Neutral Citation Number: **[2022] EWHC 2203 (Ch)**

Case No: CH-2020-000154

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)
ON APPEAL FROM THE ORDER OF DEPUTY MASTER LINWOOD ON 21 MAY 2020

IN THE MATTER OF JEAN MARY CLITHEROE DECEASED (PROBATE)

Rolls Building, Royal Courts of Justice
Fetter Lane, London, EC4A 1NL

Date: 28/07/2022

Before :

MRS JUSTICE FALK

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Between :

JOHN KEITH CLITHEROE	**Claimant/ Appellant**
- and –	
SUSAN JANE BOND	**Defendant/ Respondent**

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- -

Vikram Sachdeva QC, Jack Anderson and **Ruth Hughes** (instructed by **Irwin Mitchell LLP**) for the **Appellant**
Thomas Dumont QC and **Edward Hicks** (instructed by **Birkett Long LLP**) for the **Respondent**

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APPROVED JUDGMENT

NOTE: recording equipment faults resulted in the recording of this *ex tempore* judgment being of too poor a quality for transcription. What follows has been reconstructed by the judge from the judge's notes and the judge listening to the recording.

Mrs Justice Falk:

Introduction

1. This is my decision following a further hearing in this appeal, my initial decision in which was handed down on 4 May 2021 and can be found at [2021] EWHC 1102 (Ch) (the "First Judgment"). As explained in the First Judgment at [142]-[143] and [153], grounds 2 and 3 of the appeal remained unresolved following that hearing, and I decided to give the parties an opportunity to reflect and to attempt to reach agreement before fixing a further hearing. Regrettably, attempts at mediation failed and this hearing was belatedly listed, following prompting from the court and a failure to agree that outstanding issues could be dealt with on the papers.

2. I will not repeat the factual background. In very brief summary the appellant John Clitheroe and the respondent Susan Bond are brother and sister. The dispute concerns the estate of their mother, Jean Clitheroe, who died in 2017. As before, I will refer to family members by their first names, and Susan as Sue, without intending disrespect.

3. John's appeal is against a decision of Deputy Master Linwood ([2020] EWHC 1185 (Ch), the "Decision") in which the Deputy Master refused to admit to probate two wills executed by Jean in 2010 and 2013 respectively on grounds of testamentary incapacity, with the result that Jean died intestate. The result of the Decision is that the estate is shared equally between John and Sue, rather than John being entitled to the vast bulk of the estate under one or other will. There is a dispute about the value of the estate, but even taking account of recent evidence supplied by John, evidence for which no permission was granted and which is disputed by Sue, it appears likely that the amount at stake will be materially less than the costs incurred. In particular, and even using John's higher valuation, the figure I have for Sue's costs – John's have not been provided – well exceeds half the value of the estate, being the portion which is effectively in dispute.

4. There were six grounds of appeal. In summary they were:

   (1) the Deputy Master applied the wrong approach for determining capacity by applying the test in *Banks v Goodfellow* (1869-70) LR 5 QB 549 ("*Banks*") rather than the test under the Mental Capacity Act 2005;

   (2) if *Banks* remained good law, the Deputy Master erred by misapplying the test for "delusions", in particular by failing to consider whether it was impossible to reason Jean out of the relevant beliefs, failing to have proper regard to relevant evidence, in particular the medical meaning of "delusions", and paying undue regard to dictionary definitions of colloquial expressions used to express subjective beliefs;

   (3) the Deputy Master misapplied the test for testamentary capacity in light of the evidence, and/or made findings as to delusions which were not open to him;

   (4) the Deputy Master gave inadequate and/or irrational reasons for preferring the evidence of Sue's expert, Professor Jacoby, to that of John's expert, Dr Series,

on the question whether Jean suffered from an affective disorder and/or the nature or degree of any disorder, and/or whether any beliefs she had were properly characterised as delusions;

(5) the Deputy Master applied too low a threshold for finding that Jean had an affective disorder causing delusional beliefs, and/or that Jean's beliefs were delusional and/or that she otherwise lacked testamentary capacity; and

(6) the Deputy Master wrongly failed to uphold the validity of at least one of the wills when that was the only lawful decision open to him on the evidence.

5. Sue filed a Respondent's notice that is relevant to grounds 2 and 3, and that relied on an application to adduce further evidence. That application is no longer pursued and I say no more about it.

6. I found against John on grounds 1, 4 and 5. I observed that ground 6 did not raise issues not raised by the other grounds: see the First Judgment at [140]. As already indicated I adjourned the appeal on grounds 2 and 3, but I did make some findings about what amounted to a delusion for the purposes of the *Banks* test. In particular, I found that the relevant false belief must be irrational and fixed in nature, but that it was not an essential part of the test that it is demonstrated that it would have been impossible to reason the relevant individual out of the belief: see in particular at [101]- [107].

7. Mr Sachdeva submitted on behalf of John that the Decision contained errors of law because the Deputy Master erred in the test for delusions, especially in the need for the relevant false belief to be fixed, and that the appeal should be allowed and the case remitted to allow necessary findings of fact, including as to causation.

Initial observations

8. I want to start with some general observations.

9. First, John wants the appeal to be allowed and the case remitted to a different judge, and in a way which would leave scope to adduce additional evidence. However, even if it was found that the appeal had significant merit, the court would be very slow to adopt that particular route. As Lewison LJ said in *FAGE UK v Chobani* [2014] EWCA Civ 5 at [114], the trial is not a dress rehearsal. It is the first and last night of the show. Having failed at trial, in circumstances where he had a full opportunity to adduce evidence in support of his case, and indeed in circumstances where his credibility was found to be wanting, John cannot simply have another bite at the cherry by being given a chance to persuade a different judge that his case is to be preferred. The fact that a legal test has been clarified on appeal makes no difference to this important principle.

10. I should observe here that I in any event disagree with Mr Sachdeva's characterisation of my clarification of the test for the existence of a delusion, namely the need for a fixed belief, as a major change in the law. I would also point out that it was John's Counsel who had argued before the Deputy Master that a belief must be fixed (in the sense of it not being possible to reason the

deceased out of it), as opposed to the less stringent formulation proposed on behalf of Sue. There was therefore no real surprise in terms of the case that John had to meet.

11. Secondly, I have now expressed concern on more than one occasion about costs. They are already highly disproportionate. The court should be and is extremely cautious about doing anything that will have the effect of escalating costs still further, as well as prolonging what is on any basis a very sad dispute. That would indicate that, if an error has occurred which might ordinarily lead to a remittal, the court should carefully consider whether it can itself take the necessary decisions to allow the appeal to be finally disposed of, bearing in mind that under CPR 52.20(1) it has all the powers of the lower court.

12. I should point out that this point has not been not raised by me now for the first time. I explicitly raised it in correspondence in February via my clerk, saying this:

> "The judge's current view is that it is likely that the court would conclude that, if the appeal on grounds 2 or 3 should be allowed to any extent, then the approach that would most accord with the overriding objective would be for it to remake the [Decision] itself. It would do so on a basis that excluded from consideration false beliefs that, on the basis of the existing findings of fact, did not meet the legal test described in the [First Judgment]."

13. So the point was raised well in advance of this hearing, yet I am afraid that it – together with my directions about the timing of filing skeleton arguments – have largely been ignored by the Appellant, whose written submissions (when received) were directed almost entirely to the materiality of alleged errors and John's goal of a remittal to a different judge.

14. Thirdly, it is important that grounds 2 and 3 are not considered in isolation from the outcome of the rest of the appeal, and from the Deputy Master's findings of fact as a whole. One point is that the effect of *Banks* applying is that the burden of proof is on John. But another point I want to emphasise is the significance of the outcome on grounds 4 and 5, together with the relevant factual findings. Paragraph [138] of the First Judgment bears repeating:

> "138. As already indicated, in my view the Deputy Master was entitled to prefer the evidence of Professor Jacoby. His evidence, based on a great deal of experience, was that the concept of projected guilt was quite common in older patients. However, I emphasise the importance of the factual evidence that supported the existence of an affective disorder related to Debs' terminal diagnosis and death (Judgment at [262], cross-referring to [249]-[252]). I also note the clear findings at [168] and [169] that Jean started to maintain that Sue's allegations of abuse by her father were untrue from a point just before Debs died, and that this continued up to her death. The Deputy Master found at [265] that Jean could not accept that Debs was going to die and accepted Professor Jacoby's evidence that she projected her guilt about outliving Debs onto Sue. In my judgment he was entitled to do so."

15. In summary, what I was saying there was that the Deputy Master was entitled to conclude that Jean suffered from an affective disorder related to the terminal illness and death in 2009 of Debs, Sue and John's sibling. He also found, and was clearly entitled to do so, that Jean started to maintain that Sue's allegations of sexual abuse by her father were untrue from a point just before Debs died, that Jean could not accept that Debs was going to die and that she projected her guilt onto Sue.

16. Fourthly, John's appeal materially downplays the Deputy Master's factual findings about sexual abuse of Sue by her father (Jean's husband), set out at [163]-[175] of the Decision. These included that Jean found out about the abuse by finding letters that her husband had written to Sue, and divorced her husband on the basis of it. The Deputy Master was obviously entitled to conclude at [175] of the Decision that Jean had no rational reason to reverse her long held belief: see the First Judgment at [145].

The appropriate way forward

17. I must allow the appeal if the Decision was wrong. I also accept Mr Sachdeva's submission that any doubt as to the materiality of any error ought to be resolved in the Appellant's favour. Mr Sachdeva referred me to a number of cases but it suffices to refer to one, *Degorce v Revenue and Customs Commissioners* [2018] 4 WLR 79 at [95], where Henderson LJ referred to an error of law that "might (not would) have made a difference".

18. However, as already indicated, to the extent that I allow the appeal I also have power to remake the Decision rather than to remit it. I have concluded that the correct course, most consistent with the overriding objective, is to allow the appeal and remake the Decision in respect of grounds 2 and 3, but with the same overall result that neither will is upheld and that Jean died intestate. I do so based on the Deputy Master's findings of fact, which I see no need or justification to add to, or to give John a further opportunity to seek to do so.

Discussion

19. As an initial point, I would observe that while the Deputy Master perhaps did not express his reasoning as clearly as he might have done in some respects, he reached the correct legal answer on the question put to him by John's Counsel, Mr Hendron, as to whether it was necessary to demonstrate that the deceased could not have been reasoned out of the relevant false belief. That was the material legal point in dispute before him on this aspect of the case.

20. However, as I explained in the First Judgment, there is a concern that the Deputy Master did not take full account of the need for a false belief to be fixed in order to amount to a delusion: see the First Judgment at [110]-[111]. Further, to the extent that the Deputy Master took account of the belief on the part of Jean that Sue was a shopaholic or spendthrift, that is not straightforward to classify is a delusion by itself (although see also the First Judgment at [114] regarding Jean's beliefs about Debs' views on that topic, and also the findings in the Decision at [214] about joint shopping trips by Jean, Sue and Debs).

21. On the test of materiality referred to in *Degorce*, the full lists of insane delusions at [264] and [267] of the Decision should therefore not be regarded as entirely safe.

The delusion regarding abuse allegations

22. However, in my view that leaves intact the critical findings in respect of abuse, findings which related to both wills, and in particular the crucial fact that Jean started to maintain that Sue's allegations of abuse by her father were untrue from a point just before Debs died, with no rational reason to alter the view that she had clearly previously taken. Those findings must be considered with the conclusion that Jean was suffering from an affective disorder related to the terminal illness and death of Debs.

23. I see no rational basis for Jean to have forgotten or become mistaken about such a fundamental family matter, especially in circumstances where there was found to be no cognitive impairment: see the First Judgment at [145]. John has pointed to nothing which provides any possible rational foundation for a sudden mistaken belief in respect of something that would have caused immense family upheaval. He has certainly not persuaded me, on a balance of probabilities, that the wills were not affected by Jean's delusional beliefs in respect of the abuse.

24. It cannot be suggested that Jean had forgotten about the abuse as being an issue in the family. On the contrary, Ms Walsh's own witness statement recounts a conversation with Jean as follows:

> "[Jean] then asked me what Sue had talked about when we first spoke. I told Mrs Clitheroe that Sue had said to me that she was not on talking terms with her mother but that she didn't know why, and that Sue had also mentioned the abuse. "Ha ha ha – she's a bloody liar," Mrs Clitheroe said. "She broke my marriage because I believed her. She's a home-breaker, a liar and a thief. I had her examined and the police were called out on her father, but she is a liar. Josephine, it was only on Debs' deathbed that even Debs admitted Sue had lied. Sue tells everyone the same sympathy story, but I promise you, Josephine, it is all a lie," she said. This made me very uncomfortable, but her face and body language told me she wasn't lying – she meant every word she was saying."

25. John's case must therefore rely not on forgetting about the abuse or allegations of it, but instead on Jean having forgotten about the existence of the letters from her husband to Sue, being letters that were the source of Jean's discovery of the abuse and that were probative of it.

26. Mr Sachdeva submitted that it has not been shown that Jean was aware of evidence to contradict her false belief (namely, the letters). But there is every indication that she was aware, having discovered the letters herself and shown them to her doctor and solicitors, as supported by contemporaneous documentary evidence (see the Decision at [170]-[172]). There is no basis sensibly to conclude that Jean had simply forgotten about them. Moreover, John has the burden of showing that Jean was not aware of them.

27. On the basis of the facts found by the Deputy Master, I have no doubt that Jean's belief that Sue was lying about the abuse was an irrational fixed belief which was out of keeping with Jean's background and which was formed in the face of clear evidence, evidence of which Jean had quite obviously been aware and about which there is no realistic basis to conclude that she could or would have forgotten (there being no evidence that she did forget) or that she was simply mistaken.

28. What is involved is the mental gymnastics of Jean having discovered the letters, shown them to her doctor and solicitors and used them to divorce her husband (Decision at [174]), being turned round to Jean suddenly deciding that Sue was a liar and home-breaker. That is extraordinary and it cannot be attributed to a memory lapse on any sensible basis.

29. Alternatively, there was no rational basis for Jean to form and maintain her mistaken belief (see the penultimate sentence of the First Judgment at [102]). I do not accept the suggestion that a falling out about whether morphine should have been given to Debs close to her death could possibly cause a rational, as opposed to an irrational, reassessment in respect of the abuse.

30. I should point out that, in relation to the formulation just mentioned about there being no rational basis to form and maintain a mistaken belief, Mr Sachdeva submitted that maintenance of a false belief could only be established if it could be shown that evidence to the contrary had been shown to or observed by the deceased, and that no inferences could be drawn. I do not agree. The test referred to in the First Judgment is whether the belief was fixed. I gave some examples at [102] about how that might be proved as a matter of evidence, but they are just that: examples.

31. In my view the Deputy Master's findings on this topic meet the test set out in the First Judgment for a false fixed belief, see in particular at [102]. This is so even in the absence of evidence of challenge (although in fact was some such evidence – see the First Judgment at [146]). This conclusion is also consistent with the Deputy Master's findings at [268] of the Decision as to the absence of a rational basis and John not meeting the evidential burden.

32. Mr Sachdeva also submitted that there was no causative link, in that any delusion over sexual abuse did not influence the wills. He described a "but for" test, by reference to the way that test is expressed in relation to tortious liability. He pointed in particular to the fact that the abuse was not a reason given in Jean's instructions for either will, which instead referred to Sue being a shopaholic or spendthrift. Mr Sachdeva further relied on the Deputy Master's finding about the morphine incident being a turning point, which could provide a rational explanation for the wills. Mr Sachdeva submitted that, although there is a finding at [269] of the Decision about causation, it is a compendious finding. There is no separate finding of a causative link between any delusion about the abuse and the dispositions under the wills.

33. However, the delusion as to abuse is extremely striking, was expressed to witnesses, and started just before Debs' death and before both wills. Despite a slip at [269] of the Decision in not spelling out there that the abuse allegations were not in the instructions for the wills, it is clear that the Deputy Master did

reach a conclusion that the abuse-related delusion influenced the wills. I would add that it is hardly surprising that the abuse issue was not mentioned to the solicitors who drew the wills. It was a highly private matter, and it was no doubt easier not to raise an issue which Jean could not have discussed rationally.

34. It is also important, again, to bear in mind that John bears the burden of proof. Mr Dumont referred me to the following passage in *Banks* at p.570:

> "No doubt, where the fact that the testator has been subject to any insane delusion is established, a will should be regarded with great distrust, and every presumption should in the first instance be made against it. Where insane delusion has once been shewn to have existed, it may be difficult to say whether the mental disorder may not possibly have extended beyond the particular form or instance in which it has manifested itself. It may be equally difficult to say how far the delusion may not have influenced the testator in the particular disposal of his property. And the presumption against a will made under such circumstances becomes additionally strong where the will is, to use the term of the civilians, an inofficious one, that is to say, one in which natural affection and the claims of near relationship have been disregarded. But where in the result a jury are satisfied that the delusion has not affected the general faculties of the mind, and can have had no effect upon the will, we see no sufficient reason why the testator should be held to have lost his right to make a will, or why a will made under such circumstances should not be upheld." (Emphasis supplied.)

35. John therefore bears the burden, and he effectively has to show that no delusion regarding abuse influenced the wills. He has not done so.

36. I further observe that John's case at trial was not that the abuse allegations were immaterial, but rather that Jean took against Sue because the allegations of abuse were false, and indeed referred to Sue as evil for telling lies about the abuse. That hardly fits with a submission now that the issue was immaterial.

37. The Deputy Master's conclusion that Jean was suffering from an insane delusion that Sue had not been abused by her father and was lying about it is therefore a sufficient basis on its own to conclude that neither will should be admitted to probate.

Findings about Jean's mind being poisoned

38. I should go on to mention that the Deputy Master was also asked to make findings in the alternative about whether Jean's mind was "poisoned" against Sue, which he did at [265] and [268] of the Decision (which also need to be read with the Deputy Master's direction to himself at [253], and the finding at [269] that the poisoning influenced the wills). As *Sharp v Adam* [2005] EWHC 1806 (upheld at [2006] EWCA Civ 449) does appear to indicate, poisoning of the mind can be a distinct basis of challenge to the existence of delusions.

39. As I have previously indicated to the parties, I have some doubt that there is a clear distinction on the facts of this case between delusions and poisoning of the mind. However, while I note that the Decision at [116]-[118] suggests that Professor Jacoby may have focused on delusions, the findings at [261] and [263] are not limited in that way (see also [257]-[258]). There were factual findings from which the Deputy Master was entitled to conclude that Jean had suffered from a disorder of the mind relating to Deb's illness and death, and that this poisoned her affections. In reaching that conclusion he was entitled to take into account Sue's defiance of Jean's instruction not to call the Macmillan nurse due to her unwillingness to allow morphine to be administered (see the First Judgment at [149]) and his finding about projection of guilt.

40. Mr Sachdeva submitted that, given the state of the law about delusions, poisoning of the mind – if a separate test at all – must also involve an element of fixity and irrationality. I do not need to decide that because, as I have said, the delusion about abuse is sufficient. But I would observe that the findings made by the Deputy Master at [265] and [268] are best understood, and make most sense, as a list of symptoms of an affective disorder. That fits precisely with the heading just above [264] of the Decision and also makes sense of the Deputy Master's reference to the allegation about theft of the trolls at [265(c)], which he accepted occurred just after the first will was executed.

Other findings about delusions

41. In view of the decision I have reached, I do not need to rely on other findings made regarding delusions, in particular alleged thefts, the allegations that Sue was a shopaholic or spendthrift, or (in respect of the 2013 will) that it was Sue who cut out Jean and would not let her see Sue's daughter Charlotte, or that the bungalow had been ransacked. Suffice to say that none of these supports John's case and some elements could meet the test for delusions, and certainly support a conclusion about Jean's mind being poisoned as a result of her affective disorder.

42. In particular, the evidence before the Deputy Master included evidence, which he accepted, from Dr Sheppard. Her evidence indicates that Jean was making allegations of theft as well as lying against Sue, and expressing views which the evidence before the Deputy Master clearly indicated were irrational. I was shown one passage in Dr Sheppard's witness statement which reads as follows:

> "Jean would also say that she thought Susan had taken items. She would ask me if I thought so and I said it seemed unlikely as I did not believe Susan would have taken them as she knew her mum wanted everything to stay exactly the same. Jean's response was that she could not find them so Sue must have taken them." (Emphasis supplied.)

I also note the evidence of Ms Walsh, already referred to, which recounts Jean accusing Sue of being both a liar and a thief.

43. Other allegations could also meet the test for a delusion (see the First Judgment at [147]-[148]), but I should emphasise that I do not need to rely on any of them. I refer to them primarily because they do not support John's case, and furthermore

all of them really support the conclusion that Jean was suffering from an affective disorder associated with Debs' illness and death.

Morphine incident and spending habits as explanations?

44. The overarching points made by Mr Sachdeva were that it is perfectly plausible that a person could turn against another because of a disagreement over the administration of morphine close to someone's death, and that the view that Sue was a spendthrift would also provide a justifiable basis to exclude her from the wills. In isolation, I agree. But in this case we have a finding of an affective disorder specifically associated with Debs' terminal illness and death, we have no indication that there were previous allegations about Sue being a liar and thief, and indeed there is a finding that the allegations of lying about abuse started just before Debs' death.

45. Mr Sachdeva also relied on paragraphs [270]-[272] of the Decision. He suggested that the Deputy Master found there that the main reason that Jean excluded Sue was a disapproval of spending habits, or at best that he made no finding.

46. I agree that [270]-[272] is not expressed as clearly as it might be, but I have no doubt that the primary point the Deputy Master was making was that if there had not been a mental defect, then disinheriting Sue for inadequate or bad motives would not mean that the wills were invalid. That is obviously correct but it does not advance John's case.

47. It is true that the Deputy Master stated that he disagreed with Mr Hicks, Counsel for Sue, that disapproval of Sue's spending was inadequate to explain the disinheritance. However, I have already referred to the passage in *Banks* about the burden of proof. It does not matter that there was no finding that the abuse was the sole or main reason for the wills being made in the way that they were. In any event I certainly do not agree that the Deputy Master agreed with Mr Hendron's submission recorded at [270] that the main reason Jean excluded Sue was her belief that Sue was a spendthrift. There was no such finding.

Conclusion

48. The net effect of the First Judgment and this decision is that the appeal on grounds 1, 4 and 5 is dismissed. The appeal is allowed on grounds 2 and 3 but the Decision is remade with the same result, in Sue's favour. In the result ground 6 of the appeal is also dismissed.