but did not go ahead with that on the basis that he would be able to live at the Farm when he inherited it;

(g) Their father Peter gave up the Tenancy to improve the prospects of saving inheritance tax; as they were already in the Maile Partnership, they say that this was also a detriment to them;

(h) More generally the Claimants asserted that they would not have assisted the deceased in the way they did but would have concentrated their work and effort on Agistment Farm.

225. These are also the particulars of the alleged detriment suffered by the Claimants and I accept that the requisite reliance could be inferred from the detriment proved to have been suffered. But if these acts of reliance would have happened anyway, because for example, the Partnership had to be entered into to obtain the tax saving for the next generation, whoever they were, or the Tenancy had to be surrendered for the same reason, then there was no real reliance. The Claimants' own evidence shows that they were undertaking work on the Farm more out of a sense of kindness, affection and familial duty than because of a promise of future reward. I do not, in any event, accept that they did less work at Agistment Farm than they would have done and consider that actually the majority of their working time was at Agistment Farm, furthering the interests of the Maile Partnership. Furthermore, some of their work on the Farm was as contractors acting on behalf of the Maile Partnership, and they were remunerated accordingly.

226. It is not necessary to speculate with counterfactuals as to how the Claimants would have behaved without an alleged assurance from their grandmother that the Farm would be left to them by her. That is because when the alleged assurance was withdrawn to their knowledge at the beginning of 2016, they did not withdraw their services or act any differently. While it could be said that they were simply continuing to act in the way they had previously pursuant to the alleged assurance, the fact that they continued as before makes it that much more difficult for them to prove that they would have acted differently in the absence of any such assurance from their grandmother.

227. It is also impossible to disentangle the work that the Claimants were doing as partners in the Partnership, by which the whole family would benefit from the inheritance tax saving, their work as contractors on behalf of the Maile Partnership, the work done for the family and their grandmother as kind and loyal grandsons and the work done allegedly because of the expectation of inheriting the Farm. As they continued to farm the land after they knew that they were not going to inherit the Farm directly from the deceased, they have not proved that they had been previously relying on the alleged assurances from their grandmother.

228. Accordingly the proprietary estoppel claim fails at the first stage, as the Claimants have not proved, on the balance of probabilities, that there were any sufficiently clear assurances from their grandmother, and even if there had been, that they relied on them. No equity therefore arises in their favour and it is unnecessary to consider the other elements of their proprietary estoppel claim. However, having heard evidence and submissions on them I will state my conclusions on them more shortly than I otherwise would have done.

(v) Detriment

229. It has not been easy working out how much money and other benefits were received by the Claimants, and other members of the family, from the deceased throughout the relevant period. In the run up to the trial, Sheila had complained about the lack of financial information and bank statements disclosed that would have enabled her properly to analyse what was paid by the deceased. Mr Learmonth KC did manage to

drill down on a number of items and cross-examined witnesses with the information that he had. He came up with a complicated and detailed account of the countervailing benefits that he said were received by or for the Claimants. But as he rightly said, it is for the Claimants to prove that they were worse off as a result of their reliance on their grandmother's alleged assurances in relation to the Farm. I do not think that they have managed to do so.

230. Mr Dumont KC relied on the same particulars of reliance as for detriment, the two elements being very much bound together. In terms of financial loss, he submitted that it was the salary, profits or benefits foregone that the Claimants could have earned if they had worked elsewhere. As stated above, John considered that he had the opportunity to buy a house in 2014, including possibly a buy-to-let, but he gave up on that because his grandmother wanted him to stay at the Farm. They also had to work hard, with outdated machinery and farm buildings, to get the Farm into a position where full APR could be claimed. However it was the broader, less financial, detriment that Mr Dumont KC most relied on; that was having to live their lives in their grandmother's house and the "*loss of the promised prospect of taking over the Farm*".

231. However, as Mr Learmonth KC submitted, living at the Farm was no real detriment to the Claimants, as it was free board and lodging, with all bills, including car insurance, paid for. They continued to live there after they were disinherited. They could have moved into Agistment Farm, as they said they wanted to, at any time. But according to Peter, the reason they all continued to live at the Farm, including after the deceased's death, was because they perceived a tactical advantage in this litigation. The notion that John might otherwise have bought a buy-to-let property does not stand up to scrutiny because he seems to have invested most of his available money in the Maile Partnership, as well as purchasing some £25,000 of Premium Bonds.

232. Mr Learmonth KC divided the alleged countervailing benefits into the periods before and after the Partnership. There are scant details of amounts received by the Claimants before the Partnership. At that time most of the farming on the Farm was by Peter and the Maile Partnership pursuant to the Tenancy. On the land retained by the deceased, there was a small flock of sheep, some of which were owned by John, but this was more in the nature of "hobby farming". Steven admitted that the level of farming on the Farm was very low but that he and his brother were prepared to help their grandmother out when they were not otherwise working for their father.

233. The Claimants said that they were basically paid a bit of pocket money by their grandmother, £20 or £30, here or there. However the deceased's 2013 accounts showed a sum of £12,700 paid as contractors' fees, which John admitted was a payment to him for his services. Neither Claimant was able to say whether there were other payments, or gifts, or thank-yous during that period. It was quite misleading of them to have said that they only received very small amounts of pocket money. It emerged from the oral evidence that the Claimants had quite substantial savings, most of which were put into the Maile Partnership (Peter seemed surprisingly unaware of where his sons acquired such wealth). Mr Dumont KC sought to explain some of this by reference to some children's bonds that had been taken out for them when they were young, including producing a document during his closing submissions that was said to have proved this. In the first year of the Maile Partnership, the Claimants put in a total of £44,792, with another £10,000 the year after. It remains unclear how they had such resources at a time when they claimed to have been working hard for free. I consider therefore that insofar

as the Claimants were relying on assurances from the deceased in the pre-Partnership period, they have not shown that they suffered any real net financial detriment.

234. There is a little more information for the post-Partnership period. The amount of work being done by the Claimants on the Farm went up, partly because of the Partnership but also because of the surrender of the Tenancy and that arable land being brought back in and needing to be farmed for the tax saving. They increased the livestock a little as well. But the Claimants still spent a considerable amount of their working lives at Agistment Farm and for the Maile Partnership.

235. Mr Mark Shelton is a chartered accountant specialising in farming and related businesses and he was instructed as a single joint expert to analyse the financial records and report on payments made to the Claimants and other members of the deceased's family. His report is dated 8 January 2025. Mr Learmonth KC has further analysed the figures in his report together with other available information. This has shown the amount received by the Maile Partnership from the Partnership by way of contracting fees. The bank statements, invoices and accounts do not quite match up, but in broad terms it shows that around £70,000 to £76,000 was received by the Maile Partnership between February 2015 (the date of the Partnership Agreement) and March 2020 (the deceased's death). This would tend to indicate that the bulk of the jobs that the Claimants said they were doing at the Farm were actually charged for by the Maile Partnership, from which the Claimants would benefit. (There were small amounts going the other way, when for instance the Maile Partnership bought standing corn from the Partnership.)

236. In relation to drawings from the Partnership, the Claimants started drawing £500pm from April 2017. Before they started drawing such amounts, they appear to have paid into the Partnership, credited to their accounts, a total of £38,500 during 2016, but thereafter no funds were introduced by them. That means that the Claimants managed to find some £95,000 to put into their two Partnerships in this period, during which they maintained that they were not being paid at all for their work. The fact that these sums were credited to their capital accounts shows, as Mr Smale explained to them on 2 June 2016, that they have not lost those amounts.

237. The Claimants drew a total of £40,000 from the Partnership in the year to 31 March 2018. They received balancing payments of £15,000 each at the end of the year. This appears to have been funded by capital introduced by the deceased in June 2017 of £40,000 and further sums of around £8,000 derived from the deceased's Scottish Widows pension. As well as drawings, the Claimants received other amounts from the deceased that seem to have been regarded as gifts. These were in tranches of £5,000 each, and they were made on 30 May 2017, 26 February 2018, 18 October 2018 and 24 October 2018. There was some confusion in the evidence as to why these payments were being made, but the Claimants were essentially suggesting that this was to balance similar payments made by the deceased to her granddaughters, Gemma and Pippa, although John seemed to think that the latter two payments were about "*gearing up for winter*". As to balancing payments to the grandchildren, Gemma and Pippa had received a total of £14,900 by the end of 2018 whereas the Claimants had received the full £40,000 (plus the other amounts from the cottages account explained below).

238. The Claimants also received funds from their mother's joint cottages account with the deceased. This account was used to receive income and pay expenses of the cottages

half-owned by Ruth. In or around June/July 2016 sums totalling around £38,000 were paid by the deceased to the cottages account. This appears to have been largely about paying the cost of the roof repairs which was about £75,000. In October 2016, the Claimants received £18,000 from this account, they say because of their contribution to the roof repair work, but it is doubtful, to say the least, that this was the value of their work in relation to the roof and in any event this was in relation to the cottages not the Farm.

239. Between October 2017 and October 2018, the Claimants received a total of £25,000 from the cottages account. Again there was conflicting evidence about these payments particularly from Ruth whose oral evidence (that they were for work done) was inconsistent with her witness statement (that they were gifts). The Claimants thought they were from their mother, who also believed that the deceased had consented to the payments. This is unsatisfactory and does not assist the Claimants in showing that they suffered a net detriment. Furthermore in the year ended March 2018, the Claimants had paid £46,000 into the Maile Partnership.

240. On 8 November 2018 around £58,000 was withdrawn from the deceased's M&G investment accounts and this was paid into the Partnership and credited to the deceased's account. (The withdrawal forms are the ones said to contain a forged signature of the deceased.) On 2 January 2019, £23,000 was paid out of the Partnership account to Ruth. This is accepted to have been the repayment of a loan made by Ruth to the Partnership in 2016. Then on 5 and 7 January 2019, £38,500 was paid out of the Partnership account to the cottages account, and it was treated as a drawing by the deceased on her capital account. That same sum was then paid out on the same day to Ruth. She was unable to explain why this happened or what she did with the money.

241. The post-Partnership financial position can therefore be approximated to have resulted in the following:

(1) Total drawings from the Partnership by the Claimants were around £75,000; this can be set against around £40,000 paid in; leaving a profit to the Claimants of £35,000;

(2) The Claimants received £40,000 directly from the deceased in £5,000 tranches each;

(3) The Claimants received £43,000 from the cottages account, which has not been adequately explained;

(4) Ruth appears to have received £38,500 of the deceased's money from the Partnership;

(5) The Maile Partnership received around £70,000 for contracting work, less the amount paid for standing corn etc.;

(6) The majority of the deceased's savings were realised and used to make the above payments.

242. So the Claimants' case that they received limited drawings and no other benefits is plainly not made out. They received substantial sums over the years from the deceased and the Partnership, that far outweighed whatever was received by the Kempthorne side

of the family. It did not help their case that they sought to avoid giving any disclosure on this issue and then were extremely unforthcoming in seeking to explain the amounts received. This had to be eked out of them in cross-examination but they were either unable to remember or gave inconsistent evidence. Advice was given to the deceased to transfer assets and use her allowances for gifting, but if that was what it was all about, I do not understand why the Claimants were not more upfront about it.

243. Even taking into account the loss of the Tenancy, in respect of which there is no evidence of its value and it was in any event so as to save a huge amount of inheritance tax, and any other more general and unquantifiable losses, the Claimants have come nowhere near showing that they have suffered any sort of significant net detriment. In fact, they and their family, will have benefitted from the arrangements set up by the Partnership and it is clear that the substantial sums received by them from the deceased and the Partnership have largely been reinvested by them in the Maile Partnership, thus enabling that family asset to thrive.

244. Accordingly even if I had found there to be actionable representations and reliance, I would have rejected the proprietary estoppel claim on the ground that the Claimants had not proved they had suffered any relevant net detriment as a result.

(vi) The Partnership and Option

245. Mr Learmonth KC ran an argument, based on *Horsford v Horsford* (supra), particularly at [165], in which there was a virtually identical Partnership Agreement containing the same terms in relation to land introduced by one partner and the Option on retirement or death, that the Claimants contracted out of their estoppel rights by entering into the Partnership;. alternatively that the rights that they acquired through the Partnership Agreement were clearly inconsistent with the equity that they were seeking to enforce.

246. Actually at the time of the Partnership Agreement, the 2011 Codicil was in force, meaning that the Claimants were then going to inherit the Farm from the deceased, despite the terms of the Partnership Agreement. Mr Dumont KC submitted that the Partnership Agreement was just a standard form agreement (as demonstrated by the same one being used in *Horsford v Horsford*) and that its terms were not the subject of any meaningful negotiation. The Claimants said that they both read it and were aware of the provisions in relation to the Farm being introduced as the deceased's special capital and the Option, but considered that these were inapplicable as they would be getting the Farm under the deceased's Will.

247. The assumption that has to be made is that, by the time of the Partnership Agreement that was entered into in February 2015, the Claimants already had equitable rights arising from their detrimental reliance on assurances from the deceased that they would be inheriting the Farm from the deceased. Mr Learmonth KC submitted that, even if that were so (which he denied and which I have found not to be the case) the Partnership Agreement would effectively supersede and override those rights that had been acquired. It seems to me that the fact that, at the time, the Claimants were going to inherit the Farm through the deceased's Will and not the Partnership Agreement does not affect this question. As is known, the deceased did, a year later, change her Will. Maybe the existence of the Partnership contributed to her thinking in relation to that, although I accept that this was not raised with Mr Smale.

248. In my view there is merit in Mr Learmonth KC's argument. The Partnership Agreement when it came into existence governed the relationship between the deceased and the Claimants in relation to the Farm. While it was put into the Partnership by the deceased as special capital, the deceased was still free to dispose of it as she wished in her Will. But insofar as the Claimants seek to assert alternative rights, outside the Partnership, in relation to the Farm, whether by way of proprietary estoppel based on representations by the deceased or otherwise, those rights should not be able to survive the coming into force of the Partnership Agreement. The Partnership provisions are inconsistent with the continued existence of the alleged equitable rights and I agree with Mr Murray Rosen KC in *Horsford v Horsford* that the Claimants are estopped from or simply unable to enforce those rights which have been extinguished.

249. Should it have been necessary to do so, I would have found in Sheila's favour on this argument about the effect of the Partnership.

(vii) Unclean Hands

250. As an equitable remedy, a proprietary estoppel claim is subject to equitable defences, including the maxim: "*he who comes to equity, must come with clean hands*". The misconduct alleged must be serious and deliberate and it must have an immediate relation to the claim – see *J Willis & Sons v Willis* [1986] 1 EGLR 62.

251. In a case such as this, this overlaps considerably with the issue of unconscionability. If all three elements of the claim were proved – representations, reliance and detriment – the court would still need to look at matters in the round, assessing the quality of the representations and the degree of detriment suffered and decide whether the repudiation of the promise was in the circumstances "*unconscionable*" – see Lord Briggs JSC at [74] of *Guest*. Bad behaviour, perhaps even falling short of the equitable defence of "*unclean hands*" may therefore be taken into account at the "*unconscionability*" stage.

252. Having dismissed the proprietary estoppel claim on all the above grounds it is unnecessary for me to decide whether this defence succeeds or not. But it is a very serious allegation to have been made and reluctantly I feel that I ought to say something about it.

253. The allegation, as pleaded by Sheila, is that the deceased's signatures on four documents were forged and that this enabled the Maile family to benefit from the deceased's funds that would otherwise have been left in her estate or would have been transferred to Sheila's side if the Farm was being left to the Claimants. For the defence to succeed it must be alleged that the Claimants have not come to court with clean hands. However, the way the case was pleaded and argued, it seems to me that this was really being directed at Ruth. Mr Learmonth KC submitted that the events were being orchestrated by Ruth and that she, on behalf of the Maile family, particularly her sons, was seeking to extract as much value from the deceased's estate before she died.

254. However I have sympathy with the submissions made by Mr Briggs on behalf of Ruth, in particular where he said that the pleading of forgery is effectively an allegation of dishonesty and needed to be clearly pleaded and supported by cogent evidence – see *Lakatamia Shipping Co Ltd v Nobu Su and ors* [2021] EWHC 1907 (Comm) at [42] per Bryan J. In this case, Sheila's defence said this: that the questioned documents "*were not signed by the Deceased but were simulations of her signature by another*

individual". It then continued: "*Whether that individual was one of the Claimants, the First Defendant or someone else*…" it was known about by the Claimants. She then concluded with the following:

> "26.6 This is misconduct of the most serious kind, from which the Claimants or members of their immediate family benefited directly, and which is related to the equity sued for. It is to be inferred that, having found out in early 2016 that the Claimants would not be inheriting the Farm from the Deceased, the Claimants and the First Defendant decided to extract as much value from the Deceased during her life as they could."

255. That is effectively an allegation of theft, but without identifying who was actually responsible for forging the deceased's signature. I do not question that Sheila has the support of the forensic document examination expert evidence in this respect, both her own expert, Ms Ellen Radley and that of the Claimants, Mrs Elisabeth Briggs. The four questioned signatures were on the two M&G withdrawal forms and on the Partnership accounts for y/e 2017 and 2018, that showed a further change to the Partnership shares of 20:40:40 in Steven and John's favour. Both experienced experts concluded that there was strong evidence to support the proposition that the deceased did not sign the Partnership accounts and that it was unlikely that she signed them in an accidentally modified style because of unusual writing circumstances. Ms Radley had the same opinion in relation to the M&G withdrawal forms; whereas Mrs Briggs had a slightly lesser level of confidence as to those documents. She still however thought it more likely that another person was responsible for the deceased's signature. It should be added that the M&G forms were only available to the experts as multi-generational copies making them more difficult to assess against the known signatures. The experts could not, of course, comment on who was likely to have forged the signatures.

256. The factual evidence from Ruth and the Claimants was inconsistent and contradictory. Steven had said in his witness statement that he had seen his grandmother signing the Partnership accounts. Ruth said in her witness statement that she had filled out the M&G forms at her mother's request and had seen her sign them. However, under cross-examination, both Steven and Ruth were unable to maintain that line and said that they could not now remember seeing the deceased sign the documents. Furthermore, Ruth gave some awkward evidence in relation to the adjustment of the Partnership shares, claiming that this had been advised by Ms Campbell, when there was no evidence of that, save for a self-serving note made by Ruth. But they were responding to a vaguely pleaded allegation that did not identify who was said to have forged the signatures.

257. Mr Dumont KC's defence of this allegation on behalf of the Claimants was basically that they did not know about or consent to any forgery of the deceased's signature. And in any event the Claimants did not benefit from any such forgeries and they were not therefore related to their estoppel claim. As to the M&G withdrawals, the sum of £58,354.63 was paid into the Partnership on 8 November 2018 and credited to the deceased's account. The Claimants therefore did not benefit from that payment into the Partnership. Sheila equated the payments out in January 2019, two months later, with the M&G withdrawals but these were to Ruth, not the Claimants. Again, the Claimants themselves did not benefit. As for the Partnership accounts, the Claimants' evidence was that the change to the profit share had been agreed by the deceased and it was just the sort of thing that she would be happy with. The signature appeared on page 4 of the accounts whereas the profit shares appeared later in the accounts. Furthermore, the

deceased's signature was not questioned on the 2019 accounts, that included the same profit shares although this was signed only 6 months before she died.

258. Mr Briggs concentrated more on the alleged motive, suggesting that Ruth had unfairly been painted as this monster figure, controlling everything whereas in fact, on analysis, there was no reason for her to have done this. He pointed to the Partnership and pre-Partnership figures that he said showed that the deceased had to introduce cash in order to keep it afloat and to fund drawings. The deceased had consistently been advised to give away as much of her liquid estate as possible and that was what she was doing. In relation to the cottages, the deceased took no profit and gave money to both Ruth and Sheila from their respective joint accounts. The M&G withdrawals went into the Partnership account but the funds to Ruth were only withdrawn some two months later after a number of other business transactions. They were all recorded as drawings from the deceased's account.

259. Mr Learmonth KC made a compelling case, building on the forensic expert evidence and heavily criticising the inadequate evidence from Ruth and the Claimants. He suggested that the evidence pointed to Ruth being the culprit because she benefited and she was, contrary to her evidence, heavily involved in the Partnership. He tried to include a further document as containing a forged signature but I do not think it would be right to allow him to rely on that.

260. I am prepared to conclude on the balance of probabilities that the four questioned signatures were not those of the deceased. But I do not consider that the equitable defence would have been sufficiently made out on the evidence had it been a live point in this case. I cannot identify who forged the signatures. And I cannot find that the Claimants either knew of the forgeries or benefited substantially from them. They did receive an increased profit share from the Partnership, but in the overall scheme of things, this was not significant and I cannot be sure that this was not actually approved by the deceased. No direct benefit from the M&G withdrawals is apparent.

261. Accordingly I am not satisfied that the misconduct can be attributed to the Claimants or that there is a sufficiently close connection to the proprietary estoppel claim. Therefore I would have held that the equitable defence of unclean hands would have failed.

(viii) Remedy

262. The question of the appropriate relief does not arise and I cannot really deal with it on the hypothesis that I have wrongly found the claim not to have been established. That is because the appropriate remedy is heavily dependent on the actual findings in relation to the estoppel claim and a test of proportionality must be applied. While the starting point now, following *Guest*, is normally the fulfilment of the promise, as that is the way "*to remedy unconscionability mainly by satisfying expectation*", it is important to "*cross-check by reference to whether a proposed remedy is out of all proportion to the detriment [as] a useful guard against potential injustice*" – [68] of Lord Briggs JSC's judgment in *Guest*.

263. Lord Briggs JSC continued to explain how and when the proportionality test should be used in [71] to [73] of *Guest*. It is only relevant where the proposed remedy is "*out of all proportion to the detriment*". In cases where the value of the detriment is impossible

to assess, such as where it has had "*lifelong consequences*" such as an "*education and working life of a very different kind*", a test of proportionality cannot really be performed. But where, for example, the detriment is "*specific and short-lived*", the test is likely to "*serve a useful purpose*".

264. Mr Dumont KC submitted that this case is in the former rather than latter category and that the detriment was "*transactional*". By that he meant that the deceased's promise was to leave the Farm to the Claimants on the basis that they worked on the Farm during her lifetime. As such, this was on the "*almost contractual*" end of the spectrum and that that would "*generate the strongest equitable reason for the full specific enforcement of the promise*" – [77] of *Guest*. However, there was no evidence before me that any representation by the deceased that the Farm would be left to the Claimants, was conditional on them working the Farm during her lifetime.

265. Mr Learmonth KC submitted that the net detriment was negligible, if any, even allowing for the amorphous non-financial harm, and would be so clearly out of all proportion to the value of the Farm at around £2 million. He said there were no "*incalculable whole-life consequences in terms of the sacrifice of opportunities*" (as in *Guest*, see [95]) and the Claimants will still stand to receive at least half of the Farm through their mother and Agistment Farm through their father. They could still do a deal with Sheila to ensure they continued at the Farm, though they may have wasted their resources that would enable them to do this by bringing and fighting this claim.

266. In short, I am not convinced that this is one of those cases where the remedy should be the full extent of the promise and it is likely that the Court would limit the extent of the remedy to address the unconscionability of the repudiation of the promise but also to prevent the injustice of a disproportionate outcome. This could only be finally determined on any alternative findings of fact, should that happen.

G THE COUNTERCLAIM

(i) Introduction

267. As Sheila has defeated the Claimants' probate and proprietary estoppel claims, her counterclaim as executrix of the deceased's estate for possession of the Farm and for mesne profits and/or damages for the Claimants' and their parents' occupation of the Farm proceeds. It has been agreed that the account on the winding up of the Partnership will be conducted at a later stage and not as part of this trial.

268. The counterclaim is straightforward: Sheila claims possession of the Farm on the basis that clause 20.2 of the Partnership Agreement required the Claimants and Ruth and Peter (they deny they were bound by the Partnership Agreement) to give up occupation of the Farm within 12 months of the deceased's death, ie by 22 March 2021. Their occupation of the Farm thereafter amounted to an unlawful trespass and Sheila therefore claims mesne profits and/or damages for trespass plus interest from 22 March 2021 until occupation is given up.

269. As I have said above, the Claimants do not defend the Counterclaim, save on quantum, if they have lost on both of their claims. They accept that under clause 20.2 of the

Partnership Agreement they had no right to occupy the Farm after 22 March 2021. The curious thing is that Ruth and Peter's main defence to the counterclaim is that they had a licence to occupy from the Claimants.

(ii) Ruth and Peter's defences to the counterclaim

270. Mr Briggs on behalf of Ruth and Peter ran various arguments by way of defences to the counterclaim, some of which were pleaded and at least one was not. The only one that was vigorously pursued at the trial was the claim that they had a licence from the Claimants in their capacity as the surviving partners in the Partnership and with continuing authority to be able to grant such a licence. The first and obvious answer to this is that the Claimants are not asserting that they have any right to possession of the Farm and have agreed that they do not have any such rights. Therefore, they cannot grant any rights to occupy the Farm. The branch falls with the tree.

271. Undaunted by that proposition, Mr Briggs submitted that, even though the Farm was separately treated as special capital in the Partnership Agreement, it became a Partnership asset, in respect of which the deceased in return had a Partnership share reflecting its value. That Partnership share, not the Farm itself, became vested in Sheila as executrix. And the agency of the Claimants as the surviving partners continued in relation to Partnership assets pursuant to s.38 of the Partnership Act 1890. That is where their authority derives for allowing their parents to continue to occupy the Farm until the Partnership has been wound up. Mr Briggs relied on *Harrison Broadley v Smith* [1964] 1 WLR 456 at 465 for the proposition that every partner, subject to a contrary agreement, has an implied licence to occupy partnership property for the purposes of the partnership business. Mr Learmonth KC responded by saying that there was a contrary agreement in this case, namely cl 20.2 of the Partnership Agreement.

272. I am afraid that Mr Briggs' argument in this respect seems to me to be misconceived. Section 38 of the Partnership Act 1890 provides as follows (underlining added):

> "After the dissolution of a partnership the authority of each partner to bind the firm and other rights and obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution…but not otherwise."

273. As Mr Learmonth KC submitted, the Claimants were continuing to run the farm business after dissolution but this was not so as to wind up the affairs of the Partnership. Furthermore, Ruth and Peter's continued occupation of the Farm was not necessary for the purpose of winding up the Partnership; nor was it of any benefit to the Partnership. It is difficult to see how the Claimants could derive any authority from s.38 to grant their parents a right to occupy the Farm.

274. In any event s.38 is subject to the express agreement of the partners – see s.19 Partnership Act 1890. Therefore clause 20.2 of the Partnership Agreement which provides for occupation of the Farm to be given up within 12 months of the deceased's death, takes precedence over s.38. If the Claimants, as partners, had no right to occupy the Farm from 22 March 2021, it is obvious that Ruth and Peter cannot claim that they have a licence from the Claimants to occupy the Farm.

275. Mr Briggs continued with his theme of Sheila, as executrix, only having a share in the Partnership and no beneficial interest in the Farm itself. Therefore he said that Ruth, as one of the two legal owners of the Farm (the other being Sheila but in her personal capacity), has a better title to the Farm than Sheila in her capacity as executrix. That means that Sheila, as executrix, cannot bring a common law claim in trespass against Ruth and reliance was placed on: *Jones (AE) v Jones (FW)* [1977] 1 WLR 438 at 441H; *Wiseman v Simpson* [1988] 1 WLR 35 at 42; and *Ali v Khatib* [2022] 4 WLR 50 at [64]. However those were all cases where the joint legal owners were also beneficial owners of the property in question.

276. In my view, the legal title vested in Ruth and Sheila, is largely irrelevant to this issue. Before the deceased died, she, Ruth and Sheila were the legal owners of the Farm, but they were holding it as bare trustees for the deceased absolutely. That remained the position after the Partnership was formed. Even though it was introduced into the Partnership by the deceased in order that the business of the Partnership could be carried on there, the special capital provisions made it clear that it was still treated as owned beneficially by the deceased. It was part of the Claimants' case that the 2011 Codicil validly gifted the Farm to them, not just the deceased's Partnership share after the Partnership was formed. Therefore, the Farm was considered to be part of the deceased's estate, and after she died, Ruth and Sheila hold the bare legal title on trust for Sheila, as sole proving executrix of the deceased's estate. That is a better title than Ruth's bare legal title.

277. In a yet further argument, Mr Briggs submitted that Ruth, as a residuary beneficiary, has a right to compel the due administration of the estate and that, as the administration is substantially complete, she will be beneficially entitled to an interest in possession within the meaning of s.12 of the Trusts of Land and Appointment of Trustees Act 1996 ("**TOLATA**"), giving her the right to occupy the Farm. Quite apart from this being totally inconsistent factually with the Partnership arguments set out above, it is also incorrect factually, as the administration is far from complete largely as a result of this litigation. In any event Ruth has no beneficial interest in the Farm. All she has is a right to compel due administration of the estate. And s.12 of TOLATA is subject to s.18 of TOLATA insofar as it may prejudice the functions of a personal representative for the purpose of the administration. Cl. 6 of the 2006 Will provides, as most wills do, that the residue is held upon trust to sell it. Then the proceeds will fall into residue and will need to be distributed equally between Ruth and Sheila.

278. In summary, my view is that none of Mr Briggs' arguments work against the plain operation of cl. 20.2 of the Partnership Agreement and the acceptance by the Claimants that they have no rights in relation to the Farm, having not succeeded in their claims. Therefore Ruth and Peter cannot assert any rights of their own against the executrix of the estate and Sheila is entitled to possession of the Farm and to mesne profits and/or damages for trespass. A further argument that Sheila had either acquiesced in Ruth and Peter remaining in occupation and/or had not served any sort of notice to quit is plainly unsustainable. This was not pursued by Mr Briggs in his closing submissions; nor was it pleaded that Sheila had granted the Claimants, and/or Ruth and Peter, a licence to occupy the Farm. Furthermore several letters were written by Sheila's solicitors to the Claimants' solicitors before the claim was issued asserting that the Claimants and Ruth and Peter were in unlawful occupation of the Farm. Ruth admitted in cross-examination that she was aware of those letters. In any event a notice to quit was not necessary, as I

have found that any right to occupy the Farm and Farmhouse came to an end on 22 March 2021 by the operation of cl.20.2 of the Partnership Agreement.

(iii) Quantum

279. Finally I turn to the amount claimed by Sheila for the unlawful use and occupation of the Farm. Mr Learmonth KC had previously wanted to defer consideration of this to a later date because of the inadequacies in the valuation evidence and the difficulties of gathering the requisite information. But I ordered that it should be part of this trial and Sheila belatedly served a schedule of loss, to which Ruth and Peter responded.

280. Mr Philip Hodgkin of Greenslade Taylor Hunt was the jointly instructed expert surveyor to value the Farm and a Market Rent that could be received for the Farm. His first report was dated 29 April 2025. He produced an addendum report dated 1 May 2025 dealing with the improvement works and alleged dilapidations. And he also produced an addendum letter dated 20 June 2025 dealing with Market Rent.

281. Sheila is claiming the following:

(1) The rental valuation of the Farm on the basis that the Farmhouse had been refurbished from 22 March 2021 onwards;

(2) A claim for the deterioration in the Farm's condition since the deceased's death;

(3) Interest on these amounts.

282. The Claimants do not object to judgment being entered against them for damages based on the rental valuation of the Farm although I imagine they will say, as their parents do, that that should be on the basis of the actual state of the Farm, not on the assumption that it had been refurbished. They do object to being held liable to pay for any dilapidations.

283. Ruth and Peter say that they should only have to pay for their occupation of the Farmhouse, because that was all they occupied. They maintain that should be the rental value of the unrefurbished Farmhouse and that it should only run from the date the counterclaim was served on them, being 27 November 2023. They also resist the claim in relation to dilapidations.

284. My conclusions on this are as follows:

(1) The Claimants are liable for the rental value of the Farm on the basis of the Farmhouse in its current state, ie unrefurbished. That is because they lived in a Farmhouse that was in a terribly dilapidated state at the start of the relevant period and they should only be liable to pay for the benefit they received, which was living in a dilapidated house. That means that the rental value of the Farmhouse, according to Mr Hodgkin, is £10,000pa and the rental value of the rest of the Farm is £23,000pa. So £33,000pa for the Farm running from 22 March 2021.

(2) Ruth and Peter are similarly liable for the unrefurbished rental value of the Farmhouse - £10,000pa. from 22 March 2021. I see no reason why the time should not start running from then. They are not however liable for the rest of the Farm as they were not in occupation of it.

(3) Neither the Claimants nor Ruth and Peter are liable for the dilapidations. Mr Hodgkin came up with a small figure of £3,359 for the deterioration in the Farm's condition since the deceased's death. Mr Learmonth KC said that this did not include the poor condition of the Farmhouse to which neither Sheila nor the experts have had access. He sought further time to gather that evidence coupled with an order allowing them access. I do not think that is appropriate. A claim to dilapidations was never pleaded, although I take the point that the Claimants and Ruth and Peter did not object to expert evidence being obtained on this. But also it is clear from photographs I have seen (and this was confirmed by Ms Briggs in her evidence) that the Farmhouse has been in a very dilapidated state for a considerable time before the deceased's death. Sheila has adduced no evidence that it has deteriorated further since the unlawful occupation began. She has not proved her case and it would not be right to order the Claimants and Ruth and Peter to pay damages in such respect.

(4) The Claimants and Ruth and Peter are jointly and severally liable in respect of the Farmhouse rental values. The Claimants are solely liable in respect of the rest of the Farm.

(5) Interest will be payable on the damages under either s.35A of the Senior Courts Act 1981 or the court's equitable jurisdiction. I will fix it at 3% over base rate.

285. I hope that the parties will be able to work out and agree the final figures from what I have ruled above.

H CONCLUSION AND DISPOSITION

286. In the circumstances, and as a result of my findings set out above, the Claimants' claims are dismissed and Sheila's counterclaim succeeds. That means that I make the following orders:

(1) the Claimants' claims are dismissed;

(2) I pronounce in solemn form of law for the force and validity of the 2016 and 2017 Codicils;

(3) the Claimants and Ruth and Peter to give up possession of the Farm to Sheila as executrix of the deceased's estate;

(4) the Claimants and Ruth and Peter are jointly and severally liable to pay damages in respect of their occupation of the Farmhouse in the sum of £10,000pa from 22 March 2021 together with interest at 3% over base rate;

(5) the Claimants are jointly and severally liable to pay damages in respect of their occupation of the rest of the Farm in the sum of £23,000 pa from 22 March 2021 together with interest at 3% over base rate.

287. I would hope that the parties can agree a form of order and any consequential matters. But if that is not possible then I can either determine the outstanding matters in writing or at a hearing.