Neutral Citation Number: [2024] EWHC 121 (Ch)

Case No: PT-2022-000787

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

Royal Courts of Justice
Rolls Building, London EC4A 1NL

Date: 09/02/2024

Before :

DEPUTY MASTER BOWLES

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Between :

Ali Biria	**Claimant**
- and -	
(1) Hamid Biria	
(2) Nasrin Biria	
(3) Hamideh Biria	
(4) Mansour Biria	
(5) Mohammad Biria	
(6) Farideh Biria	
(7) Douglas Scott	**Defendants**

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Richard Dew (instructed by **Boodle Hatfield**) for the **Claimant**
The Defendants did not appear and were not represented

Hearing dates: 14 and 15 November 2023

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Approved Judgment

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

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DEPUTY MASTER BOWLES

Deputy Master Bowles :

1. Abdul Razagh Biria (Mr Biria) died on 21 January 2022. He was 97 years of age. He had been born in Iraq and had lived in England since about 1980. On 1 May 2020, when he was 95 years of age, he, purportedly, executed a will (the will).

2. At the date of the will, there were extant proceedings in the Court of Protection. Those proceedings had commenced on 9 April 2020, seeking an assessment of Mr Biria's capacity to manage his own affairs and expressing a concern that Mr Biria was being exploited by the first and second defendants (Hamid Biria (Hamid) and Nasrin Biria (Nasrin)), both of whom were made parties to the proceedings.

3. On 24th April 2020, the Court of Protection had made a declaration that there was reason to believe that Mr Biria lacked the capacity to consent to an assessment of his capacity to manage his own affairs and had directed Hamid and Nasrin to use their best endeavours to make Mr Biria available for an assessment of his capacity and, further, not to interfere with that assessment.

4. That assessment, in circumstances detailed later in this judgment, eventually took place on 24 August 2020. The assessment was carried out by Doctor Andrew Barker, who gave evidence before me. His conclusion, following that assessment, was that Mr Biria did not have the capacity to manage his property and affairs and that he was unable, by reason of dementia, to understand, retain, use, or weigh, relevant information. That conclusion was reflected in and, as it seems to me, formed the essential basis underlying the order of Judge Hilder, in the Court of Protection, dated 7 September 2020, which recited that the court had reason to believe that Mr Biria lacked the capacity to make decisions concerning his property and affairs and which appointed Mr Jeremy Abraham as his interim deputy. Mr Abraham's appointment as deputy was made final on 27 July 2021 and, by order dated 6 August 2021 the court declared that Mr Biria lacked the capacity to make decisions about his property and affairs.

5. The question for this court is whether the will constituted a valid will, or whether, as is contended by the Claimant, Ali Biria (Ali), who is the eldest son of Mr Biria, the will is ineffective as a will. Ali's case is that, as at the date of purported execution, Mr Biria lacked testamentary capacity. He contends, also, that the will is invalid for the want of Mr Biria's knowledge and approval of its contents, that the will was purportedly executed under and by reason of the undue influence exercised, or exerted, over Mr Biria by Hamid and Nasrin and/or because the will was the product of false beliefs as to the character and conduct of Ali inculcated in Mr Biria by Hamid and Nasrin, such that the will fell to be set aside as a fraudulent calumny.

6. Hamid and Nasrin are, respectively, son and daughter of Mr Biria and two of Ali's younger siblings. At the time of the purported execution of the will, they lived with Mr Biria at his home at 7 Beltane Drive, Wimbledon SW19 5JR (Beltane Drive). It is Ali's case that from, at least, 2018 onwards, Hamid and Nasrin acted to limit, or exclude, others from having access to Mr Biria and to procure that any access that there was took place in their presence, such that they were able to exercise a virtually complete control over his life and affairs.

7. The will was purportedly executed by Mr Biria at the offices of a notary, Kurupath Sreekumar, in Holborn in Central London. Mr Biria attended the offices in company with Hamid and Nasrin and a Mr Bhalwani, who, with a colleague of the notary, in fact, his wife Meera, witnessed the disputed will. Hamid and Nasrin, although in attendance, were not present in the notary's room when the disputed will was actually signed and witnessed. In the recollection of the notary, Hamid had booked the appointment for the execution of the disputed will. Prior to the appointment the notary had had no dealings at all, either with Mr Biria, or his family

8. The will, itself, was not prepared by the notary, but was brought to the meeting by those attending, having been prepared by the seventh Defendant, Mr Douglas Scott (Mr Scott) and American attorney with offices at 465 Rainier Boulevard, Issaquah, Washington.

9. In regard to the process of execution, itself, the notary, in a telephone attendance upon Ali's solicitor, Nicola Bushby in April 2023, some three years after the purported execution of the disputed will, explained that, in accordance with his protocol, he had read over the will to Mr Biria, in the presence of the witnesses, but not in the presence of Hamid or Nasrin, in order as he said, to ensure that Mr Biria knew what he was signing and that he was signing of hie own free will. Later in the conversation with Ms Busby the notary also stated that he had insisted that Mr Biria read the will in the absence of Hamid and Nasrin.

10. The notary's recollection is that the only clause which gave rise to any response from Mr Biria was the clause, discussed later in this judgment, purporting to exclude Ali from any inheritance under the disputed will. Mr Biria's response to the notary's reading of that clause was 'no Ali, no Ali'. The notary's recollection of Mr Biria, himself, was as being very old and infirm, but that he came across as knowing what he was doing and as an opinionated and angry old man.

11. In regard to Mr Biria's understanding of what he was signing, the notary explained that he had not gone into the matter in the way that he would have done had he been preparing the will, that he had not sought either to persuade, or dissuade Mr Biria from signing but had simply asked him whether he was happy to sign and Mr Biria had signed.

12. In regard to the preparation of the will, in a so-called Defence Form lodged by Mr Scott, in the form of a letter dated 24 January 2023, Mr Scott stated that he had begun to prepare Mr Biria's will as early as 2016, that he had sent drafts to Mr Biria in 2017 and that the will that Mr Biria actually signed (the disputed will) had been provided to him long before it was signed in May 2020. Although, so far as the evidence goes, there is no suggestion that Mr Scott ever met with Mr Biria, in respect of the preparation of his will, he, nonetheless, felt able to say that Mr Biria was 'not unduly influenced by anyone' in the preparation of his will and, also, that Mr Biria had capacity.

13. In that regard, a request to Mr Scott for a **Larke v Nugus** statement and for his will file, relating to his instructions in respect of the preparation of the disputed will and to the circumstances surrounding its preparation, fell on somewhat stony soil. By his letter to Mr Biria's then solicitors, Irwin Mitchell, dated 4 May 2023, Mr Scott drew attention to the fact that he was not a solicitor, nor a person authorised to practice law

in the United Kingdom, and asserted that, in consequence, the questions which Irwin Mitchell had raised with him, in respect of the preparation of the disputed will, his instructions in respect of the disputed will and the circumstances surrounding its preparation were not, in his words, 'properly directed'. Accordingly, the questions raised remained unanswered and, unusually, the court is left with minimal direct information as to the process and circumstances whereby the will, or the earlier drafts came into being.

14. All that, I think, can be discerned from Mr Scott's Defence Form, taken together with an attendance note of a conversation with Mr Scott in December 2020, prepared by Mr Abraham, following his appointment as interim deputy, in which Mr Scott explained that Hamid had helped his father with his business affairs, that instructions had on occasion been relayed to him via Hamid and Nasrin and that Hamid had also acted as an interpreter for Mr Biria in giving instructions, is that Hamid and Nasrin are likely to have had some role in the passing of instructions to Mr Scott.

15. As regards the earlier drafts of Mr Biria's will, in separate correspondence, with Mr Abraham, who was appointed Interim Administrator of Mr Biria's estate by Master McQuail, by her order of 24 February 2023, Mr Scott has provided copies of a number of such drafts, albeit with no further explanation as to the circumstances and process of their preparation than is already set out.

16. The will, itself, has a number of salient features.

17. It is in a form unfamiliar to those primarily accustomed to wills drawn by English lawyers. It names Mr Biria's seven children living at the time when the will was drawn. Most materially it specifically disinherits Ali, on the grounds that he has not been a good son, is not an honest person and has received substantial sums from properties previously owned by Mr Biria in the United States

18. It identifies a bank account with Key Bank National Association and purports to bequeath to each of his children other than Ali and Nasrin the sum of $500,000 from that account. Ali is to receive nothing. The balance of the account is to go to Nasrin, who is also to receive the residue of Mr Biria's estate, whether in the United States, the United Kingdom, or in Iran. Hamid is appointed personal representative in respect of Mr Biria's estate in the United Kingdom, Iran and outside the United States. Mr Scott, 'my friend and attorney' is appointed personal representative in respect of Mr Biria's property in the United States.

19. At the time of the purported execution of the will, the amount standing in what I will call the Key Bank account was circa $13.2M, representing, as I understand it, Mr Biria's share in the proceeds of sale of property investments in Bellevue, in the state of Washington. Those investments had been held by a partnership, the Allen Building Partnership, in which ultimately the partners were Mr Biria and Ali. The properties were sold in or about October 2016 for circa $16M and a part of those proceeds went to Ali, in circumstances to which I will return later in this judgment.

20. By the date of Mr Biria's death, however, and notwithstanding his apparent testamentary intentions, as set out in the will, nearly all the monies in the Key Bank account had been withdrawn from that account. In October 2020, as appears from Key Bank accounts provided by Mr Scott, to whose offices bank statements were

apparently directed, monies to the value of $11,470,000 were withdrawn. Those withdrawals were effected by two cheques, each in favour of the fourth Defendant, Mansour Biria (Mansour); one in the sum of $11,250,000; the other in the sum of $220,000. Further relatively modest sums, totalling $29.000, were withdrawn in favour of Mansour later in 2020. In January 2022, Mr Birria dying on 21 January 2022, there was a further withdrawal by cheque in favour of Mansour in the sum of $1,630,000. A further cheque in the sum of $54,118.73 was cashed in February 2022, presumably reflecting a cheque drawn before 21 January, resulting in a balance in the Key Bank account as at 28 February 2022 of 23 cents.

21. In light of the election of all the Defendants and specifically, in this context, Hamid, Nasrin and Mansour not to respond at all to the current litigation, no explanation exists for these withdrawals other than a document, dated 21 October 2020 and signed by Mr Biria addressed 'To Whom it May Concern' and stating that the October 2020 transfers had been made to Mansour, following consultation with Hamid and Nasrin, as being in Mr Biria's best interest.

22. In regard to the balance of Mr Biria's estate, at the time of the execution of the will, he was the owner of Beltane Drive, a substantial property in a good part of Wimbledon. Although, apparently, in a somewhat run down condition, it is said to have a value upward of £2M.

23. Additionally it is Ali's evidence that Mr Biria had substantial commercial and residential property assets in Iran, to the value of some $9 to 10M, together with a luxury property in Mallorca and, possibly other assets in Germany, the Netherlands and China, Limited further information has been provided by Mr Scott, who confirms the potential existence of assets in Iran and, also, that Mr Biria had had business dealings in China.

24. Reverting, now, to the draft wills, the first in time is a document apparently prepared in 2014. It is little more than a template and fails to identify the entirety of Mr Biria's family. It divided his estate between the four children, including Ali, named in the draft. There is no question of a disinheritance. Hamid is named as personal representative of Mr Biria's English estate. The personal representative of his American estate, specifically the property assets then owned by him in Bellevue, is left in blank.

25. The next two drafts, in time, seem to have been prepared in 2016 and, inferentially, I think, after the sale of the Bellevue properties, which are no longer mentioned in either draft. It is in these drafts that provision is first made for the disinheritance of Ali and where reference is first made to Ali not being a good son and receiving money from Mr Biria's American property. Otherwise, the drafts provide for Mr Biria's estate to be divided between his children, appointed Hamid as personal representative in respect, now, of his worldwide estate, other than the United States, and appointed Mr Scott as personal representative in respect of Mr Biria's United States estate.

26. A further draft appears to have been prepared in 2017, which draft, as drawn, closely, if not exactly replicates the 2016 drafts.

27. That draft, however, appears to have been amended in 2020, by way of manuscript alterations; most significantly by the purported disinheritance, in favour of Nasrin, of all Mr Biria's other children.

28. The final draft, undated but identical in its terms to the will, brings in, for the first time, the Key Bank account and makes the provision out of that account for Mr Biria's children, other than Ali, which is contained in the disputed will. Given that the disputed will was purportedly executed on 1st May 2020 and that the earlier draft disinheriting all of Mr Biria's children, save Nasrin, is itself dated, in manuscript, 2020, it would appear that the final formulation of the disputed will, in fact, only came into being in the early months of 2020 and had not, as asserted by Mr Scott in his Defence Form and as set out in paragraph 12 of this judgment, been provided to Mr Biria 'long before' the date of the purported execution of the will.

29. The immediate context in which the will was purportedly executed, namely very shortly after the Court of Protection's order that Mr Biria undergo an assessment as to his capacity, has already been set out, in paragraph 2 of this judgment. Before adverting further to that context and to the circumstances existing at and around the date of the purported execution of the will, it is helpful, I think, to look at the broader context. That context is largely to be derived from the evidence given before me by Ali.

30. As already outlined in this judgment, neither Hamid nor Nasrin (nor any of Mr Biria's other children, who, with Mr Scott constitute the named Defendants) have participated in this litigation. Although Mr Scott has put in the Defence Form to which reference has already been made, he has subsequently informed the court of his unwillingness to participate, further, in the case.

31. In this context and given the nature and the seriousness of the allegations made by Ali, in this case, I determined, earlier in the litigation, that, although, in form, undefended, this case could not proceed on written evidence, pursuant to CPR 57.10. In the result, therefore, in addition to, respectively, their witness statements and reports, I heard oral evidence from both Ali and, as already set out, Doctor Barker and, although untested by cross examination, I was able, in both instances, to satisfy myself as to their evidence by way of additional questioning.

32. I regarded Ali as an honest and reliable witness, genuinely seeking to assist the court. His oral evidence provided a level of circumstantial detail that I found persuasive and convincing.

33. As already set out, Ali is Mr Biria's eldest son. He lives in Seattle, in the United States, and has done so since 1982, having previously lived in London from 1970.

34. Ali, although, I think, trained in electrical engineering, has made his career in the property business in the United States. In 1980, prior to his moving to the United States in 1982, he helped Mr Biria in his purchase of his first property in England, in Brunswick Gardens in Kensington. Later, in 1982, he assisted his father in the purchase of Beltane Drive.

35. Mr Biria had, seemingly, made his wealth, in concert with his brothers, in an import/ export business carried on in Ahvaz in South West Iran. When Mr Biria came to

England he continued in the import/export business, through a company, Biria London Limited. Relevantly, to the current claim, Ali's evidence is that his father, living and working in England and, apparently, for some five years having an English 'girlfriend', spoke fluent English, as well as being a considerable linguist in other languages.

36. The wealth that Mr Biria had secured in business was, as Ali told me, invested in property.

37. In 1985 Ali and Mr Biria set up the Allen Building Partnership as what Ali termed a family partnership. At the outset, the partnership included a third family member, Abdul Latif Najafi. The partnership shares were said to be 70% in respect of Mr Biria, 25% in respect of Mr Najafi and 5% in respect of Ali. At some point in the course of the partnership, Mr Najafi was bought out and, after that, Ali told me that his purported share advanced to 7.5%, The partnership continued for thirty years, until the sale in 2016 of the Bellevue properties, with Ali as the active, or operating, partner and with Mr Biria, already living in England, taking a more passive role.

38. Ali's evidence to me was that both his business and his family relationship with his father was, at least until the sale of the Bellevue properties and the termination of the partnership, a very good one.

39. On the domestic front, Ali and his son Ashley were over many years regular and welcome visitors to Mr Biria in London. Things, however, began to change when Hamid moved to London to live with Mr Biria, in about 2010. From that point, Ali's impression was that Hamid was seeking to make it difficult for him to visit his father and seeking, also, to exclude him from his father. By way of example, when Ali visited his father, after Hamid moved in, Hamid made no space for him in the house, such that on one occasion he had to sleep on the floor and such that, thereafter, on other visits, he preferred to stay at an hotel.

40. In regard to their business, the only issues, in thirty years of business dealings, that Ali could tell me about, seems to have arisen in, or about, 2011. At that stage, Ali's evidence is that Mr Scott, who had, as confirmed in his Defence Form been advising Mr Biria, as his attorney, since 1994, was seeking to take over Ali's role as managing partner of the partnership and, to make his case to Mr Biria, was alleging that Ali was improperly abstracting rental payments from tenants of the partnership's properties. That allegation, which Ali robustly denied in his evidence to me, is reflected in Mr Scott's Defence Form, in which Mr Scott alleged that Mr Biria had suspected Ali of 'skimming' money from the partnership's tenants and not paying his father his full share and was reiterated by Mr Scott in his discussion with Mr Abraham, in December 2020, referred to in paragraph 14 of this judgment.

41. As already stated, Ali wholly denies this allegation. Mr Scott has not seen fit to support or advance the allegation, by way of evidence, and I see no reason to disbelieve Ali in respect of his response to the allegation. Not insignificantly, Ali and his father continued to work together from 2011 until 2016, notwithstanding the allegation.

42. The sale of the Bellevue properties and with it the termination the partnership precipitated a further issue between Ali and his father. Although, at the outset, Ali

was stated to have only a 5% share in the partnership that had, according to Ali, always been a subject of discussion. When the partnership was first drawn, Ali had questioned the percentage and been assured by his father that the written shares were immaterial because, really, the partnership existed for the family. Over the years, however, Ali had received assurances from Mr Biria that he would receive what he termed a 'rightful' share of the proceeds of the partnership, which he understood to mean not less than 30%.

43. In the result, when the properties were eventually sold, Mr Biria, now in his nineties, took the position that Ali should have none of the proceeds of the business; a position that Ali could not accept. Litigation resulted and, as I was told, following settlement of the litigation, Ali eventually received 15% of the proceeds of the partnership properties. As already set out Mr Biria's share, circa $13M, made its way into the Key Bank account.

44. The sale of the properties was, in Ali's mind, in itself a cause for concern as to his father's mental well-being and, in Ali's eyes the product, in his vernacular, of his father beginning to lose his mind. Prior to the sale, Ali and Mr Biria had had extensive discussions as to the development of the Bellevue properties and monies had been spent on the preparation of plans for redevelopment. In consequence, Mr Biria's decision to sell represented a complete change of heart and one which Ali put down to a combination of his father's fading faculties and the control that he believed that Hamid was beginning to exercise over Mr Biria. While peripheral to the issues that I have to decide, I am not wholly persuaded that Mr Biria's change of heart was indicative of mental failings, rather than, simply, reflecting the understandable decision of an elderly man to deal, conservatively, with his assets.

45. Ali's evidence was that following the sale and following the settlement of the partnership litigation his personal relations with his father remained good. It may, nonetheless, not be coincidental that it was in the 2016 draft will, prepared at a time when, inevitably, as it seems to me, matters between Ali and his father must have been strained, that it is first specified that Ali was not a good son, that, resurrecting, apparently, Mr Scott's 2011 allegation, as set out in paragraph 40 of this judgment, Ali had wrongfully received monies from his father's properties and that, consequently, he fell to be disinherited.

46. Be that as it may, Ali's evidence before me, which I accept, is that, by 2018 and whatever may have earlier been the case, there were signs that Mr Biria's mental faculties were beginning to slip. There were indications, also, that efforts were being made to limit, or control, access to Mr Biria.

47. Ali describes a visit to his father in 2018, at which Mr Biria, over a period of half an hour and notwithstanding his efforts to jog his father's memory, failed to recognise him at all. On that same occasion, Nasrin, Hamid not being present, sought to prevent Ali from seeing his father, such that, as Ali put it, he had to talk himself in.

48. That, as it transpires, was the last time that Ali saw Mr Biria. In December 2019, on a further visit to England, Ali tried to visit his father, at Beltane Drive, but was refused access by Hamid, who physically obstructed his entering the property. Telephone communication proved, also, to be impossible since all phone calls were answered by either Hamid or Nasrin.

49. It was this exclusion from access to Mr Biria which, coupled with other factors, resulted, as Ali told me, in the application to the Court of Protection, in April 2020, as set out in paragraph 2 of this judgment.

50. Ali had learnt from a number of sources that his father had been entering into what seemed to Ali to be improvident, uncharacteristic and undocumented investments with a number of third parties, going back as far as 2008. He had now found himself excluded from his father. What, however, as he told me, finally precipitated his action was advice received from an old friend, Maurice Cooper, and his own son, Ashley, together with concerns expressed by his sister, Hamideh, the third Defendant, that Hamid and Nasrin were taking over Mr Biria and abstracting the family's inheritance.

51. I revert, now, to the circumstances at and surrounding the execution of the will.

52. As already set out, the purported execution took place within seven days, or so, of the Court of Protection's original order that there be an assessment of Mr Biria's capacity and that Nasrin and Hamid use their best endeavours to make Mr Biria available for that assessment. That order also required Hamid and Nasrin to allow Doctor Barker access to Beltane Drive, for purposes of that assessment and not to interfere in that assessment.

53. Doctor Barker attempted to carry out his assessment on 26 May 2020, but was unable to secure access to Mr Biria, In the days preceding the attempt, he had contacted Hamid and Nasrin in order to ftx an appointment for the assessment. In attempting to fix the assessment he had provided Hamid and Nasrin with a copy of the 24 April order. There followed, on 18 May 2020 a number of telephone conversations with Hamid.

54. In the first conversation Hamid cancelled the appointment which had been provisionally fixed for 19 May 2020, indicated his refusal to fix another appointment and told Doctor Barker that he intended to instruct a solicitor to represent his and his father's interests. A further conversation ensued in the afternoon, in which an angry Hamid accused Doctor Barker of making his father sick, again referred to the instruction of a solicitor, but, ultimately, agreed to re-schedule the appointment to 26 May 2020. Later that day, however, Hamid rang Doctor Barker twice, telling him that his father did not want to see him, did not need a doctor and was very irritated by the whole process. In each of those conversations Mr Biria was briefly put on the phone by his son who, on each occasion, echoed his son's words. Hamid told Doctor Barker that if the stress that Hamid said that Doctor Barker was causing Mr Biria made Mr Biria ill then that would be Doctor Barker's fault. The series of conversations ended with Doctor Barker informing Hamid that he would carry on with his intended visit and assessment unless directed otherwise by the court, or the solicitor instructing him.

55. Doctor Barker did visit on 26 May. The door of Beltane Drive was not answered. Contacted by telephone Hamid said that he was out, his father did not want the assessment and his solicitor would be contacting the court. He refused to give the land line telephone number and told Doctor Barker that he did not know whether Nasrin was in the house.

56. Doctor Barker's assessment which was, with respect, clearly correct was that Hamid was unwilling to facilitate the assessment. He described Hamid as controlling the

conversation with Mr Biria and he noted that Mr Biria did not seem to be, or have been made, aware that the purpose of Doctor Barker's visit was to assess his mental capacity.

57. It would appear that Hamid did instruct a solicitor. Attached to Mr Scott's Defence Form is a letter from a Mr David Tang, of David Tang & Co, in which he states that he met with Mr Biria on 22 May 2020, that he had taken full instructions from Mr Biria and that, as far as he, Mr Tang, was concerned, Mr Biria's mental capacity was still intact. Substantively, he stated that Mr Biria did not consent to being examined by Doctor Barker and that, should Ali wish to bring proceedings, they would be opposed.

58. That letter raises as many questions as it answers. Although Hamid had told Doctor Barker that he, Hamid, was instructing solicitors both for himself and his father, it is not apparent that Mr Tang was acting for Hamid, nor that, as must have been the case, Hamid and/or Nasrin were either at the meeting, or, at the least had delivered Mr Biria to the meeting. Perhaps more materially, although it is said that full instructions were taken, Mr Tang, by making reference to his intention to oppose any proceedings brought and by referring to Doctor Barker as 'your doctor', does not seem to have been aware either that proceedings were on foot, or that Doctor Barker was acting under an order of the court.

59. The perhaps inevitable consequence of Hamid's want of co-operation with Doctor Barker was that, on 16 July 2020, an application was made for Hamid's committal for contempt in respect of his non-compliance with the order of 24 April 2020. That application first came on, on 14 August 2020, at which hearing Hamid was in attendance. The committal hearing, itself, was put over to 7 September 2020, but, at the 14 August hearing, Hamid agreed to permit and facilitate Doctor Barker in carrying out his assessment and an appointment, at Beltane Drive, was fixed for 24 August 2020. The order made on 14 August repeated the requirement in the 24 April order that Hamid should permit Doctor Barker's entry to Beltane Drive, for purposes of the assessment and should not interfere with the carrying out of the assessment.

60. The assessment duly took place on 24 August 2020. As it transpires and as is set out later in this judgment, this was the only occasion in which any independent person was able to secure significant access to Mr Biria.

61. I will deal in greater detail with the substance of the assessment, itself, the interview with Mr Biria, which underwrote the assessment and Doctor Barker's opinion arising out of the assessment later in this judgment. For present purposes, however, it is of note that, when interviewing Mr Biria, in the garden at Beltane Drive, and although Doctor Barker had asked Hamid and Nasrin to remain in a back room indoors, so as not to interfere with the assessment, they, in fact, remained close to the door to the garden, opened the door from time to time and came out and interrupted the interview from time to time, over its 90 minutes duration, such that, in the event, Doctor Barker had, on a number of occasions, to interrupt his interview in order to ask that the door be shut and he be able to interview Mr Biria alone.

62. As set out in paragraph 4 of this judgment, Doctor Barker's conclusion, following his assessment was that, by reason of dementia, Mr Biria lacked the capacity to manage his own affairs and was unable to understand, retain, use or weigh, relevant

information. In due course and, again, as set out in paragraph 4 of this judgment, that conclusion gave rise to a declaration by the Court of Protection that Mr Biria lacked the relevant capacity to deal with his property and affairs and to the appointment of Mr Abraham, first, as his interim deputy and then as his deputy.

63. At the committal hearing on 7 September 2020, Hamid was found to have been in contempt in respect of his non-compliance with the 24 April 2020 order, albeit, because Doctor Barker had now carried out the assessment, the court (Her Honour Judge Hilder) felt able to impose no penalty. The court, however, directed that Hamid and Nasrin allow Mr Biria's local authority, the London Borough of Merton (the Council), access to Mr Biria, at Beltane Drive, to carry out a Care Act assessment and that that assessment take place on 10 September 2020.

64. On 10 September 2020, as set out in a report lodged with the court of Protection on 22 September 2020, officers of the Council attended at Beltane Drive, assisted by an interpreter. Although the officers were able to meet Mr Biria in the garden of Beltane Drive, they were not able to have any private conversation with him. He was only able to stand with the support of Hamid and Nasrin and his reiterated response to the officers' attempts to explain that they required a private interview so that they could report to the court was that his daughter and son cared for him and that that was what he wanted.

65. Despite careful and patient explanations by the officers that they were obliged and required to speak to Mr Biria alone, so that, in their terms, his voice could be heard, neither Hamid nor Nasrin were prepared to allow a private interview, or to accede to any suggestions as to how, without distress to Mr Biria, his independent views could be obtained. They were adamant, even after being made aware that their stance was contrary to the wishes of the court, that they, or one of them, must be present at any interview, that this was Mr Biria's wish and that they could not go behind that wish. In the result, the Council was unable to carry out the Care Act assessment directed by the court.

66. The order made on 7 September 2020 had, in addition to directing a Care Act assessment, also required Mr Abraham, as interim deputy, to report to the court by 30 November 2020, as to Mr Biria's income, outgoings, capital and liabilities and had, in aid of that report, required Hamid and Nasrin to co-operate with Mr Abraham in the provision of information as to Mr Biria's property and affairs. Although, that requirement had been, as directed by the court, 'backed up' by a penal notice and although, as already set out, in paragraphs 20 and 21 of this judgment, it was in this period that, to Hamid and Nasrin's apparent knowledge, some $11,470,000 was withdrawn from the Key Bank account and transferred to Mansour, no mention of that matter was made to Mr Abraham by either Hamid and Nasrin, who, as set out in the court's subsequent order of 15 December 2020, had, by 30 November 2020, provided Mr Abraham with only two documents, a TV licence pertaining to Beltane Drive and a single NatWest bank statement, showing a balance of some £1288.

67. Faced with what might, at best be called, Hamid and Nasrin's deficient compliance with the court's requirements, the court's order, of 15 December 2020, required Hamid and Nasrin to provide a complete inventory and account of Mr Biria's estate.

68. In purported compliance with that order, on 15 January 2021, Hamid served and filed a witness statement. In that statement he professed a minimal knowledge of his father's affairs. He made no mention at all of the transfers out of the Key Bank account in October 2020, or of the fact that, at least according to the document signed by Mr Biria, on 21 October 2020, those transfers had been effected in consultation with himself and Nasrin. He denied any knowledge of the whereabouts of his father's will and elected to make no mention of the fact that he and Nasrin had arranged the execution of Mr Biria's will and had accompanied Mr Biria to the notary's office for the execution of the will. Contrary to the indication given by Mr Scott, as set out in paragraph 14 of this judgment, the impression he gave, in his witness statement, was that he had played no role and had had no involvement at all in his father's business affairs.

69. The 15 December 2020 order had also invited the Council, having been unable, as set out in paragraphs 64 and 65 of this judgment, to carry out the Care Act assessment directed by the court, to make further attempts to carry out such an assessment, together with an occupational therapy assessment and, in support of those assessments had directed that Hamid and Nasrin to allow the Council to meet with Mr Biria privately and independently and without either of them being present and further directed that they should not interfere with or obstruct the Council's meeting with Mr Biria or otherwise obstruct the Council's assessments.

70. In March 2021, as set out in a witness statement, dated 18 March 2021 prepared for the Court of Protection by a Council officer, Debra Fothergill, unsuccessful attempts were made by the Council to carry out those assessments.

71. A visit fixed for 2 March 2021 was cancelled by Hamid, on the grounds that it interfered with preparations for the Farsi New Year, notwithstanding that that festival would have taken place a month after the proposed visit. A further visit was arranged for 10 March 2021 and attended by Ms Fothergill and a Mr Dudley, who, however, were not given access either to Beltane Drive or to Mr Biria. In a telephone conversation with Mr Dudley, Hamid who was, in fact, in the locked garden of Beltane Drive, made it clear that, notwithstanding the court's direction, he would not give the requisite uninterrupted, or any , access to Mr Biria, because his father did not wish to be assessed. It emerged that Mr Biria was, with Hamid and Nasrin in the garden at Beltane Drive. He was in a distressed state, being held up by Hamid and Nasrin, and he was shouting out that he did not want to see anybody. It was, as described by Ms Fothergill, a rainy and stormy day and, given Mr Biria's state of distress, she insisted that Hamid and Nasrin take their father indoors and informed him that his actions would be reported to the court. As reported to the court, in her witness statement, as a result of the obstruction faced by the Council, the Council was again unable to carry out a Care Act assessment, or to carry out an occupational therapy assessment.

72. Mr Biria's case returned to the Court of Protection, on 26 March 2021. Further directions were given. The Council was to provide a report pursuant to section 49 of the Mental Capacity Act 2005, dealing, in particular, with any concerns it might have as to Mr Biria's welfare and as to the Council's ability to fulfil its safeguarding duties in respect of Mr Biria. The court further directed a Special Visitor's report in order to update the court as to Mr Biria's capacity to manage his property and affairs. No doubt in view of the history of the case, as set out in this judgment, Hamid, then

represented by counsel, was invited to and agreed to give a formal undertaking to the court that he would co-operate fully in respect of all requests and appointments and facilitate the assessment of Mr Biria by the Special Visitor.

73. Despite this undertaking neither the Council nor the Special Visitor were able to secure access to Mr Biria.

74. Mr Dudley and Ms Fothergill attempted to visit Mr Biria on 20 April 2021 and 18 May 2021. On neither occasion was access given to Beltane Drive. On the first occasion, Hamid had been forewarned by text message. On the second occasion, in addition to a text message, the Council's legal department wrote to Hamid advising of the date of the intended visit. Following the first visit, an email was received from a Mr Hash-Trudi, apparently a friend of the family, describing the first visit as having been 'unannounced' and requesting prior warning, duly given, in respect of any further call. No response at all was received in respect of, or following, the second visit.

75. In regard to the Special Visitor, Dr Sarah Constantine, she tried unsuccessfully to contact Hamid by telephone on a number of occasions and eventually attempted to contact him by text message. That led to a phone conversation in which Hamid indicated that his father did not want to see her, during which Mr Biria, himself came on the line to say that he did not need to see a doctor. Doctor Constantine asked if the family would be in over the weekend because she should try to see Mr Biria and Hamid indicated that they would be, but that his father would not want to see her. Over that weekend, 2 May 2021, Doctor Constantine attended Beltane Drive but received no answer either to her knocking on the door, or ringing the doorbell, or to her phone calls to Hamid's number, even though she could hear the phone ringing in the house.

76. In the result and as indicated in paragraph 60 of this judgment and in despite of the various orders of the Court of Protection, the court's finding of contempt, in respect of the provision of access to Mr Biria, and Hamid's own undertaking to the court, the only independent access to Mr Biria, throughout the Court of Protection proceedings, terminated by Mr Biria's death in January 2022, was that achieved by Doctor Barker in August 2020.

77. That meeting, the contents of the interview with Mr Biria conducted by Doctor Barker at that meeting and Doctor Barker's conclusions arising from that meeting were, as already set out, the main basis for the Court of Protection's conclusion that Mr Biria lacked the capacity to manage his property and affairs. In the absence of any significant information as to the circumstances in which Mr Biria's will came to be prepared and although not directly contemporaneous with the execution of that will, it also provides the best available evidence as to Mr Biria's mental state and capacity as at the date that the will was executed.

78. Doctor Barker prepared a very full report of his interview with Mr Biria on 24 August 2020. In addition to that report, dated 2 September 2020, he also prepared a supplemental report, dated 28 October 2020, by which date he had been able to examine Mr Biria's medical records. Doctor Barker has also provided a further report, for purposes of these proceedings, bearing directly upon the issue, or one of them, with which I am concerned, namely Mr Biria's testamentary capacity as at the date

when he purportedly executed the will. This latter report, dated 27 August 2023, reflects, of course, the fact that the question asked of Doctor Barker in 2020, namely Mr Biria's then capacity to manage his property and affairs, is a different question to the one, as to Mr Biria's testamentary capacity, that I have to resolve.

79. I have had the benefit of all three reports and, also, as already stated, Doctor Barker's very helpful oral evidence. Doctor Barker is a highly qualified and very experienced consultant in old age psychiatry and, as might be expected, was a very impressive witness. I have no doubt at all that his reports and his evidence to me were of the highest professional standards and, as such, that they provide weighty evidence, in respect of all of the matters upon which he gave evidence.

80. Although the question of testamentary capacity is ultimately one for the court and not for even the most able and experienced expert, Doctor Barker's clear professional conclusion, based upon his dealings with Mr Biria and following his examination of Mr Biria's medical records, is that Mr Biria, by reason of his dementia, would, as at 1 May 2020, have been unable either to understand the extent of his estate or the moral claims of potential beneficiaries of his estate and, in consequence, would have lacked the capacity to execute a valid will.

81. Reverting to the interview conducted by Doctor Barker with Mr Biria on 24 August 2020 and without setting out in extenso the entire sequence of their conversation, as set out in the 2 September 2020 report and as replicated and expanded in Doctor Barker's oral evidence, the essential features seem to me to be as follows.

82. Firstly that Mr Biria appeared at the outset of the interview not to be aware of the reason for Doctor Barker's attendance and, more materially and despite Doctor Barker's repeated explanation as to the reason for his attendance, remained unable to retain that explanation for the duration of the interview.

83. Secondly, that Doctor Barker having conducted some simple cognitive testing and while making allowance for what he believed to be a language barrier between Mr Biria and himself, having been informed by Hamid that Mr Biria's first languages were Persian and Arabic, felt able to conclude that Mr Biria suffered from mild-moderate dementia, such as to render him unable to manage day by day independent living. Mr Biria could register and retain some information, but this was patchy and soon forgotten.

84. In regard to language, Doctor Barker was unaware until hearing Ali's evidence at trial, that Mr Biria had for very many years been a fluent English speaker. In light of that evidence and the fact that he had only been able to converse with Mr Biria in very simple English, he felt that Mr Biria's evident loss of language was both consistent with and supportive of his findings of dementia.

85. Thirdly, that Mr Biria had very little sight, had no functional right eye, wore glasses, could not write his signature, other than a scrawl, and could not read even large capital letters.

86. Fourthly and in regard to his financial affairs, Mr Biria's apparent understanding was that he had very little money and no savings. He believed that he was supported by Hamid and Nasrin. When asked whether he had ever had a million pounds, his

response was 'no, I have no pounds at all'. When asked if he had ever had and sold property interests in America, to the tune of $20M, he denied that he had ever had any investments in America and laughed at the idea. When asked about his business and assets in Iran, he said that he had never had or sold a business in Iran and that he had never got any money from anywhere. These answers, of course, entirely contradict the actual fact, that at the date of this interview, Mr Biria had over $13M in his Key Bank account and that those monies had emanated from his American investment and business activities.

87. Fifthly and in regard to Ali, Mr Biria told Doctor Barker that Ali was 'a bad and dangerous person', that Ali had threatened to kill him and that he wanted to kill him 'with a knife and gun'. When questioned, as to when, where and why Ali should have threatened him in this way, Mr Biria repeated that Ali was 'a very bad person, a dangerous person' and had said that he wanted to kill him. As to when, he said 'a long time ago, some time ago I don't know when'. As to where, he first said 'in Amer… and then 'here, here'. As to why, he repeated that Ali was bad and dangerous person and that it might be to do with 'the money'. He was not able to specify what money and reiterated that he had 'no, not very much money'.

88. More generally, Doctor Barker described Mr Biria, while very frail, as courteous and dignified. Contrary to what he had been told by Hamid, he seemed happy to meet and talk to Doctor Barker and did not appear to be at all stressed by Doctor Barker's attendance.

89. That said, Doctor Barker's clear opinion was that Mr Biria was wholly dependent upon Hamid and Nasrin, by reason of the combination of his dementia, his physical frailties and his very limited eyesight. He was, further, of the view, given, as he put it, his earlier experience when seeking to visit Mr Biria, that Hamid and Nasrin controlled access to Mr Biria, albeit that Mr Biria might well be oblivious of that fact and gave no appearance of being anxious or fearful of them. That opinion, emanating from an experienced consultant in old age psychiatry, such as Doctor Barker, is one which, to my view, carries considerable weight.

90. As set out in paragraphs 4 and 62 of this judgment, following his interview with Mr Biria, Doctor Barker felt able to advise the Court of Protection that, in his opinion, Mr Biria lacked the capacity to manage his property and affairs.

91. Doctor Barker's second report, dated 28 October 2020, added little to the 2 September 2020 report. Doctor Barker had now had the opportunity to examine Mr Biria's medical records. Those records cast little new light upon Mr Biria's mental state. Mr Biria had had a serious depressive episode in 2017 which had been resolved by medication. In 2017, Mr Biria's memory was said to be good, with the implication that his cognitive impairment, as demonstrated at the August 2020 interview, was likely to have developed since that date and, in Doctor Barker's opinion in the two years preceding Doctor Barker's assessment. In recent years, Mr Biria seemed to have been accompanied to medical appointments by one or both of Nasrin and Hamid, who had also acted as interpreters. Those circumstances had given little scope for the detection of any incipient, or progressing, cognitive impairment, or dementia. Medical records confirmed that, as at 2019, Mr Biria had only one operative eye and that the vision in his remaining eye was limited to the counting of fingers.

92. Doctor Barker's third report, dated 27 August 2023, went, as already stated, specifically to the question of testamentary capacity and gave rise to the conclusion, set out at paragraph 79 of this judgment, that Mr Biria lacked the capacity both to understand the extent of his estate and the moral claims of those having potential claims upon that estate.

93. Doctor Barker considered that it was unlikely that Mr Biria's mental state and dementia would have been significantly different on 1st May 2020, when the will was purportedly executed than it had been when Doctor Barker had carried out his interview in August 2020. There was, in particular, nothing in Mr Biria's medical notes to suggest that anything might have occurred between May and August 2020 such as to radically shift his mental state as between the one date and the other. Correspondingly and relevantly, perhaps more, to his knowledge and understanding of the contents of the purported will, it was clear from Mr Biria's medical notes that his very limited eyesight antedated the date of purported execution of the will.

94. Doctor Barker's view of Mr Biria's capacity to understand the extent of his estate derived, essentially, from his interview with Mr Biria on 24 August 2020 and Mr Biria's palpably false understanding, by reason of his dementia, of the true state of his past and present financial affairs and of the fact, in particular, that far from having limited money and no savings, he, in fact, had had, at that date and at the date of the purported execution of his will, assets in the Key Bank account exceeding $13M arising out of the sale of his property investments in America, in respect of which he professed no recollection and no knowledge.

95. In regard to Mr Biria's capacity to properly understand and weigh up those who might have legitimate moral claims upon his bounty, Doctor Barker focused upon the repeated allegation that Ali had threatened to kill him and was a bad and dangerous man. Doctor Barker had been unable to secure any explanation as to the where, when, or why, of that allegation other than some wholly unexplained reference to 'the money'. It was different in kind to the allegations emanating from Mr Scott as to Mr Biria's alleged dishonest business dealings with Ali and entirely unsubstantiated by any evidence or reasoning. Doctor Barker, as he explained in his oral evidence, did not necessarily regard the allegation as delusional, or as necessarily constituting a fixed false belief. His opinion, however was that Mr Biria's repeated allegation, in respect of Ali, which appeared to have no foundation in evidence and for which no coherent explanation could be afforded demonstrated a mental state, arising from Mr Biria's dementia, whereby Mr Biria had lost the capacity to properly understand and weigh up those, including Ali, who might have moral claims upon his bounty.

96. In tendering his expert opinion, Doctor Barker, as he explained in his 27 August 2023 report, had regard to the familiar 'test' for testamentary capacity established, long ago, in **Banks v Goodfellow (1870) LR 5 QB 549.** He was right to do so. There has been some recent debate as to whether the **Banks v Goodfellow** 'test' has been modified, or superceded, by the provisions of the Mental Capacity Act 2005. In my view, it has not. I agree, with respect with Falk J, in **Clitheroe v Bond [2021] EWHC 1102 (Ch)**, at paragraph 82, that the **Banks** test has not been overridden by the Mental Capacity Act 2005. I agree, further, with the views expressed, in **Walker v Bodmin [2014] EWHC 71 (Ch)** and **James v James [2018] EWHC 43 (Ch),** to the effect that the Mental Capacity Act affords a test, or tests, for capacity in respect of transactions effected, or to be effected, by living persons, whereas the **Banks** test is

applicable for the retrospective determination of capacity in respect of a past transaction, specifically, a will.

97. Doctor Barker's conclusions as to testamentary capacity rest upon his view that Mr Biria's dementia prevented him from satisfying two of the criteria for such capacity, set out in **Banks**, namely the requirement that the testator have the ability, or capacity, to understand the extent of the property of which he was disposing and the further requirement that the testator comprehend and appreciate the claims to which he ought to give effect.

98. While, as already stated, the decision as to testamentary capacity must be that of the court, the court must, as it seems to me, give full weight to the views, on these questions, of a highly qualified expert, such as Doctor Barker, particularly where, as here and unusually in cases such as this, Doctor Barker, rather than having to rely on medical records and the evidence of others, has had a full opportunity to make an assessment of the testator only a few months after the date at which capacity, or the lack of it, falls to be established.

99. Giving, therefore, as I do, full weight to Doctor Barker's evidence and conclusions, I am satisfied that Mr Biria lacked testamentary capacity, as at the date of the purported execution of the will and that, in consequence, that will was and is invalid.

100. It seems to me, based on Doctor Barker's evidence, that it is overwhelmingly clear, given the known facts as to Mr Biria's actual finances and assets, both at the date of the purported execution of the will, in May 2020, and at the date, August 2020, of Doctor Barker's assessment and given Mr Biria's manifest want of knowledge of those facts, indeed denial of those facts, when interviewed by Doctor Barker, that, unless there had been a complete change in Mr Biria's mental state, as between May and August 2020, that, at the date of his execution of the purported will, Mr Biria wholly lacked the capacity to appreciate or understand the extent of the estate which, by his will, he was purportedly disposing.

101. It further seems to me that there is no reason at all to question Doctor Barker's view that Mr Biria's mental state, in May 2020, was substantially the same as it was in August 2020. The medical records do not elicit any change of circumstances in that period and there is no other evidence such as to warrant the conclusion that there had been any significant change in Mr Biria's mental state, as between the one date and the other.

102. In regard, to Doctor Barker's further conclusion, that Mr Biria lacked the capacity to appreciate the claims to which he ought to give effect, that conclusion was based, as already fully set out, upon Mr Biria's unevidenced, unexplained and unparticularised, but, seemingly, strongly held contention that his eldest son, Ali, was a bad and dangerous man who had threatened to kill him.

103. That contention was wholly denied by Ali, in what I have described and accepted as honestly given evidence. It derives no support from any other source. Mr Scott, who, as is clear from his Defence Form, holds no brief for Ali, makes no such allegation. No other party to this litigation has come forward to support the allegation. I am satisfied that the allegation, whether sourced in dementia , or otherwise, is without foundation.

104. I am further satisfied that, where a testator holds, or entertains, such an entirely unfounded and, therefore, irrational belief as to the conduct, or character, of someone, such as his eldest son, Ali, with whom he had worked for many years and who would, ordinarily be one of those to whose claims he should have regard, the effect of that unfounded belief is to so distort, or skew, the testator's understanding, or appreciation, of, in this case, Ali's claim as to render him unable to appreciate that claim and, for that reason, to lack the capacity to make a valid will.

105. In this regard there is no reason to believe that Mr Biria's unfounded beliefs, as to Ali, were any different when the will was purportedly executed than they were when interviewed by Doctor Barker. Rather his manifest antipathy to Ali is, as set out in paragraph 10 of this judgment, the one particular thing that the notary who supervised the purported execution of Mr Biria's will was able to recall.

106. In concluding, as set out in paragraph 99 of this judgment, that Mr Biria lacked testamentary capacity, I have sought to have regard to any countervailing facts or circumstances which might impinge upon that conclusion, or cast a different light upon it.

107. There is very little such material. Mr Scott, as set out in paragraph 13 of this judgment, refused to provide **Larke v Nugus** information, as to the preparation of the will, or of earlier drafts. No attempt was made, in respect of the execution of the will, to have it executed in accordance with the so-called golden rule, namely by having the will witnessed by a medical practitioner, who could assess and certify capacity at the point of execution.

108. The only material which ostensibly contradicts the view that I have taken is to be found in Mr Scott's Defence Form and in Mr Tang's letter of 26 May 2020, referred to, respectively, in paragraphs 12 and 57 of this judgment. Mr Scott's Defence Form asserted Mr Scott's belief that Mr Biria had capacity. Mr Tang's letter stated that as far as he was concerned Mr Biria's mental faculty remained intact.

109. In Mr Scott's case, it is hard to see, particularly in the absence from Mr Scott of any **Larke v Nugus** information, the basis upon which he could make any assertion as to Mr Biria's capacity at the point when the will was purportedly executed. Mr Scott's Defence Form indicated that the will had been drawn up 'long before' the date of purported execution. How then could Mr Scott have any knowledge at all as to Mr Biria's capacity at that date? Even if, as is set out in paragraph 28 of this judgment, the final drafts of Mr Biria's will, prior to purported execution, had, in fact, been drawn up in the early part of 2020, Mr Scott has given the court no information as to the circumstances in which the draft came into being and, most materially, how and by whom instructions in respect of the draft were given.

110. In regard to Mr Tang's letter, Mr Tang, apart from setting out that Mr Biria was apparently able to give his address and postcode and the details of his children, including Ali, gives no further basis at all as to the grounds upon which he was purportedly satisfied that Mr Biria's mental faculty was intact. The letter itself was not concerned with testamentary capacity. It says nothing at all as to the circumstances in which Mr Tang took his instructions, or as to the role that may have been taken by Hamid and Nasrin, in the giving of those instructions, and, as already set out in paragraph 58 of this judgment, it evinced a clear misunderstanding, or lack

of awareness, as to the fact that Court of Protection proceedings were already in existence, suggesting, at the least, that full and clear instructions were not given.

111. I am not persuaded that there is anything in Mr Tang's letter sufficient to gainsay the clear and convincing evidence that I have received from Doctor Barker.

112. Rather, what stands out, in this case, both in respect of the issue of capacity and the other issues, yet to be discussed and resolved, is the evident unwillingness of the material Defendants to challenge the case that is being advanced by and on behalf of Ali, even, in this context, to the limited extent of putting Mr Tang forward to speak to Mr Biria's mental state on 22 May 2020, some three weeks only after the purported execution of the will.

113. In the result and as set out in paragraph 99 of this judgment, I am satisfied that, as a the date of execution of the purported will, on 1 May 2020, Mr Biria lacked testamentary capacity and hence that the will purportedly executed on that date was invalid.

114. That determination brings into sharp focus the question as to how Mr Biria, with no knowledge, or understanding, of, in particular, the Key Bank funds, came to purportedly execute a will making particular and specific provision as to those funds and, in due course, take the steps set out in this judgment to transfer those funds to Mansour. The answer, as explained and discussed in the next part of this judgment and to which the court is forced, is that both the execution of the will and the transfers of funds were procured by way of undue influence exercised by Hamid and Nasrin over Mr Biria, that the purported will did not reflect Mr Biria's testamentary intentions and that, in addition to Mr Biria's want of capacity, the will fails both on account of undue influence and want of knowledge and approval.

115. As is well understood, want of capacity and want of knowledge and approval are two different concepts. Capacity goes to the ability to make a will. Knowledge and approval goes to the question as to whether the contents of the particular will executed, or purportedly executed, by a testator, truly reflect the testator's intentions as to those contents and as to the effect of those contents. A testator with capacity may, nonetheless, in particular circumstances, not understand and approve the contents of his will, or its effects, so that the will fails for want of knowledge and approval. Conversely, it is not, I think, wholly impossible to think of circumstances where a testator without capacity, nonetheless, both knows and approves the contents of the will he, or she, purports to make.

116. The traditional approach, in dealing with a will said to fail for want of knowledge and approval, is for the court to determine whether, on particular facts, the will in question 'excites the suspicion of the court'. If so, then affirmative evidence is required to allay those suspicions and, so, to satisfy the court that, despite those suspicions, as to the testator's knowledge and approval of the contents and effect of his will, the testator did, in fact know and approve those contents.

117. The alternative approach, discussed by Lord Neuberger, in **Gill v Woodall [2011] Ch 380**, is to treat the question of knowledge and approval as a single issue and, taking account all relevant material, for the court to reach a conclusion as to whether the testator, in a given case, had known and approved the contents of the will in question.

As Lord Neuberger pointed out, however, at paragraph 23, in **Gill**, whether approached as a single question or in two stages, the answer should be the same.

118. In this case, the suspicion of the court, adopting the traditional approach, arises, in an extreme form, from the matters set out in paragraph 114 of this judgment. Mr Biria, who, as I have found, had no knowledge of the Key Bank account, or the monies in that account, or the source of those monies, nonetheless purported to make a will making detailed provision for the disposition of those funds in favour of his children, other than Ali.

119. It is, on the face of it, impossible to see how those dispositions, in respect of monies the existence of which he was totally unaware, could possibly have been dispositions of his estate of which Mr Biria knew or of which he approved. As explained, at paragraph 14, in **Gill**, knowing and approving the contents of a will is traditional language for saying that the will represented the testator's testamentary intentions. Quite plainly, Mr Biria can have had no testamentary intentions in respect of monies of which he was wholly unaware and the existence of which he had, in his interview with Doctor Barker, essentially, denied.

120. How then, if at all, can, or could, those suspicions be allayed?

121. It seems to me that the only way of allaying those suspicions would be, or would have been, for those who might seek to support the will to present affirmative and persuasive evidence that, notwithstanding, Mr Biria's patent lack of understanding of his finances and affairs, as at 24 August 2020, as detailed by Doctor Barker, in his 2 September 2020 report and in his evidence to me, and despite Doctor Barker's opinion that, by reason of his mental state, Mr Biria would have had no better understanding of his assets and affairs, as at the date of purported execution of his will, on 1 May 2020, Mr Biria had, as at that date, in fact, been fully aware of his true financial position and, in particular, of the monies in the Key Bank account.

122. No such evidence exists. The only matters available to me, other than, as discussed in the next following paragraphs, the facts pertaining to the purported execution of the will, which could possibly gainsay the evidence, factual and expert, that I have received from Doctor Barker, are Mr Scott's and Mr Tang's assertions, as to Mr Biria's capacity, set out, discussed and discounted, in paragraphs 107 to 111 of this judgment.

123. The facts and circumstances, pertaining to the purported execution of Mr Biria's will, on 1 May 2020, are set out in paragraphs 7 to 11 of this judgment.

124. In the usual case, such facts and circumstances are highly relevant to the question of knowledge and approval. As explained by Lord Neuberger, in **Gill**, at paragraph 14, in a case where a will has been properly executed after being prepared by a solicitor and read over to the testator, there is, as a matter both of common sense and authority a strong presumption that the will represents the testator's intentions at the moment of execution of the will.

125. That explanation reflected citations from **Fulton v Andrew (1875) LR 7 HL 448**, at **469**, and from **Gregson v Taylor [1917] P 256**, at **261**. In **Fulton**, Lord Hatherley stated that 'when you are once satisfied that a testator of competent mind has had 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'. In **Gregson**, Hill J said that 'when it is proved that a will has been read over to 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'.

126. It is to be noted that, in both the foregoing citations, the circumstances in which the presumption of knowledge and approval is said to arise is confined to cases where the testator is 'of competent mind' or is a 'capable testator'. That is not this case. In this case, Mr Biria was not competent, or capable, and a key aspect of his incapacity related, specifically, to his inability to understand, appreciate, or acknowledge, his potential testamentary estate, or, therefore, to form any testamentary intentions in respect of monies, or assets, forming part of that estate.

127. Additionally, in this case, although the notary read over the will to Mr Biria, prior to execution, the impact, or effect, of that reading, in respect of Mr Biria and in respect of his understanding of the contents of the will, has to be evaluated in the context of his mental and physical state, as at 1 May 2020.

128. Doctor Barker gave evidence about this, as part of his oral evidence. His assessment, drawing upon his interview with Mr Biria and upon his conclusions from that interview, as set out, in particular, in paragraphs 4, 62, 82, 83 and 93 of this judgment, was that Mr Biria would not have been able to retain the contents of the will, as read out to him by the notary, until the termination of that reading, such that he would not have been aware of those contents at the point when the will was executed. By reason of his severely impaired vision, he would not have been able to read the will, or procure any understanding of the will from reading the will.

129. In the light of the foregoing, I am satisfied that this is, in no sense, the usual case, that the common sense considerations, which, in such a case give rise to the presumption of knowledge and approval, have no application to the facts of this case and that, in consequence, no such presumption arises. In this case, accepting, as I do, Doctor Barker's evidence, the reading over of the will to Mr Biria by the notary, followed by the execution of the will, does not afford any evidence that, when executing the will, Mr Biria knew and approved its contents, nor, therefore, allay, in any way, the court's suspicions in that regard.

130. In the result, I am satisfied that, whether treated as a single issue, as recommended in **Gill,** or by the application of the traditional two stage process, Mr Biria did not, at the point of execution of his will, know and approve its contents. The will, accordingly, fails on that basis, as well as for lack of capacity.

131. I am satisfied, further, as set out in paragraph 114 of this judgment, that, as I have found, the purported execution of his will, by Mr Biria, at a time when he lacked capacity and when he was unable, by reason of his mental state, to know and approve the contents of his purported will, was procured by the undue influence exercised over Mr Biria by Hamid and Nasrin and, although not, in itself, an issue for my determination, that it was by the exercise of the same undue influence that the transfer of the Key Bank funds to Mansour was procured.

132. In the context of the validity of a will, the court is concerned not with the application of any presumption of undue influence but with a determination, or finding, of actual undue influence.

133. In **Edwards v Edwards [2007] All ER (D) 46 (May),** at **paragraph 47**, Lewison J (as he then was) provided a useful summary, or synopsis, of the facts and matters to be taken into account, when determining, as a matter of fact, that a will has been procured by undue influence.

134. The core question for determination is whether, in respect of the execution of his will, the testator's own will has been influenced by coercion, in the sense that his will has been overborne by the conduct of others, such that he ceases to act on his own volition. Influence is undue, where the effect of the influence, however exercised, is that the will executed, as a result of that influence, is not the testator's will, because it has not been made at his own volition.

135. In making a finding of undue influence, which will almost always have to be determined inferentially, it is not sufficient to establish that the facts are consistent with the application of undue influence. Recognising the high burden to be met, even to the civil standard of proof, in establishing undue influence, the facts established must be consistent only with the exercise of undue influence.

136. In determining whether a testator's will has been overborne and whether a testator is acting on his own volition, the physical and, in this case, most materially, the mental state, or strength, of the testator are, naturally, highly material considerations.

137. In this case, I am completely satisfied that Mr Biria, in purporting to execute his will, was not, in any sense, acting on his own volition. I am satisfied that, both in respect of his will and in respect of the transfers out of the Key Bank account, he was acting entirely at the behest of Hamid and Nasrin and entirely under their influence. In executing his purported will and in making the transfers to Mansour, Mr Biria was not exercising his own will but implementing the will of Hamid and Nasrin, at their direction and under their control and influence. In the context of his mental state and his state of understanding of his affairs, both at the date of purported execution of the will and the date of the various transfers, I consider no other conclusion to be possible.

138. That conclusion flows, inevitably, from the findings that I have already made. At the point, on 1 May 2020, when Mr Biria purportedly executed his will, he had no knowledge, or understanding, at all, as to his financial standing, or as to the existence of the Key Bank account and the monies in that account. Nor, when he purportedly executed the will, did he have any knowledge of its contents. He had, in short, no idea as to what he was executing and could not, in consequence, therefore, have intentionally and of his own volition made the specific provisions in respect of the Key Bank funds which are contained in his purported will. In that state of affairs, the irresistible inference is that he was not executing the will at his own behest and in order to give effect to his own wishes but at the direction and under the influence of another, or others, and, in context, therefore, at the direction of Hamid and Nasrin, with whom he was living and upon whom, as indicated by Doctor Barker in his assessment, he was completely dependent.

139. Correspondingly, when, in October 2020, only weeks after his assessment by Doctor Barker, Mr Biria wrote cheques on the Key Bank account, divesting himself of over $11M, in respect of funds of which he had no knowledge or understanding and when, later on, he ostensibly divested himself of the balance of the Key Bank funds, he can, again, only have been acting at the direction of others and, hence, in the context just set out, Hamid and Nasrin.

140. The circumstances in which these matters came about cannot, on the available evidence and in the absence of any engagement in this litigation by Hamid and Nasrin, be definitively established.

141. The evidence is that Mr Biria's mental state began to decline, as Doctor Barker opined, some two years before the will was executed. That date conforms with the date (2018) when Ali visited his father and when his father could not recognise or recall him. It was from then on that, at least in Ali's perception, Hamid and Nasrin sought to keep visitors at bay.

142. The draft wills which were prepared in 2016 and 2017 were not, therefore prepared at a time when, on the available evidence, Mr Biria's mental state and capacity was impaired. Those wills reflected, subject to the exclusion of Ali, Mr Biria's desire to divide his estate equally between his children. The exclusion of Ali appears, as already discussed, to reflect allegations emanating from Mr Scott and, perhaps, a degree of bad blood, arising from Ali's insistence, or attempt, to secure a greater share of the proceeds of the Bellevue properties than his father had wanted.

143. The position changes, however, in 2020 and, therefore, in the few months prior to the purported execution of the will. In those months two drafts came into being; the first disinherited all of Mr Biria's children save Nasrin; the second, identical in form to the will purportedly executed, made gifts to each of Mr Biria's children, save Nasrin and Ali, from the Key Bank account, excluded Ali and gave the rest of the funds in the Key Bank account to Nasrin, together with the rest of his estate. Hamid was appointed executor of the English and worldwide estate, other than the United States; Mr Scott in respect of the United States estate.

144. It cannot be said when, within the early months of 2020, those two drafts were prepared. It is possible that the catalyst for their preparation was the initiation of the Court of Protection proceedings, but given the relatively short period of time between the service of those proceedings, in early April 2020, and the purported execution of the will, on 1 May, it seems most likely that these drafts were in preparation prior to the inception of those proceedings.

145. What can, however, be said with a high degree of certainty, given Mr Biria's mental state on 1 May 2020 and the fact that his mental deterioration would, by early 2020, have been progressing for some two years, is that unless some medical event had taken place to accelerate the development of his dementia between the beginning of 2020 and May 2020 (there being nothing in the medical notes to support such an acceleration) the clear likelihood is that, at the date, or dates, when those drafts came into being, Mr Biria would have had no significantly greater understanding of his finances and affairs than he had on 1 May 2020 and that he would not, therefore, of his own volition and independently, have been able to initiate, or give instructions as to, the preparation of a will making specific provisions, in particular, in respect of the

Key Bank account. Those provisions must have emanated elsewhere and, realistically, from Hamid and Nasrin, who, by Nasrin, would have been the substantial beneficiary of those provisions.

146. What can further be said, again, with a high degree of certainty, is that the service of the Court of Protection proceedings and the 24 April order, directing an assessment of Mr Biria's capacity, undoubtedly catalysed Hamid and Nasrin in procuring the purported execution of the will. As appears from the committal judgment, Judge Hilder, was in no doubt that the Court of Protection proceedings had been served on Hamid and Nasrin by 24 April. It is beyond coincidence that, so shortly after the service of proceedings, investigating Mr Biria's capacity, steps were taken by Hamid and Nasrin to procure the execution of the will, as set out in paragraph 7 of this judgment. There is no doubt in my mind that, faced with a Court of Protection investigation, Hamid and Nasrin took early steps to procure the execution of a will very substantially in their favour. Correspondingly, there is no doubt in my mind that, faced with the continued prosecution of the Court of Protection proceedings and the appointment of Mr Abraham, as interim deputy, on 7 September 2020, Hamid and Nasrin, in October 2020, procured Mr Biria to sign the cheques, stripping the Key Bank account of the bulk of its funds, and to sign the document, referred to in paragraph 21 of this judgment, purportedly justifying the transfers to Mansour as being in Mr Biria's best interests. Mansour's role in all of this has not been explored. It seems, however, to be reasonably plain that he was complicit with Hamid and Nasrin in procuring that the Key Bank monies were removed from Mr Biria's account and from the control of the Court of Protection and the deputy appointed by that court.

147. The balance of Hamid and Nasrin's conduct, as detailed earlier in this judgment, is all of a piece with the foregoing and, in particular, with their intention to obstruct and defeat the Court of Protection investigation.

148. Hamid's evidence to the Court of Protection, as outlined in paragraph 68 of this judgment, was demonstrably misleading and disingenuous. In that witness statement he asserted that he had no knowledge of the whereabouts of his father's will. That must have been untrue. Hamid and Nasrin had procured the execution of the will and will, upon that execution and given the circumstances of this case, inevitably have taken possession and control of the will. His assertion that all he knew about his father's estate was that he was the owner of Beltane Drive was equally untrue. He had, himself and with Nasrin, procured the transfers of the Key Bank monies to Mansour out of his father's estate and the creation of the document providing 'cover' for those transfers.

149. Correspondingly, Hamid and Nasrin's conduct, in denying independent access to Mr Biria, initially by Doctor Barker and latterly by Council officers and the Special Visitor appointed by the Court of Protection, also had, as its purpose, the frustration of the Court of Protection investigation.

150. It was to that end that, at the inception of the proceedings, they obstructed Doctor Barker's initial attempts to interview Mr Biria and sought, as explained in his evidence by Doctor Barker, to intrude upon and interfere with Doctor Barker's assessment of Mr Biria, when it eventually took place, and, to that end, later on, prevented the Council and the Special Visitor from having independent access to Mr Biria.

151. In the context of the foregoing, the excuses put up by Hamid for denying access to his father are not to be taken at face value. It was all too easy for him to assert that his father did not want to see anybody, or was too stressed to see anybody, or required an interpreter before he could speak to anybody, and to procure that his dependent father fell into line. The reality, when Doctor Barker succeeded in talking to Mr Biria, is that Mr Biria was not at all stressed by the occasion and was, in point of fact, happy to talk to Doctor Barker. In regard to language, the reality is not that Mr Biria required an interpreter, because English was not his first language, but that, by reason of dementia, he had lost language capacity and that this was something that, as it seems to me, Hamid and Nasrin did not want the authorities, or the Court of Protection, to know.

152. In the result, I am satisfied that the will was executed by Mr Biria at the direction and by reason of the undue influence exercised by Hamid and Nasrin. The will was not executed by Mr Biria independently and of his own volition, but entirely at the behest of Hamid and Nasrin and by reason of the control and influence they were able to exert over him, in consequence of his diminished mental state. The will, accordingly, fails on grounds of undue influence.

153. There remains to consider one further aspect of the pleaded claim, namely that the will also fails on grounds of fraudulent calumny.

154. Fraudulent calumny is explained by Lewison J, in **Edwards**, at **paragraphs 47 (vii) and (viii)**, as arising in circumstances when A poisons the mind of a testator against B, who would normally be a natural beneficiary of the testator's bounty, by casting dishonest aspersions upon his character. The aspersions must be known to the person making those aspersions to be false, or, at the least, that person must be reckless as to the truth or falsehood of the aspersions made. Where, as a result of such dishonest aspersions, a putative beneficiary is excluded as a beneficiary, or a recipient only of reduced benefits, then the will is liable to be set aside.

155. In this case, the pleaded allegation is that it was Hamid and Nasrin who concocted, or created, the allegation that Ali had threatened to kill Mr Biria with a knife or a gun and had created the allegation that Ali was not a good son and had been wrongfully receiving monies from the Bellevue properties and it was those allegations which gave rise to Ali's exclusion from the will.

156. This head of claim is not made out.

157. As explained in this judgment, at paragraphs 40 and 41, the allegation (untrue) that Ali had been taking money out of the Bellevue properties did not emanate from Hamid or Nasrin but from Mr Scott.

158. The allegation that Ali threatened to kill Mr Biria is discussed, in the context of capacity, in paragraphs 95 and 102 to 104 of this judgment, on the basis that this was an irrational, unparticularised and unfounded allegation, distorting, or skewing, Mr Biria's ability to understand and appreciate those who he should have in mind as potential beneficiaries of is testamentary bounty. If that were not the case and the foundation of the allegation was a false and dishonest aspersion made by Hamid or Nasrin about Ali, then that ground of incapacity could not be made out.

159. There is no basis, at all, however, for the conclusion that the allegation emanated from Hamid or Nasrin, or that Mr Biria was 'fed' the allegation by one or both of them. Doctor Barker's conclusion, in effect, was that this was simply an unfounded allegation, emanating from someone suffering from dementia and affecting that person's capacity to recognise, or appreciate, the proper subjects of his bounty. I have seen no reason to question that conclusion.

160. The overall consequences of all of the foregoing is that the will fails on grounds of capacity, want of knowledge and approval and undue influence, but not on the ground of fraudulent calumny. I shall make declarations to that effect, together with such other consequential declarations, or directions as may be necessary and appropriate.