

**IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

29th October 2008

Before :

THE HON MR JUSTICE FLOYD

Between:

**IN THE ESTATE OF EDWIN JOHN WATSON
(PROBATE)**

**DEREK CARR
MARGARET HELEN WATSON
ALAN KENNETH COLE**

Claimants

- and -

**CATHERINE ANN BEAVEN
MARILYN JANE WATSON
EDWIN RICHARD JOHN WATSON
JANET DIXON
EDWIN LUKE WATSON**

Defendants

**Mr Peter John (instructed by Howard Pollok & Webb) for the Claimants
Mr Michael Waterworth (instructed by Mills & Reeve) for the Defendants
Hearing dates: 14th to 17th October 2008**

Mr Justice Floyd :

1. Edwin John Watson, known as John Watson, died on 11th April 2006. This case concerns the validity of his last will dated 17th November 2000.
2. The claimants are the executors of John Watson's will by virtue of the will of 17th November 2000 and a subsequent codicil dated 2004. The second claimant, Margaret (Margot) Watson is the widow of John Watson and was his second wife. John and Margot Watson were married in October 1997, but they had been together since 1971 following the break-up of John Watson's first marriage. The claimants seek a grant of probate in respect of the November 2000 will.
3. The first four defendants (whom I shall refer to as Catherine, Marilyn, Richard and Janet) are the children of John Watson by his first marriage. The fifth defendant is John Watson's grandson and Marilyn's son. The defendants' sole ground for contesting the November 2000 will is that they

contend that John Watson lacked testamentary capacity when he made it. They contend that the same applies to a previous will he made on the 14th March 2000. By their counterclaim they contend that I should pronounce in favour of a yet earlier will dated 5th January 1998.

4. By consent, and before the trial, the fifth defendant withdrew from the claim on agreed terms.
5. This is, in many ways, an unfortunate dispute. It is true that the 1998 will did make provision for John Watson's four children. The provision is in the form of specific, and modest sums totalling £50,000. This relatively small provision for the children was removed by the 2000 wills. The broad pattern of all three wills (that is to say the 1998 will and the March and November 2000 wills) was to give certain properties and a life interest in the rest of the estate to Margot, with the residue going to John Watson's grandchildren. The defendants say that the motivation for their resistance to the claim, and for the counterclaim, is not money, but a desire to see their late father's true will implemented. In this connection they claim to be particularly concerned to ensure that the executors remain obliged to grant a lease in favour of David Smith, the occupant of a cottage on the estate ("the Cottage"). David Smith occupied the Cottage with his wife Lisa (until her recent death) in return for odd jobs and gardening. David Smith's occupation of the Cottage was pursuant to a licence agreement tied to his employment. The removal of the executors' obligation to grant a lease to David Smith of the Cottage was the principal change made by the November 2000 will. David Smith himself was served with notice of these proceedings, but did not participate in them other than by way of giving evidence at the trial.

The Law as to testamentary capacity

6. Giving the judgment of the court in *Banks v Goodfellow* LR 5 QB 549 at 565, Cockburn CJ described the requirements for testamentary capacity in the following way:

"It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object, that no disorder of mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made."

7. Thus the testator must be capable of understanding that the effect of the will is to give his property on his death to the named beneficiaries under the will. He must be capable of understanding the extent of his property. Finally he must be capable of understanding and appreciating the moral claims of those he is including, and those he is excluding from his will without any mental disorder affecting his judgment.

8. Cockburn CJ, after the passage cited above, considered that he was setting

"the measure of the degree of mental power which should be insisted upon"

The particular factor under consideration in *Banks v Goodfellow* was the fact that the testator was suffering from insane delusions. These delusions gave rise to a violent aversion to a man named Featherstone Alexander: so much so that the mere mention of his name was sufficient to throw him into a state of violent excitement. But the evidence as to the occasion on which he executed his will was that he was behaving normally and was well able to understand not only the acts of testamentary disposition, but other affairs affecting his estate. The question for the court was whether a delusion "which neither exercises nor is calculated to exercise any influence on the particular disposition" could deprive the testator of capacity (page 565). That was a decision that the *form* of the disease was not such as to affect the testator on the particular occasion in question in relation to the disposition he was making. Equally, it is clear from the language which Cockburn CJ used that the mental illness from which a testator is suffering, though present at the

material time, may not be present in sufficient *degree* to have any impact on testamentary capacity.

9. The judgment of the court in *Banks v Goodfellow* contains references to scholarly writings on other legal systems, in particular those where the dispositions capable of being made by will are regulated by the law itself. I have gained some assistance as to policy underlying the test propounded by the court from the following passage (at 565-566):

“It must be borne in mind that the absolute and uncontrolled power of testamentary disposition conceded by the law is founded on the assumptions that a rational will is a better disposition than any that can be made by the law itself. If therefore, though mental disease may exist, it presents itself in such a degree and form as not to interfere with the capacity to make a rational disposal of property, why, it must be asked, should it be held to take away the right. It cannot be the object of the legislator to aggravate an affliction in itself so great by the deprivation of a right the value of which is universally felt and acknowledged. If it is to be conceded, as we think it must be, that the only legitimate rational ground for denying testamentary capacity to persons of unsound mind is the inability to take account of and give due effect to the considerations which ought to be present to the mind of a testator in making his will, and to influence his decision as the disposal of his property, it follows that a degree or form of unsoundness of mind which neither disturbs the existence of the facilities necessary for such an act, nor is capable of influencing the result, ought not to take away the power of making a will, or place a person so circumstanced in a less advantageous position than others with regard to that right.”

10. Thus the court’s task is a more specific one than that of simply assessing the mental state of the testator. The testator’s mental state has to be assessed so as to determine (a) whether he had a specific capacity, and (b) whether he possessed that capacity at the specific time at which he made his will. Many changes will be observed in the elderly as they lose the vigour and acuity which they enjoyed as younger people. The more vigorous and sharp witted those persons were, the more noticeable may be their decline in later years. But the exercise is not one of contrasting the former person with his state in executing his will: despite the decline, he may still enjoy the necessary degree of memory and understanding to meet the law’s standard for testamentary capacity. Moreover, like the testator’s delusory state in *Banks v Goodfellow*, testamentary capacity may come and go. In such cases it is all the more important to focus on the question of whether he possessed the necessary capacity at the relevant time.
11. It is, of course, the testator’s mental state which is of importance. Much of the Defendants’ evidence in this case, I felt, focused on John Watson’s physical decline in his later years. This decline was upsetting for him, and no doubt had an impact on his mental health, particularly when it progressed so far as to impair his ability to lead an active life. But it is his mental capacity which is the ultimate matter on which I must decide. A man diminished in physical and even mental strength may nevertheless make a will, provided he can and does understand that which the law requires.
12. The so called “golden rule” that, in the case of an elderly or infirm testator, a solicitor should attempt to obtain the opinion of a medical practitioner to place with the will is, undoubtedly, excellent advice to solicitors. Its value lies in avoiding later disputes. Where, as here, evidence has been called on both sides as to the testator’s mental capacity, reference to the golden rule is rather like crying over spilled milk. As HHJ Norris QC (as he then was) said in *Cattermole v Prisk* (cited in *Scammel v Farmer* [\[2008\] EWHC 1100 \(Ch\)](#) at [122]; [2008] WTLR 1261 at 1287:

“The “golden rule” is not itself a touchstone of validity and is not a substitute for the established tests of capacity...”
13. Subject to the rule in *Parker v Felgate* (1883) 8P & D 171, all three elements must be present at the time when instructions for the will are given and when the will is executed.

14. When challenged, it is for the party who asserts testamentary *capacity*, in this case the claimants, to prove it.

The Facts

Early years

15. John Watson was born in 1924, and was approaching the age of 82 when he died in 2006. His first marriage produced four children. The oldest was Janet, then came Marilyn and lastly the twins Catherine and Richard. John Watson led an active business life. He had an old-fashioned, perhaps rather Victorian approach to his children, believing they should show him respect, administering corporal punishment from time to time and allowing them to speak mainly when spoken to. He had quite an aggressive personality. He was said not to “suffer fools gladly”, an expression sometimes used to forgive abruptness or downright rudeness.
16. John Watson had an outstanding war record, serving as a navigator in Bomber Command and flying numerous missions. The Second World War formed an important part of his life, and was a frequent topic of conversation. He was a founding partner of an estate agency business called Watsons, which he built up into a thriving business with offices in East Anglia. In business, he expected professionals to do their jobs promptly and professionally. He worked long hours at the office, seeing his children for relatively brief periods in the evenings.
17. John Watson’s main leisure interests were shooting and fishing for which he maintained a lifelong passion. He owned some woods near Holt in Norfolk which he used for shooting and which he visited at weekends. As a result he did not see very much of his children at weekends either.
18. In 1971, with his youngest children aged 14 years, John Watson left the family home to go and live with the second claimant whom he had met two years earlier. John and Margot were to live together for the next 35 years until John Watson’s death in 2006 at the age of 81. They did not marry until 1997.
19. As part of the financial settlement which John Watson made with his first wife, John Watson created a trust for the benefit of his children into which he placed three fairly substantial properties. All the children recognised the generosity of this settlement, although the properties were gradually sold and the proceeds divided amongst them. None of the children seriously challenged the notion that John Watson was entitled to consider that he had made sufficient lifetime provision for his children not to feel morally obliged to do more under his will.
20. With what remained of his capital, John Watson purchased Heath House in Holt, Norfolk. He continued to build up the estate agency business until 1987. At that stage some of his partners agreed to sell their share in the business to an insurance company, General Accident. John Watson and another partner, Alan Cole, the third Claimant and one of the executors, decided to remain in business. That renewed partnership continued until John Watson left it in 2000.

Margot Watson

21. Margot Watson was the principal witness for the claimants. She was cross examined over a lengthy period. I have not felt able to accept the entirety of her account of events. On some occasions I have not been able to place faith in her recollection, on others I think she may have exaggerated aspects of the history. I have treated her evidence with some caution elsewhere.

The children

22. John Watson does not appear to have had a particularly close relationship with his children. He seemed better able to form relationships with his grandchildren, in particular Matthew, who shared his interest in shooting.
23. Catherine was 14 years old when John Watson left his first wife. She used to visit him in the school holidays. She confessed to being frightened of him, at least until his later illnesses.
24. Richard, Catherine's twin brother, and therefore also 14 when his father left home, also visited Holt during the school holidays. He too found his father intimidating and found conversation with him difficult. After he married in 1987 he would visit Holt once a year, usually for a long weekend. He preferred to keep in touch by letter rather than telephoning, which he found difficult.
25. Marilyn was the closest to her father of the four children. She was 19 when her father left. After the birth of her son in September 1988 she had a serious argument with her father, who refused to come and see his grandson, preferring to attend to his keeping in Norfolk. Although she was less afraid of her father than her siblings, this disagreement meant that she did not stay at her father's house for the decade from 1988-1998.
26. Janet was the eldest of the four children and, at 24, had already left home in 1971 when her father left. For a time she worked in her father's business, which meant, on a certain level, they had common interests which they could discuss. After her marriage she was fully occupied with her husband's farming business. For a lengthy period her father would stay with them during the week when working. Janet kept a diary, of which extracts have been made available, recording incidents of family life.

The stroke

27. In September 1997, whilst on holiday, John Watson suffered a stroke. On return after a difficult car journey, he appeared to his GP as disorientated and drowsy. He spent most of the next week asleep. Margot described him to a consultant to whom he was referred as a "changed man", being less aggressive and more docile. She is reported as drawing a contrast between his former outgoing and chatty personality, and his current state.
28. The 1997 stroke affected John Watson physically, causing some slurred speech and lack of co-ordination. These improved. Notwithstanding the stroke he continued to work in the Watsons partnership. Nobody suggests that he lacked testamentary capacity at this stage, although the event plainly marks the beginning in a gradual deterioration of John Watson's health.
29. In October 1997 John Watson and Margot got married.
30. On 5th January 1998 John Watson executed a will. The 1998 will, as previous wills, made specific bequests of £10,000 each to Marilyn, Catherine and Richard, and released a debt of £20,000 owed by Janet and her husband. The 1998 will also directed the trustees to grant a lease of the Cottage to David Smith and his wife Lisa for a period not exceeding 60 years at a nominal rent.
31. In March 1998 John Watson's consultant described him "getting on extremely well. He is certainly steadier and able to do more".
32. Notwithstanding his improvement, in 1998 John Watson was asked to leave the estate agency partnership, something which he did not wish to do.
33. There followed a lengthy process of negotiation in which Mr Harvey of Hansells solicitors acted for Mr Watson and Ms Carole Webb of Howard Pollok & Webb acted for the partners. These negotiations were complicated and continued until early 2000. It is clear from the evidence of Mr

Harvey that Mr Watson was well able to give instructions to him in relation to the finalisation of the consultancy agreement until their conclusion.

The events of December 1998

34. In December 1998 John Watson was admitted to hospital. He was reported as having blood in his urine, something which he had been experiencing over a few months, and later suspected to have had a mild stroke, although this was not medically confirmed. The children were duly contacted, and were alarmed by reports of their father's condition which they received from staff at the hospital. He was discharged after two days, once the underlying infection had been treated and he had been rehydrated. There was a tendency on the part of the children to exaggerate the seriousness of this event. Marilyn described it as a "major stroke" in her witness statement. Janet said "He had a massive stroke in December 1998.... He was never the same again after this stroke" and later refers to it as "the big stroke". This was in contrast to her diary entry which records a conversation with a nurse at the hospital who said her father "may have had another small stroke"
35. This account of the December 1998 incident also does not accord with the medical evidence or that of Margot Watson. On his admission to hospital Margot Watson is reported to have told the admitting doctor that he was confused. On admission he had a temperature, but normal blood pressure. His haematuria settled rapidly, and, with good fluid intake, he was allowed home. An appointment was made for him to see the specialist again on 1st February. In the meantime he saw a further specialist on 23rd December, who recommended a further brain scan "just to make sure we are not overlooking any other illness or overlooking multiple cerebral emboli". The radiologist reported on 6th January 1999 that there were no significant changes over the past year, and no evidence of progressive disease.
36. Whatever the precise diagnosis of the event of December 1998, it was neither a massive nor a major stroke. I think the picture painted by the children may have relied more on the alarm that they felt on John Watson's admission to hospital, than on any real step change in his health which occurred as a result.

1999

37. On 6th December 1999 John Watson's GP records include an entry "Perhaps cognitively not so good since operation" (he had had a small operation to remove a polyp in the course of the year) and in April 2000 there is an entry "memory deficit" under the heading "Problems".
38. Some witnesses described John Watson as communicating in a rather shorthand way when he wanted to be helped up in or out of his chair. He would say "Can we...." or "Shall we...." without completing the sentence. I accept that this happened, but not that it has much significance to the issues which I have to decide. Margot said that this was "just John" meaning that it was a lazy way of communicating with her, and not indicative of any greater inability to communicate – and that is what it was.

The January 2000 argument

39. In January 2000 Janet and Catherine were visiting their father. An argument developed in which John Watson said they (the children) "never helped" and Catherine retaliated by saying he and Margot never phoned them. The next day Janet describes her father in her diary as "spoiling for a fight", saying that they were "liars about the phone calls". John Watson had also been critical of Ross Smith, the son of David and Lisa Smith (who occupied the Cottage) for not speaking properly, which again annoyed the daughters.
40. The reaction of the children to this incident was to be angry with their father. Catherine said that he was "goading" her. Catherine admits that she lost her temper, something which the rest of her

family describe as a very rare event indeed. I think this shows that Janet and Catherine considered that their father was responsible for his actions. Moreover it is some evidence that John Watson's short term memory was not much compromised, as the argument of the previous day was carried forward. I reject the suggestion that Margot had somehow reminded him of it. In fact Margot was one of those who tried to persuade him to stop arguing. It is also fair to say that the children would never have dreamt of arguing with their father in that way in his prime: by comparison to the man he had been, John Watson was much diminished.

41. This incident no doubt caused something of a rift: when Janet phoned after this incident on 14th January, her father could be heard saying in the background "I do not want to speak to her". Janet records in her diary "So I really think the time's coming when his wish will be granted". She did not visit him again until November 2000. Janet's attitude was clearly that her father's wishes should be respected.

Janet's diary

42. Three further entries in Janet's diary at around this time are of relevance:

"16th March: Phoned dad who rambled on about John [her husband] calling him the wrong title – not a navigator in the war but a bomb pilot aimer! Don't know what brought that on.

18th June: Cath phoned v. upset. Dad had been nasty on the phone and Margaret hung up on her. Why do we bother?

19th November ... went to Holt to see Dad and Margaret, v difficult conversation wise. Dad went on about modern shooters – bang, bang, bang!"

43. The first and third of these entries are close to the dates of execution of the March and November 2000 wills. Janet sought to attach some importance to them as indicative of odd behaviour in her father, but I do not think they count for much. They reflect what were by far John Watson's favourite topics of conversation, the third entry in particular being something of a hobby-horse of his – a concern that modern shooters get too much shooting for too little effort. The second of these entries again shows that Janet's attitude at the time was that her father should be treated as responsible for the consequences of his attitude to his children.

Miss Payne

44. June Payne was a physiotherapist who treated John Watson from September 2001 onwards. She described him in her notes as "pleasantly confused", but in retrospect she said that was an incorrect entry as, as she had got to know him, she realised he retained a sense of humour and some insight. She would not have considered it worth carrying on physiotherapy unless the patient was able to make progress. This would not be possible if the patient forgets what has been done from session to session. She found him fully co-operative doing whatever she wanted him to do, as though he wanted to get the session over with and go home.

Dawn Bush

45. Dawn Bush recalled visiting John Watson between late June 2000 and 2005. She was employed in the Sheringham office of Watsons from August to December 2000. She used to type letters on behalf of John Watson although these were dictated by Margot. There were days when she found John Watson needed to be shown where to sign, but there were great fluctuations in his condition.

Post-2000

46. There is no doubt that John Watson's mental health deteriorated after 2000. In November 2001 he signed an enduring power of attorney in favour of Margot, explaining to Ms Webb (who

prepared it) that he no longer wished to be bothered with the signing of documents. A friend, Judith Wilson, describes him as “on a one to one basis ..quite happy to chat and there were no problems”, but “going into his shell” when there was a group. He was admitted to a nursing home in 2004, and the evidence from 2003 and thereafter is of more serious dementia, including some inappropriate sexual behaviour, which is a recognised incident of the syndrome. He was also, at some times, experiencing some delusions from 2002.

47. Margot Watson said that John Watson continued to talk to her until the end and knew what he wanted. I am sure that to a degree that was true. It may be that he continued to enjoy lucid intervals during which he might have still been capable of testamentary disposition, but these must have been of decreasing frequency.
48. Against that overall background, I turn to the evidence concerning the March and November 2000 wills.

The March 2000 will

49. The March 2000 will was prepared by John Harvey of Hansells, solicitors with offices in Sheringham, Norfolk. John Harvey was satisfied until “the early part of 2000” that John Watson “knew his own mind and that the changes he was making to the Will were changes that he both understood and required to be carried out”.
50. At some point, probably in February 2000 John Watson made an appointment to see Mr Harvey concerning his will. He attended the office in Sheringham together with Margot. Mr Harvey made no attendance note of the meeting, but he identified an earlier draft with crossings out and amendments as having been the subject of discussion at the meeting in John Watson’s presence. He confirmed that it was John Watson who was giving instructions as he went through the will. There was a fairly brief discussion of the removal of the gifts to the children. No instructions were given at that stage to make Margot an executor. The instructions were that David Smith was to have the lease for the joint lives of himself and Lisa.
51. Following the meeting and before the will was presented to Mr Watson for execution, Mr Harvey was telephoned. The instructions, which came from John Watson himself, were now that he did wish Margot to be named as an executor and for the lease to David Smith to be for his life only. Mr Harvey was a little concerned that the instructions should change so soon after the meeting. Margot Watson had no recollection of the discussion, but I accept that it occurred. Nevertheless Mr Harvey went to Heath House on 14th March for Mr Watson to sign the will. John was reclining; the witnesses were assembled. Mr Harvey summarised the will. He says that John Watson did not appear to be registering. He had to be shown where to sign and encouraged to do so. Mr Harvey said he felt uncomfortable taking that step but felt it could be dealt with subsequently. Margot Watson said that John Watson had recently been woken from sleep and that this accounted for his apparent lack of awareness on that day. Whatever the cause, it is clear that John Watson was at or close to a cognitive low point on this occasion.
52. On 23rd March Mr Harvey wrote to Margot Watson suggesting that he should see a medical practitioner to assess his testamentary capacity, and to obtain a letter to place with the will. The letter recorded that:

“There is no doubt in my mind that at the time the principal instructions were given to change his Will John clearly understood what he was doing, the last few amendments have been relatively minor.”
53. This is important evidence, as it is strong support for the existence of testamentary capacity in March 2000, at least when the decision to remove the children was taken. The letter went on to express concerns about John Watson’s condition at the time of executing the will:

“My worry is that if the children sought to contest the Will they may be able to establish a question mark in the court’s mind as to whether John was capable of signing the Will as he did on the 14th March”

54. It is clear that this rather belated attempt to apply the solicitor’s “golden rule” was not met favourably by John Watson. He telephoned Mr Harvey to say he was upset and disappointed. It was clear to Mr Harvey that John Watson had taken offence. John Watson’s reaction to the suggested course of action is, by all accounts, not an uncommon one.
55. Notwithstanding his earlier suggestion, some time later Mr Harvey was prepared to witness John Watson’s signature on a statutory declaration. For such a declaration Mr Harvey only needed to be persuaded that John Watson could be satisfied he was telling the truth: so I do not place much weight on that fact.
56. John and Margot Watson did see a GP following Mr Harvey’s suggestion, although it was a Dr Chapman and not their regular GP who conducted the examination. Margot Watson’s account of the interview is that it lasted half an hour or so. The interview included some general awareness and calculation questions, apparently including some subtraction. John had problems with some of the calculations: but responded “I am an auctioneer: I add up not take away”. Mrs Watson’s account of the interview was that Dr Chapman was prepared to say that Mr Watson was capable of making a will. However, no letter was obtained. I think Dr Chapman was much more reserved than Mrs Watson recalled.
57. The tests conducted on Mr Watson by Dr Chapman do not appear to have been standardised ones. Following this consultation, Dr Chapman rang and spoke to Mr Harvey. Mr Harvey’s recollection was that the doctor was of the view that John Watson did not have, on the basis of the tests he had conducted, sufficient testamentary capacity to sign a will on 14th March. Again, Mr Harvey did not have an attendance note of this telephone call.
58. Dr Chapman was not called as a witness, but the computerised GP records show two entries of relevance. The first is dated 5th April 2000 and reads

“has altered will sent by solicitor to verify mental ability, but has mild dementia 14/20. I need to speak to his solicitor.”
59. The second entry is dated 6 days later on 11th April:

“further discussion about will. We need Hugo de Waal’s view here. New wife of 3 years standing but long term relationship for 29 years, terms of new will do not alter her status from old will. He wishes for his estate to go mainly to his grandchildren which seems reasonable. Get B12 and TFT done.”
60. The reference to Hugo de Waal was to a consultant psychiatrist. John Watson refused to see a psychiatrist. The B12 and TFT were tests for dementia, were carried out and returned as normal. I think this indicates that there were two consultations.
61. I am faced with the contrasting recollections of Mrs Watson and Mr Harvey in relation to the upshot of Dr Chapman’s consultations. Despite Mr Harvey’s recollection, I do not consider it probable that Dr Chapman had expressed a concluded view that John Watson did or did not have sufficient capacity to sign a will on 14th March 2000. In my judgment, based on the evidence of Mrs Watson and the contemporary documents, it is more likely that Dr Chapman expressed the view that the matter needed to be further investigated.
62. In summary therefore, Mr Harvey had suggested obtaining a medical opinion so as to remove a “question mark” over John Watson’s capacity to make the March will. The medical practitioner

diagnosed mild dementia, but, without expressing a final view, considered that the view of a consultant psychiatrist should be sought. That was not done.

The November 2000 will

63. The November 2000 will was drawn up by Carole Webb. Ms Webb had been a friend of John Watson for many years, and been named as the recipient of a small bequest in previous wills, including the 1998 and March 2000 wills. She is a very experienced solicitor and a partner in the firm of Howard Pollok and Webb in Norwich.
64. Mr Waterworth, who conducted the case on behalf of the Defendants, submitted that Ms Webb was not a good witness, in that she showed a mark reluctance to answer some questions, particularly some questions I put to her about how often she advised an elderly testator to obtain a medical opinion. I did not form that impression of her at all. I found her to be an honest and reliable witness.
65. Ms Webb described the occasion when she came to take instructions for the November will in some detail. She recalled that she had not seen John Watson for some 18 months or so. This was because she had been acting for the partnership in connection with the terms on which John Watson should leave it. When she came in to the room he was fully awake, dressed and seated upright. He had no difficulty recognising her. He expressed condolences over her loss of her mother as he had not seen her since her mother had died. I have no reason to doubt this evidence, which seems to me to shed some light on John Watson's memory on that day.
66. Margot Watson gave Ms Webb the March will. Ms Webb took her instructions by going through the will paragraph by paragraph. This is confirmed by her attendance note.
67. John Watson explained that he was not happy with the service he had received from Mr Harvey and he wanted Mr Harvey removed as an executor.
68. Ms Webb's account of the removal of the clause requiring the grant of a lease to David Smith is important, as it forms an important plank in the Defendants' attack on the will. John Watson explained that he did not necessarily want David Smith removed: rather he thought it would be better for his wife to deal with the situation as and when it arose. She also said that John Watson told her that David Smith had not been carrying out his duties properly in relation to his duties around Heath House and the shooting sites which John Watson owned and that he thought he was being taken advantage of. He also explained to Ms Webb that he realised that, given the size of the Heath House estate, Margot might not wish to remain there after his death, and having a tenant for life in the Cottage could have a detrimental effect on the sale price.
69. The Defendants attack the removal of David Smith's lease from the November will as irrational. They rely on the evidence of David Smith. I found David Smith to be an excellent witness. He denied that there had been any real complaints about the performance of his duties. There had been one incident in relation to shooting where he had had an argument with Mrs Watson, but that was it. I have no hesitation in accepting his evidence. I think Mrs Watson's account of complaints about David Smith's performance of his duties was exaggerated. Nevertheless I think this was a matter that was mentioned to Ms Webb by Mr Watson as part of an overall explanation, or perhaps justification for the steps he was taking.
70. Ms Webb mentioned the small bequest to her which was in the March and earlier wills. She told him that it was extremely kind of him to think of her but it was not necessary. John Watson was insistent that the gift remain.
71. Ms Webb concluded that the instructions she was taking were "from John himself" and were "clearly stated". Moreover when the will was signed John Watson had no problems

communicating. She said it was clear to her that when he signed he understood that it represented his wishes.

The medical evidence

72. Both sides have commissioned a report from an expert consultant specialising in old age psychiatry. Neither side wished to cross examine the other side's expert.
73. The claimants commissioned a report from Professor Robert Howard, Professor of Old Age Psychiatry at the Maudsley Hospital in London. The defendants commissioned a report from Professor Robin Jacoby who is Professor Emeritus of Old Age Psychiatry at the University of Oxford. Both are extremely distinguished experts in their field.
74. Both experts expressed the view that at the time he executed the November will, John Watson had testamentary capacity, although Professor Howard considered he probably did not have testamentary capacity in March.
75. Both experts were given access to the witness statements in this case and the medical reports on John Watson. Neither of them saw him as a patient during his lifetime.
76. By way of background, the experts point out that dementia is a syndrome, that is to say a collection of clinical signs, rather than a pathological diagnosis. The underlying disease processes which cause dementia are Alzheimer's disease and cerebrovascular disease, although there may be others. Professor Jacoby cites the latest WHO definition:

"Dementia is a syndrome due to the disease of the brain, usually of a chronic or progressive nature, in which there is impairment of multiple higher cortical functions, including memory, thinking, orientation, comprehension, calculation, learning capacity, language and judgement. Consciousness is not clouded. Cognitive impairments are commonly accompanied, and occasionally preceded, by deterioration in emotional control, social behaviour or motivation."
77. Professor Howard conducts an extended review of the witness statements and the medical records. His opinion is that although John Watson's degree of cognitive impairment progressed, it was only mild in 2000, progressing to "on occasion seriously affected by his underlying dementia" in 2003 and "at the forefront of his clinical picture" so as to be "moderate to severe" in 2004.
78. It is common ground that patients with vascular cognitive impairment can show wide fluctuations in their degree of cognitive deficit "from day to day and sometimes from hour to hour". Professor Howard considered that:

"in 2000, when Mr Watson was involved in preparing a Will with Mr Harvey in March and Ms Webb in November, it would be my opinion that he was only mildly affected by dementia. He had lost something of his earlier drive and forcefulness of character and had developed a lability of his mood which manifested itself most notably in an observed low mood which his doctors treated with antidepressants".
79. Professor Jacoby concentrates primarily on the medical records, given that the witness statements were "at variance with one another and .. have not been proved in evidence". He points out that the scan performed in January 1999 did not establish that the condition had not progressed at all from the first scan in 1997, merely that the changes were not sufficient to be picked up on the limited resolution of the CT scanner.
80. Professor Jacoby's opinion was that in November the degree of John Watson's dementia was "mild to moderate". However neither expert concluded that John Watson lacked testamentary capacity at the time of the November will.

81. Of course, the final decision on the issue of testamentary capacity is for the court, not for the experts. Nevertheless, one thing emerges very clearly from the reports of these experts: that a diagnosis of mild or even moderate dementia is not of itself an obstacle to satisfying the requirements of testamentary capacity. As Professor Howard's report makes clear, a testator may lack testamentary capacity on a particular day, but may possess it on a particular day many months later. What is crucial is the condition of the testator on the day he gives his instructions and the day he makes the will.

Conclusions on the November 2000 will

82. It is quite clear from the evidence of the lay and medical witnesses that John Watson's mental condition was deteriorating from the time of his first stroke and that by November 2000 he was suffering from mild to moderate dementia. Nevertheless I am satisfied that, on the occasions when he gave instructions for and executed his November 2000 will, he had the necessary testamentary capacity.
83. Mr Waterworth did not really focus on the first two limbs of the test in *Banks v Goodfellow*. He was right to do so. The evidence that John Watson knew that he was making a will, and the consequences of so doing is really overwhelming. It is inconceivable that Ms Webb would have given the evidence she did if she had picked up any sign that John Watson was unclear as to what he was doing. The view that he did not understand the nature of the act he was performing is inconsistent with the evidence.
84. Equally, I am satisfied that John Watson knew the extent of his property that he was disposing of under his will. Mrs Watson was sure that he knew all his properties, and there is no evidence to the contrary. One would expect an estate agent to have a good grasp of such matters, and nothing in the evidence suggests that he had lost that grasp by November 2000.
85. Wisely, Mr Waterworth focused on whether John Watson appreciated the moral claims on him of those he was including and those he was excluding from his will. He pointed to the fact that it is strange that Marilyn, with whom relations had been strained from 1988-1998, should, as soon as matters improve, be excluded from the will. More importantly Mr Waterworth drew attention to the disparity between the lack of evidence of any real problem with Mr Smith, and his exclusion from the lease of the Cottage. He contends that, from all we know of John Watson, it is unlikely that these exclusions are things which he would have wanted to do. The very irrationality of the exclusions, coupled with the evidence of a deteriorating mental state, points to a conclusion of lack of testamentary capacity.
86. I reject these submissions. I am entirely satisfied that John Watson had come to the conclusion that he no longer wished to include the gifts to his children in the March and November wills. In doing so he weighed the claims of his wife against those of his children and reviewed the extent to which he had benefited them during his lifetime. I am entirely satisfied that he was both capable of conducting that weighing exercise and decided himself in favour of excluding the children. There is nothing irrational in the decision which he took.
87. I accept that there was no real cause for complaint against David Smith so far as his performance of duties under the terms of his licence was concerned, although there had been an argument in relation to the shoot. I think that this may have been something of a makeweight reason given to Ms Webb for the change to the will, the real reason being to give Margot the option of selling Heath House and the Cottage as a whole with vacant possession, or at least the opportunity to do so. I am satisfied that John Watson was capable of weighing the claims of his wife and David Smith and did so, deciding in favour of excluding David Smith should his wife choose to do so in the future.
88. Quite apart from the fact that I believe that there are entirely rational reasons for the dispositions, the other evidence in the case strongly supports the existence of testamentary capacity. I have

referred to the points which impressed me in the course of reviewing the evidence, in particular the children's attitude to their father in January 2000 and thereafter and John Watson's ability to give instructions in relationship to his partnership dispute and the March 2000 will. Against that background I could find no possible basis for doubting Ms Webb's account of the instructions for and the execution of the November 2000 will.

89. It follows that I am satisfied on the evidence that at the time when the instructions for the November 2000 will were given, and at the time that he executed it, John Watson had testamentary capacity.

The codicil

90. The codicil was executed in 2004. The effect of the codicil is not significant in the events which have happened. Nevertheless, on the evidence, it is improbable that John Watson had testamentary capacity at this date.

Overall conclusion

91. I will pronounce in favour of the November 2000 will but not the 2004 codicil.