SUPREME COURT OF QUEENSLAND

CITATION:	*Conroy v Unsworth-Smith* [2004] QSC 81
PARTIES:	**MARTIN BENEDICT CONROY** (plaintiff) v **GARRY NORMAN UNSWORTH-SMITH** (defendant)
FILE NO:	BS11486 of 1999
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	7 April 2004
DELIVERED AT:	Brisbane
HEARING DATE:	18-20 February 2004
JUDGE:	Mullins J
ORDER:	**1. The plaintiff's claim is dismissed.** **2. The Court pronounces for the full force and validity of the will of Marjorie Phyllis Smith made on 9 December 1988 and being Exhibit 2 in this proceeding.** **3. The requirements for the giving of a notice of intention to apply for grant of probate of the will of the late Marjorie Phyllis Smith made on 9 December 1988 and the publication of that notice be dispensed with.**
CATCHWORDS:	SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – THE MAKING OF A WILL - TESTAMENTARY CAPACITY – SOUNDNESS OF MIND, MEMORY AND UNDERSTANDING – GENERALLY – executor under the testatrix' 1992 will sought grant of probate in solemn form - whether the testatrix had testamentary capacity at time of giving instructions or executing the 1992 will which omitted the testatrix' son as a beneficiary – whether the testatrix' dementia of the Alzheimer's type had affected the testatrix to such an extent that she lacked testamentary capacity *Bailey v Bailey* (1924) 34 CLR 558 *Banks v Goodfellow* (1870) LR 5 QB 549 *Grynberg v Muller* [2001] NSWSC 532 *Re Hodges; Shorter v Hodges* (1988) 14 NSWLR 698 *Jones v Dunkel* (1959) 101 CLR 298 *Read v Carmody* (NSWCA 23 July 1998 unreported)

Timbury v Coffee (1941) 66 CLR 277

COUNSEL: KJ Lynch for the plaintiff
DRM Murphy for the defendant
TC Somers for the intervener

SOLICITORS: Alex Mackay & Co for the plaintiff
Crimmins Kerwin Burns for the defendant
Templeton Smith for the intervener

[1] **MULLINS J:** Mrs Marjorie Phyllis Smith ("the deceased") died on 23 February 1998. The plaintiff is the executor named in the will executed by the deceased on 24 July 1992 ("the 1992 will"). The plaintiff seeks a grant of probate in solemn form of the 1992 will.

[2] When the plaintiff applied for a grant of probate of the 1992 will in common form, the defendant who is one of the sons of the deceased lodged a caveat. The defendant claims in his defence that at the time the 1992 will was executed by the deceased, she was not of sound mind, memory and understanding and did not know and approve of its contents. The defendant alleges that the deceased was at the time of executing the 1992 will suffering from senile dementia of Alzheimer's type which had been diagnosed in 1988, had a history of severe memory loss and agitated depression, was unable to manage her business affairs and had severe deficit in her short term memory. At the trial it was only the issue of the deceased's testamentary capacity for making the 1992 will that was pursued. The defendant seeks an order that the court pronounce for the force and validity of the will executed by the deceased on 9 December 1988 ("the 1988 will") in solemn form of law.

[3] The intervener Joanne Margaret Smith is one of the daughters of the deceased. She appeared by counsel and solicitor and supported the plaintiff in the proceeding.

Deceased's history

[4] The deceased was born on 13 June 1917. She married and had four children. Apart from the defendant and the intervener, they were Mr Thomas Unsworth Smith and Mrs Royalie Elvira Helmrich. The deceased and her husband divorced in about 1972.

[5] When the deceased was being treated at the Wesley Hospital in September 1988 for a chest infection, the treating physician referred the deceased to neurologist Dr Don Todman. At that time Dr Todman noted that the deceased had a history of memory problems over the previous 4 years. The history given to Dr Todman was that the deceased had forgetfulness for names and where she had placed things and had deterioration in calculation and other mental function.

[6] The mental status examination conducted by Dr Todman showed a global impairment of function. The deceased was not able to remember any of 4 items after 5 minutes and performed poorly on mental arithmetic and tests of general knowledge. She was orientated and alert and the full neurological examination was otherwise normal. According to Dr Todman, the head scan showed "moderate cerebral atrophy which is somewhat more marked than would be expected for age". Dr Todman expressed the opinion that the clinical features were consistent with a

dementia and that Alzheimer's disease was the likely cause. Dr Todman's opinion and observations were set out in his report of 10 September 1988, a copy of which was provided by him to the deceased's general medical practitioner, Dr John Feros.

[7] The plaintiff who is a most experienced solicitor, having been in practice for 38 years, commenced to act as the deceased's solicitor in about 1987. He was consulted by the deceased in relation to a dispute with her former husband over a property in Bowen. It was necessary for the deceased to apply for an extension of time in which to make an application to the Family Court. On 13 May 1988 Mr Conroy wrote to Dr Feros (Ex 5) seeking information on the deceased's medical condition which could have explained why she had not earlier prosecuted her application in relation to that property. The letter noted that one of the matters of which the deceased was complaining was forgetfulness. By letter dated 27 June 1988 Dr Feros responded. The deceased had been a patient of his practice since August 1985. Dr Feros stated:

> "We have seen her frequently with recurrent chest infections, and for treatment of arthritis. She has been quite agitated and depressed on several occasions. She states that when her 'nerves are bad' she is unable to concentrate and becomes forgetful. I have formed the opinion that she is suffering from a chronic agitated depressive illness, and the symptoms of lack of concentration and forgetfulness are of course prime symptoms in a person suffering from depression."

[8] The plaintiff took the instructions from the deceased for and prepared the 1988 will.

[9] Dr Feros wrote a further letter to the plaintiff's firm dated 6 August 1989 to provide further information about the deceased's medical condition, which he had obtained since the letter of June 1988. Dr Feros informed the plaintiff of the opinion of Dr Todman and the results of the CT head scan which showed moderate cerebral atrophy which was more than would be expected for the deceased's age. Dr Feros also informed the plaintiff that the diagnosis of emphysema had been confirmed and that in the last few months the deceased had undergone lengthy investigations in hospital for severe vomiting and marked weight loss which resulted in a diagnosis of achalasia of the oesophagus for which the deceased was treated, but was likely to require further treatment. Dr Feros concluded:

> "In my opinion, Mrs Smith has suffered from very significant illnesses over the past four years which have needed constant medical investigation and treatment, at times in hospital for lengthy periods. These illnesses and the now confirmed Alzheimers Disease explains her very poor memory. In my opinion a patient with these complaints would very easily forget or neglect her business affairs."

[10] At this stage the deceased was continuing to live on her own in her house at Taringa Parade, Indooroopilly and was continuing to drive her own vehicle.

[11] In about May 1991 the deceased had granted an enduring power of attorney in favour of the intervener. One of the plaintiff's employed solicitors had attended to the preparation and execution of this enduring power of attorney.

The 1988 will

[12] The plaintiff was appointed the executor and trustee under the 1988 will. The deceased divided her estate as to three-tenths to the intervener, as to two-tenths to the defendant, as to two-tenths to Mr Thomas Smith, as to two-tenths to Mrs Helmrich and as to one-tenth to her sister Mrs Joyce Scott.

The letter of 12 May 1990

[13] The deceased sent a letter to the plaintiff dated 12 May 1990 (Ex 3) which was in the following terms:

> "Mr Conroy, in view of what Gary has done during the Court Case with you and now I have had to seek application to the Court once again for settlement out of the garage (Bowen) I wish to have him, known as Gary Unsworth Smith, elemated (*sic*) from my Will (Marjorie Phyllis Smith) which you have in your procession (*sic*).
>
> I feel as Gary Unsworth Smith has cost me approximately $20,000, Dollars with costs of the matrimonial Court trying to secure the Garage which was to be in the Divorce settlement.
>
> In addition because he has defied the Court order obtained 1990 he has added extra costs to me about $3,000 to $4,000 because he refused to sign the contract which I have on the Garage plus the personal stress & upset.
> In view of the above I feel Gary has already used up his inheritance."

As is apparent from the deceased's signature on that letter, the letter was written in her own hand. The letter reflected the deceased's perception of the defendant's involvement in the particular transaction. It was not the defendant's case that it was irrational for the deceased to have that view.

[14] Upon receipt of that letter, the plaintiff did not contact the deceased, but placed the letter in the safe custody packet containing the 1988 will.

[15] The defendant was unaware that the deceased had sent to the plaintiff the letter dated 12 May 1990. The defendant stated, and this was not disputed, that after the date of that letter, the deceased asked him to take her to Mackay for the funeral of her sister, Mrs Joyce Scott. This occurred in 1990.

Consultation on 1 May 1992

[16] On 16 April 1992 the deceased signed an authority (Ex 19) in favour of solicitors, Messrs Estwick & White, in relation to the disbursement of funds to which the deceased was entitled from her brother's estate. This authority authorised Messrs Estwick & White to pay $3,500 to the plaintiff's firm in payment of legal fees and to hold the sum of $33,000 in their trust account, on account of the deposit payable to Austcorp Developments Pty Ltd ("Austcorp") in respect of Lot 1 in a development known as "St James". The deceased and the intervener had entered into a contract dated 8 August 1991 to acquire from Austcorp a townhouse for the sum of $330,000. The intervener's husband, Mr Benjamin Smith, was associated with Austcorp and I infer that Messrs Estwick & White acted on behalf of Austcorp.

[17] The defendant became aware of the authority which the deceased had directed to Messrs Estwick & White. He stated that the deceased showed him the authority.

The defendant was concerned about the deceased's purchase and that the intervener was obtaining a benefit from being the deceased's attorney. He stated that the deceased told him that she was going to buy the property for $33,000. The defendant arranged for the deceased to see the plaintiff.

[18] The plaintiff could not recall the detail of his consultation with the deceased who attended at his office on 1 May 1992, accompanied by the defendant. Any file note that the plaintiff had made is no longer in existence.

[19] The plaintiff still has a diary note made on 5 May 1992 which he had placed on the deceased's file relating to her matrimonial affairs in relation to telephone calls that he had about the deceased on 5 May 1992 (Ex 6). The diary note recorded that the plaintiff had advised the intervener of the telephone discussion he had had earlier with Mrs Helmrich about the reasons for "the appointment" and had said that there were 3 things which could happen:

> "1. Mrs Smith could do nothing.
> 2. Mrs Smith could convene a meeting and tell everybody she wanted to pull out and change the power of attorney; or
> 3. Mrs Smith could convene the meeting and confirm that she wanted to revoke the Power of Attorney and appoint new people."

[20] The diary note also recorded a telephone attendance on the defendant on 5 May 1992 and the plaintiff recorded that the intervener had only just found out about the meeting and referred to the 3 choices which Mrs Smith had. The diary note then recorded:

> "There is a fourth choice apparently in that he had been to the Public Trustee and I said that was the fourth possibility but something had to be sorted out fairly quickly. He said Dr. Ferros *(sic)* would not sign a Certificate but said that it should be from a Psychologist. I queried a psychologist or a psychiatrist. He said he thought it was a psychologist. I said that the meeting should be convened to discuss the matter."

[21] The plaintiff's firm sent an account to the deceased for the conference held on 1 May 1992. That account was dated 2 June 1992. The plaintiff's firm sent a letter to the deceased dated 16 July 1992 seeking payment of the account (part of Ex 17). It appears that the deceased or someone on her behalf gave instructions to the plaintiff's firm to forward that account to the defendant which was done by the plaintiff's firm under cover of letter dated 24 July 1992 (part of Ex 17).

[22] As a result of receiving the plaintiff's firm's letter dated 24 July 1992, the defendant sent a letter to the plaintiff dated 6 August 1992 (Ex 7) in which he set out his version of the consultation on 1 May 1992. Although the plaintiff could not recall receiving that letter, he did not dispute that it was sent, but did describe it as "self-serving". The letter is written from the defendant's viewpoint, but some of the matters referred to in the letter are confirmed by the plaintiff's diary note of 5 May 1992.

[23] It appears that the defendant arranged for an appointment for the deceased to see Dr V Feros, the sister of Dr John Feros, on 5 May 1992, but that the deceased did not attend that appointment. The defendant's intention was to obtain a medical

certificate in support of the deceased's making a new enduring power of attorney. The defendant stated that the intervener took the deceased to her home at Brookfield on or about 5 May 1992 and that he telephoned the deceased at that address and managed to speak to her on one occasion, but was unsuccessful in his subsequent attempts.

[24] The defendant had little contact with the deceased after May 1992.

[25] When the deceased was assessed by Dr Berry on 19 August 1992, Dr Berry recorded that the deceased was then living with the intervener and the decision to move from her previous home was made because of a number of break-ins and the intervener was concerned about the deceased's adequate nutrition and close proximity to shops. I therefore infer that the deceased was residing with the intervener at least during the period between 5 May 1992 and 19 August 1992.

The 1992 will

[26] Under the 1992 will the plaintiff was again appointed executor and trustee. The deceased's address in the 1992 will was shown as Taringa Parade, Indooroopilly. Under clause 3 of the will a specific request was made of the deceased's gold chain and matching gold earrings to her granddaughter Lauren Margaret Smith. Another specific bequest was made under clause 4 of the will of the deceased's other gold chain to her granddaughter Catherine Emma Smith. Clause 5 of the 1992 will was in the following terms:

> "I GIVE DEVISE AND BEQUEATH the rest and residue of my estate both real and personal of whatever nature and kind and wheresoever situate unto and to the use of my Trustee upon Trust as follows:
>
> (a) as to six twelfths of my residuary estate to my daughter JOANNE MARGARET SMITH;
> (b) as to two twelfths of my residuary estate to my daughter ROYALIE ELVIRA HELMRICH;
> (c) as to four twelfths of my estate to my son THOMAS UNSWORTH SMITH;
> (d) provided however that if any child of mine should pre-decease me leaving a child or children, him or her surviving, then such child or children shall take and if more than one in equal shares the share which his her or their parent would have taken under this my will had such parent survived me and provided further that should the said THOMAS UNSWORTH SMITH pre-decease me without issue then the share of the said THOMAS UNSWORTH SMITH shall be divided between such of them the children of my daughter the said JOANNE MARGARET SMITH and the children of my son GARY NORMAN UNSWORTH SMITH as shall survive me and if more than one in equal shares."

The plaintiff's evidence

[27] The plaintiff could recall the interview which he had with the deceased on 21 July 1992. His recollection was considerably aided by the diary note which he made

during the course of that interview (Ex 8). The plaintiff saw the deceased without any other person being present. He could not say whether the deceased personally made the appointment, as the appointment was made through his receptionist. No transcript of the diary note was provided to the court. The plaintiff did decipher some of the entries in the diary note during the course of his evidence. I have attempted to set out my interpretation of what the diary note records. Where I have not been able to make out the handwriting, I have shown the word as "[indecipherable]":

21/7/92

Marjorie Smith

(Doc re G.U.S.
read to-day dated
12/5/92)

	{	3		
	{	10	-	J.M.C
PRESENT	{			
WILL	{	2		
	{	10	-	G.N.U.S
	{			
	{	2		
	{	10	-	T

Leave NOW only to Executor MBC (to avoid fights)

Jo-Anne	}	
	}	Leave equally?
Royal	}	no
	}	Jo-Anne a bit more
Thomas	}	See below

Cut out Joyce (dec'd) and Gary Norman Unsworth

ESTATE DIVIDED AS FOLLOWS

(a)	Jo-Anne	- 50%	6/12
(b)	Royalie	- 1/3 of 50%	2/12
			4/12

(c) Thomas - 2/3 of 50% with grandchildren namely Jo-Anne and Gary Norman Unsworth-Smith

(Exclude Royalie and Thomas is NOT MARRIED)
Substitute provisions to apply

~~2~~ Gold chain and matching gold earring leave to:
- LAUREN MARGARET SMITH

Other gold chain - CATHERINE EMMA SMITH

Re-cap again on above

Confirmed
Medical C/T

Agreement		50% ? T in C
Her new house to protect will.	-	[indecipherable] would

Time Engaged 40 MINS

[28] The plaintiff's evidence in chief by reference to his diary note (Ex 8) was in the following terms:

> "Well, Mr Conroy, could you go on with your account, as her Honour asked? -- Your Honour, Mrs Smith came in and she said to me, "I want to change my will." I'm going back, now, 12 years, so I'm giving it to the best of my recollection. I said to her, "What changes do you want to make," and she indicated – I had previously received from her a letter dated the 12th of May 1990 in which she had set out that she had wanted to cut out Garry from her will. I hadn't acted on that because she hadn't followed it up by coming to see me, but I kept it in the security packet. She indicated again that – she said to me, "I've told you why I want to exclude Garry," and I said to her, "I have – I have a received a letter" – referring to the date, 12th of May 1990. "Is that the reason you want to cut out Garry?" She said, "Yes, I feel he's done the wrong thing by me and, for that reason, I want him excluded from the will." I said to her, "Looking at your old will which is 1988, the provisions are three-tenths to Joanne, two-tenths to Garry, two-tenths to Thomas, and of course Royalie, the other daughter, was there – was referred to, and her sister Joyce. I said, "In your old will, you've left three-tenths to Joanne, two-tenths to Garry, two-tenths to Thomas. What do you want to change?" She said, "I want to" – she said, "I want you to be the executor." And I said, "Why do you want me to be the executor," and, ironically, she said to me, "To avoid fights within the family." And I've got that note recorded. I said, "What do you want to change?" She said, I only want to leave to Joanne, Royalie and Thomas." I said to her, "Do you want to leave it to them equally?" She replied, "No." She said, "Joanne has looked after me the most and I want to look after her." I said, "Well, you're leaving out Joyce and Garry?" She said, "Yes, I'm leaving out Joyce because she's now deceased and I don't want Garry in the will because – for the reasons I've told you." I said, "Well, how do you want to leave your will?" and she replied to me – I wrote it down. She said, "I want Joanne to get half", which I put 50 per cent and because the – try and work it out – I put 6/12 beside it because she was referring to twelfths. She said, "I want Royalie to get one third of 50 per cent", which I then worked out was 2/12, and she said, "I want Thomas" – who was another son – "to get two thirds of 50 per cent". I then said to her – I raised with her the issue of the provisions in the Succession Act whereby if a child pre-deceased leaving issue that those issue took. I said to her, "Do you want the substitute provisions to apply?" and she replied to me, "Thomas is not married", she said, "I want to

> exclude Royalie from any children that she may have taken", but she said, "If Thomas dies I want his share to be divided between the grandchildren of Joanne and Gary". I said to her – I went over – I reiterated those instructions from her and she affirmed those instructions. At that stage she then said to me, "Oh, I've got some gold chains and a watch – a watch and a gold ear-ring", and I said, "What do you want to do about those?" She said, "I want to leave the gold chain to my granddaughter, Lauren, and I asked her, "What is Lauren's full name?", and she told me Lauren Margaret Smith. And I said, Well what about the other gold chain", she said, "I want to leave that to my granddaughter Catherine", I said "What is her full name?", and she replied, "Catherine Emma Smith". I then – I've got a note – recapped again on the above. I then, again, went through and asked her the same questions in respect of what she'd previously said to me and she reiterated and confirmed her instructions. I then said to her, "Well, we should look at a medical certificate", because she was concerned that Gary would contest the will. And I said, "Well, if you want to be sure you should get a medical certificate", and I left that to her to obtain. She then also raised at that stage some – the fact that in the future was going to go into buy a residence with her daughter, Joanne, because she was thinking of leaving her residence at 105 Taringa Parade, Taringa, and she said, "I'll be buying 50 per cent of that", and I said, "How are you going to hold that?" and I explained to her the difference between a joint tenancy and a tenancy in common. Explained to her that it was a joint tenancy that her share would pass to Joanne. She said, "No. I want to have it as a tenancy in common". She said, "It's going to be a new house", but she said, "I'm only telling you that as you will need to protect that in the will"…..
>
> Thanks? -- Can I say that at the time I saw her I had in front of me a letter of 12th May, 1990, which I had retrieved from the safe custody packet. I read her that letter, showed her that letter and she again confirmed the contents of that letter to me."

[29] Before the plaintiff gave evidence of his attendance on the deceased by reference to the diary note, his evidence was in the following terms:

> "Initially, she told me she wanted to change her will. I had the 1988 will which was in a security packet and I caused that to be taken out and had it in front of me as I spoke to her. She indicated to me that she wished to change the will to take out two beneficiaries, specifically. One of her sister, Joyce, who had died, and the other beneficiary omitted from the '88 will was to be her son, Garry. When she raised that and indicated what she wanted to do, I opened and discussed with her what was in the 1988 will and I wrote down the percentages, what people were getting and what they were going to now get, and she indicated to me she had very strong reasons for omitting Garry. She was omitting her sister because she had died and she also wanted to make provision for two of her grand-daughters in relation to giving them legacies of some jewellery and-----."

[30] During cross-examination by Mr Murphy of Counsel on behalf of the defendant, the plaintiff was questioned about the letter dated 12 May 1990 (Ex 3):

> "And that resulted to some family law proceedings between herself and her former husband?-- That was, well – that was prior to this will being drawn up. Because I had actually acted for Mrs Marjorie Smith to try and clear up the remaining dispute which was a garage at Bowen, and I was aware from that previous dispute, and Marjorie Smith had said to me very forcefully that she saw Garry as taking her ex husband's role, and had disadvantaged her financially to a significant degree, and she was quite angry about it.
>
> At that time, were you aware that Garry had taken the view that he was holding matters up because he was concerned that this – the sale of the garage was on a contract whereby a man by the name of Benjamin Smith was to get commission from the sale?-- I wasn't aware of the background of those issues. I didn't inquire in to those issues as to why the – why she felt that Garry had disadvantaged her, but she was very adamant and very strong about it, and she'd expressed that to me on, not one occasion, but several occasions. In fact, she was very hurt by the role that Garry took."

[31] It is apparent from that exchange that what the plaintiff was referring to when he described that the deceased had "forcefully" complained about the defendant's role in that dispute over the garage at Bowen, was occasions other than the one on which he was taking instructions from the deceased for the 1992 will.

[32] In further cross-examination about how the plaintiff obtained instructions from the deceased, the plaintiff stated:

> "She said she now only wanted to leave her assets to Joanne, Royalie and Thomas, and I said to her, 'Do you want to leave them equally?' And I've got, 'Leave equally', question marked. And she emphatically, said no. She said, 'Joanne is the major one because' – for the reason, she said, so I've got, 'See below', because she said, 'She's the one who's looked after me, she's the one who done things for me. She should get the major share of the assets.' And I said to her, 'Well, that means that we're leaving out Joyce.' And she said, 'Well, Joyce is deceased, she's died.' And I was aware of that, because I think I might have handled her estate. And I said, 'You've left out Garry.' And she then, again, recapitulated her reasons for leaving out Garry. ----- "

In this part of his evidence, the plaintiff did not say in terms what the deceased said about her reason for leaving the defendant out of her will, but merely summarised that the deceased "recapitulated her reasons for leaving out Garry".

[33] When Mr Somers of Counsel on behalf of the intervener cross-examined the plaintiff, he treated the evidence given by the plaintiff in cross-examination on this issue as amounting to evidence to the effect that on 21 July 1992 that the deceased had made the same sort of forceful statements to the plaintiff about her disappointment with the defendant's role in the dispute with her former husband. The questioning by Mr Somers was as follows:

> "Now, under cross-examination by Mr Murphy before lunch, you said that on the date of her giving you the instructions in July several years later as to the 1992 will that she repeated that she was, I think to use your words, quite angry about it and, again, to use your words, she was very adamant and she'd expressed it to you on several occasions. Do you recall saying that?-- I do recall saying that.
>
> Other than the date of the instructions to you in July of 1992, what other occasions are you referring to where she articulated this anger?-- When the issue arose itself involving the sale of the garage in Bowen. She was very very distressed and agitated and upset by her perception of Garry's role in supporting her ex-husband against her."

There was the following further exchange between Mr Somers and the plaintiff:

> "And her conduct upon seeing you on or about 24 July several years later, in 1992?-- 21 July, Mr Somers.
>
> I see. Was her conduct consistent or inconsistent with the concerns expressed in that letter?-- Absolutely consistent.
>
> That is, one of severe animosity?-- It wasn't animosity so much. She was angry and she was hurt by what she perceived some treachery in the family.
>
> I think to use your words she said – you said she was quite angry about it?-- Well, yes."

[34] Even though Mr Somers' questioning proceeded on the basis of a characterisation of the plaintiff's earlier evidence which I do not consider was accurate, the answers of the plaintiff still did not provide any further elaboration than what he had said in evidence in chief on what the deceased said to him on 21 July 1992, that enabled the plaintiff to conclude that the deceased was angry and hurt by what she perceived to be "treachery" on the part of the defendant.

[35] At the time the plaintiff took the instructions for the 1992 will, he was aware of the animosity that existed between the defendant and the intervener and his concern was for the deceased who, as he described, was "caught in a family cross-fire".

[36] In cross-examination, when the plaintiff was asked what he knew about the deceased's state of health prior to 21 July 1992, he stated:

> "I was aware there were some concerns but the situation was that my knowledge of Mrs Smith and her ability to indicate to me what she wanted to do, was very clear to me that I did not have a doubt as to testamentary capacity because of the very specific instructions that she was giving me. The specific reasons as to what she did and didn't want to do was that she was very clear on those matters. She was quite articulate on those matters. And I had acted for her for a number of years and knew her quite well."

[37] The plaintiff then stated:

> "And her instructions to me were clear, unequivocal, precise and she knew exactly what she was doing. I did not prompt her in any shape or form nor did I have to even suggest anything to her. She knew exactly what she wanted to do."

[38] The plaintiff referred in his evidence to the *Banks v Goodfellow* test and stated that when he saw the deceased on 21 July 1992 "there was absolutely no doubt in my mind that she complied with all the prerequisites" of that test. The plaintiff stated that if he had had a doubt, he would have made a file note that he had made the will notwithstanding a reservation about capacity.

[39] The following further exchange took place in the cross-examination of the plaintiff by Mr Murphy:

> "What did you ask her to ascertain on the 21st July 1992 that you were – so as to satisfy yourself that she had the capacity? -- First of all, she made the appointment herself. She saw me on her own, she was able to – she was with me for 40 minutes and we discussed matters other than what's in the diary note, because I chatted with her to get the feeling that she – as I always chat to clients who are making wills, to get the feel of the person to ensure that they know what they're on about. I'd asked her why she came in to see me. She told me she wanted to make a will, change – sorry, to change the will. I got out the old will, went through that with her, discussed with her the changes. We had a discussion about what her assets were, which at that stage were pretty minimal. There was the house, and there was a car at that stage, some shares -----
>
> Can I interrupt you? -- No, but you've asked me what I did.
>
> Well, I'll let you finish, but -----? -- She – we discussed what the assets were, which were some shares in North Queensland Crematorium, small bank account, discussed with her why she wanted to make the changes, told her – refreshed her memory by showing her what was in the old will, discussed with her the position of executor. I went through what I thought were the questions to satisfy my mind that she had testamentary capacity."

[40] As there is no mention of the assets of the deceased in the diary note (Ex 8), the plaintiff was asked by Mr Murphy where one would find a note of the questions the plaintiff asked the deceased about her assets. The plaintiff responded:

> "I didn't record them for the simple reason that I knew from my discussions and knew from making the 1988 will, and she again confirmed what the assets were, and because of that, I didn't specifically record that. But that's not representing 40 minutes' conversation. That's the salient points only."

[41] As the plaintiff was to be the executor under the 1992 will, he organised for his employed solicitor, Mrs Angela McLaughlin, to attend to the execution of the will.

Evidence of Mrs McLaughlin

[42] Mrs McLaughlin was admitted as a solicitor in about 1991. Mrs McLaughlin could recall that the deceased was brought to the office on 24 July 1992 by the intervener, but that Mrs McLaughlin saw the deceased alone for the purpose of taking her through the terms of the will and to ensure that she understood it. Mrs McLaughlin did not suggest that she was instructed by the plaintiff to consider whether the deceased had testamentary capacity. Mrs McLaughlin was concerned with whether the deceased understood the terms of the will.

[43] Mrs McLaughlin had the original of the prepared will and gave the deceased a copy. Mrs McLaughlin then read each clause, asking the deceased if she had any questions. Mrs McLaughlin made a diary note of her attendance on the deceased (Ex 10) from which Mrs McLaughlin was able to refresh her recollection. This diary note records:

> "AMM attending on Mrs Smith when she came in on 24th July, 1992. AMM went through the provisions of the will and Mrs Smith said she understood the meaning of the will. She said she was unsure as to whether she wanted to leave any money to her daughter Royalie Elvira Helmrich as she said that her daughter Royalie had won gold lotto and had not given her a thing. She asked AMM whether she had to leave any money to her and I said that she was entitled to do what ever she wanted to do with her property and leave it as she wished to leave it. AMM advised she was not under any obligation to lease (*sic*) her property in any particular way or to any particular person or persons. She said that she would leave the will as it was and sign it as it was including the provision to leave 2/12 of the residuary estate to her daughter Royalie Elvira Helmrich and then she said that if she later decided she did not want to leave anything to Royalie Elvira Helmrich then she would just strike her out of the will and I said that if she changed her mind after executing the will on 24th July, 1992 which included the provision giving 2/12 of the residual estate to Royalie Helmrich then she could simply make another will and could telephone this office and make an appointment to come in and sign another will which would be dated later than this will and that will could have the provision regarding Royalie Helmrich getting part of the estate deleted and perhaps on that situation we would include a provision stating Royalie had been purposefully excluded from taking a share of the residuary estate. Mrs Smith said she was satisfied with that so we then went ahead and she executed the will as required including the provision leaving 2/12 of her residuary estate to her daughter Royalie Helmrich. AMM was satisfied that she understood all the provisions (the will) and the document of the will that she signed."

[44] The following exchange took place in examination in chief:

> "Did she say anything to you; did she ask you anything? -- Yes, she did. She asked me about whether there were any rules about who you should leave your estate to or – and I said, "Well, it's your property and your money and you can leave it to whoever you like," and I said something to her like, you know, "You can leave it to the Cat Prevention Society if you want to" to make the point that, you know, there was no particular way that she had to leave it.

> Yes. Did she mention any names to you of people she was particularly thinking about? -- Well, she did. She mentioned – we discussed two people: the first one was her daughter, Royalie, who she said she'd given instructions to Martin to give her this two-twelfths, and she said she – and I understand she'd seen Martin a day or two before she was seeing me to sign the will, and she was umming and aahing to giving money to this Royalie because she said that Royalie had won some money and she'd never given Marjorie, like, any money or she'd never given her even a present, and Marjorie was a bit – she was annoyed about that. But she said to me, well, you know, in relation to Royalie, she said well, if I change my mind, she said, I'll sign it as it is, and, she said, if I change my mind I can always come back. And I said you can come back if you change your mind about that or any other aspect and you can come back and we'll do another will, revoking this will and we'll go from there. She also mentioned her son, Garry, and she said that she'd left him out and that the reason was that he had diddled her out of money that was owing to her in relation to a land deal in Bowen." …..
>
> "I see, yes. Did she say anything about how she would alter it if she changed her mind? -- Well, it would just be to leave Royalie out.
>
> But, did she say how she would do that? -- She said – no, she didn't. She just said, she'd been in two minds – she said to me, even though she'd given instructions that Royalie was to get two twelfths, she'd sort of been tossing and turning and didn't know whether she was really doing the right thing by giving it to her because she was annoyed with her because Royalie had won money and had never given her anything or a present or – but she definitely said, "We'll leave it like it is and if I want to come back and change it I can do that." And I said, "Well, you can. And, if you want to come back, we'll do a new Will and we'll revoke this Will."

[45] In cross-examination Mrs McLaughlin was asked whether she addressed her mind to the state of health of the deceased. She responded:

> "Well, she – she was quite frail but she – to me – I mean, we were carrying on a conversation as you and I are now. I guess the other thing which I – I remember was that when – the will was in the twelfths and when we went – when she went through it she made a reference to Royalie getting a sixth and I didn't have any reason at all to doubt – she seemed absolute – she – you know, she's frail in appearance, definitely, but she seemed perfectly all right to me and – --- "

[46] When asked what Mrs McLaughlin had done to satisfy herself that the deceased was of sound mind, memory and understanding, Mrs McLaughlin responded:

> "Well, I guess – I – I mean, I just – I was – I was talking to her. We were – she seemed to be carrying on the conversation. She, you know, had asked questions. She spoke, you know – you know, she spoke – I'm just trying to think of the word – eloquently, you know, and she just seemed to – just, yeah, she seemed like she was with it, and – and if she hadn't seemed like that, then I – you know, I

> wouldn't – I would have gone back into Martin and said, "Look" ----
> -- "

[47] Mrs McLaughlin had been forewarned by the plaintiff that the deceased was leaving the defendant out of her will and that the plaintiff was concerned there may be a problem arising from that. In respect of her evidence that the deceased had told her that she had left the defendant out of her will, because "he had diddled her out of money that was owing to her in relation to a land deal in Bowen", Mrs McLaughlin clarified that that issue was not discussed at length, but it came up just to the extent to which she had referred to in her evidence. That is consistent with the fact that Mrs McLaughlin's diary note (Ex 10) makes no reference to her discussion with the deceased about the defendant, but makes extensive reference to a discussion which Mrs McLaughlin had with the deceased about whether or not she should make a gift under her will to her daughter Mrs Helmrich. Mrs McLaughlin recalled that the attendance took between 30 and 45 minutes.

[48] The 1992 will was executed in the presence of Mrs McLaughlin and a secretary employed by the plaintiff's firm, Mrs Lisa Walton (who was then Lisa Browne). Unsurprisingly, Mrs Walton has no specific recollection of witnessing the execution of the will.

[49] Mrs McLaughlin had further dealings with the deceased in October/November 1992 in relation to the purchase of the townhouse. The purchase of the townhouse was proceeding on the basis that the deceased and the intervener would be registered as owners as tenants in common in equal shares. By October 1992 the plaintiff's firm was acting on behalf of the deceased in connection with a side agreement to be entered into by the deceased and the intervener which set out the terms and conditions on which they had agreed to acquire the property, notwithstanding that they would be registered as tenants in common in equal shares. This side agreement was executed by the deceased and the intervener on 12 November 1992 (Ex 9). By that date the deceased had sold her property at Taringa Parade, Indooroopilly and was proposing to put the sum of $200,000 from the proceeds from that sale towards completing the purchase of the townhouse which was due to be effected on 19 November 1992.

[50] Although settlement of the purchase of the townhouse had not taken place by 12 November 1992, I infer that the deceased was residing at the townhouse, as that is where Mrs McLaughlin attended upon her on 12 November 1992. Mrs McLaughlin made a lengthy diary note of that attendance (Ex 11). Mrs McLaughlin stated that she explained the effect of the side agreement to the deceased. The attendance took at least an hour. The intervener was present when the attendance commenced. The meeting became emotional when the deceased said at one stage that she did not think she would sign the side agreement, because she thought it was unfair in one respect. The intervener signed the agreement herself at that stage and left in an upset and agitated state. After further speaking with Mrs McLaughlin, the deceased ultimately signed the side agreement. Mrs McLaughlin recorded in her diary note that the deceased said "that she fully understood what she was signing but was prepared to sign the agreement because she knew she would have somewhere to live for the rest of her life and she new (*sic*) that Joanne would always look after her". Mrs McLaughlin stated that she considered that the deceased understood the side agreement and that she did not seem confused at all during the attendance.

[51] This attendance on 12 November 1992 took place some 4 ½ months after the instructions were given by the deceased for the 1992 will. Although that is remote in time from the events with which this proceeding is concerned, in view of the fact that the deceased had a progressive condition, it is relevant to consider whether the events which took place on 12 November 1992 can shed any light on whether the deceased had testamentary capacity in July 1992.

Dr Berry's evidence

[52] Dr Feros referred the deceased to Dr Glenise Berry for assessment. Dr Berry is a physician specialising in geriatrics. Dr Berry saw the deceased at Geriatric Outpatients of the Princess Alexandra Hospital on 19 August 1992 and sent a report dated 26 August 1992 to Dr Feros (which is included in Ex 1). The deceased was accompanied by the intervener. The deceased told Dr Berry that she did not have Alzheimer's disease and Dr Berry noted that the deceased still had "an insight into her memory difficulties although its contribution to effect on business judgment and decision making was not present". Dr Berry noted that the deceased rationalised her memory problems by saying that she chose to forget things that she was not interested in or which upset her.

[53] The intervener told Dr Berry that she felt that the deceased's memory had not particularly deteriorated over the last 4 years, but, on questioning, Dr Berry considered that there were obvious cognitive problems which had come to light over the last 4 years including that 2 years ago the intervener took over the deceased's business affairs because bills were not being paid and the electricity was cut off. When Dr Berry asked the deceased about an enduring power of attorney, the deceased could not remember that the intervener had procured that and could not explain what it was. Dr Berry commented:

> "It is just as well that the daughter is now protected with an Enduring Power of Attorney as I would worry about her capacity to convey it at the moment."

[54] The intervener also told Dr Berry that there had been no problems with the deceased driving out on the road, but that twice in the last year the deceased had left the car with the key in the ignition and running at the shopping centre and that when the intervener had then met the deceased at the shopping centre, the deceased claimed that she had lost her keys. The deceased's driver's licence was tendered in evidence (Ex 13). It expired on 13 June 2002. I infer that the problems with driving to which the intervener referred had taken place during the year prior to the expiry of the deceased's licence.

[55] Dr Berry stated in her report:

> "On examination she was an alert cooperative lady but became extremely flustered and very resistive as the interview progressed. She was very defensive about memory testing and rationalised her deficits. Short term memory testing revealed a severe deficit. Her MSQ was only 4/10 and her daughter marvelled that she had only just been told where she was coming and had no recollection of the name of the Hospital even where she was seeing me. She was unable to name any flowers but slowly named 5 animals with some repeats. Serial 7's were poor, 93 to 86 and then up to 83 – 88. Simple calculation was poor, handling of a simple money problem was

> absent. Proverb interpretation was concrete. There was no constructional dyspraxia nor body image problems but she was unable to put Perth in a map of Australia. There were no focal neurological signs although she had a left ptosis which her daughter says has been present for years. She has positive palmomentals and snout, reflexes are hyperreflexic and plantars are downgoing. There are no cerebellar signs."

[56] Dr Berry expressed her opinion in the following terms:

> "I do think clinically this lady has a very slowly progressive dementia which on previous investigation and assessments would be most likely Alzheimer's disease. I spent quite a time speaking with the daughter who I felt initially was trying to underestimate the degree of dementia but when changes were pointed out she certainly saw these as an indication of deterioration."

[57] At the time of this attendance on 19 August 1992, Dr Berry was not informed that the deceased had executed the 1992 will on 24 July 1992. Dr Berry was therefore not requested at that time to express an opinion about the deceased's testamentary capacity.

[58] The deceased had purported on 7 May 1993 to make another will, to revoke the existing enduring power of attorney and to make another enduring power of attorney, while she was spending some time with Mrs Helmrich in Gympie. The intervener brought the deceased back to Brisbane and took her to Geriatric Outpatients on 9 June 1993 for Dr Berry to conduct a further assessment. In her report dated 10 June 1993 addressed to the plaintiff, Dr Berry expressed the opinion that the deceased had moderate to severe senile dementia of Alzheimer's type and at the time of the report was incapable of managing her business affairs and would have been incapable 5 weeks earlier of understanding a revocation of an enduring power of attorney. Dr Berry referred the deceased to psychiatrist Dr James Dodds for assessment as to whether she was incapable of managing her affairs, as a result of being mentally ill.

[59] After the deceased's death, Dr Berry was requested to provide a report on whether the deceased had testamentary capacity on 24 July 1992. Dr Berry expressed her opinion in her report to the plaintiff's firm dated 5 March 1999 (which is included in Ex 1) in the following terms:

> "With regard to the will dated 24th July 1992, this was executed one month prior to my seeing her in 1992. At this time her cognitive and memory function had deteriorated with a documented MSQ of 4/10 and severe short-term memory deficits. It was obvious that she was not able to conduct her business affairs and I felt the daughter should be acting under Enduring Power of Attorney which was deemed capable of being bestowed in May 1991 according to the letter signed by Dr VS Feros. In my discussion with Mr Martin Benedict Conroy, solicitor, regarding the circumstances of this will, he informed me that the instructions for the will were taken solely from Mrs Smith, although her daughter had brought her and the daughter was not present. Her sister Joyce had died and the solicitor had been aware of this but she understood that her property would now be distributed with the sister's share being divided amongst her

> children. She gave specific instructions regarding the division of her property, leaving out her son Gary Norman Unsworth-Smith for specific reasons, as she documented in a letter to Mr Conroy dated the 12th May 1990. In this letter she documented the involvement of her son during the court settlement of her difficult divorce and she documents why he should have been left out of the will, as he was well provided for during the divorce settlement because of his taking part with his father and that she felt that he had already 'used up his inheritance'. Mr Conroy did not act upon this letter until she appeared to make up a new will dated the 24th July 1992. She thus divided her property with the major share 6/12 again being to the daughter, Joanne Margaret Smith, who was her close caring daughter, 2/12ths to Royalie Elvira Helmrich and 4/12ths to the estate of her deceased son Thomas Unsworth-Smith to be distributed to her grandchildren. She also specifically mentioned 2 special bequests of gold jewellery to her two granddaughters. She again appointed Mr Martin Benedict Conroy as executor of the will according to her previous expressed wishes. It is my opinion that despite Mrs Marjorie Smith's inability to conduct her business affairs and the daughter acting under the Enduring Power of Attorney that she would however have retained testamentary capacity sufficient to execute the will dated 24th July 1992."

[60] This opinion was obtained by the plaintiff after the deceased's death, when it was over 6 ½ years since the deceased had made the 1992 will. It appears that the plaintiff conveyed to Dr Berry in the course of a conversation his recollection at that time of the instructions given by the deceased for her will. It is invaluable assistance for a solicitor who takes instructions for a will from a person whose testamentary capacity is called into question to prepare a full statement on the taking of those instructions, as soon as it is apparent that there is an issue about testamentary capacity. What Dr Berry has recorded as being conveyed to her by the plaintiff of the circumstances of the instructions of the deceased for the 1992 will is a brief summary only of what occurred which is coloured by the plaintiff's interpretation of those instructions.

[61] In giving evidence, Dr Berry drew the distinction between business competence and testamentary capacity. She pointed out that her report dated 26 August 1992 addressed to Dr Feros was concerned with dealing with the deceased's business competence and her ability to look after her banking and paying bills. Dr Berry stated that even though a degree of cognitive impairment may be documented, one has to address the specific aspects of testamentary capacity to give an opinion about the existence or not of testamentary capacity. It was apparent from Dr Berry's evidence that she was familiar with the requirements for testamentary capacity set out in *Banks v Goodfellow* (1870) LR 5 QB 549, 565 ("*Banks v Goodfellow*").

[62] Dr Berry expressed the opinion that a will is a very commonly known about document in contrast to an enduring power of attorney. Even allowing for the severe short term memory deficit and the other aspects of diminished cognition which Dr Berry documented on assessing the deceased on 19 August 1992, retrospectively Dr Berry was of the opinion that the deceased would have been capable of understanding the three aspects required to establish testamentary capacity under *Banks v Goodfellow.* Dr Berry's conclusion was influenced by the

consistency between the particular wish to exclude the defendant from her will which the deceased had disclosed in her letter dated 12 May 1990 to the plaintiff (Ex 3) and the instruction given to the plaintiff on 21 July 1992 to carry that wish into effect and what the plaintiff told Dr Berry about how the deceased gave the instructions for the 1992 will.

Dr Feros' evidence

[63] The plaintiff's firm requested an opinion from Dr Feros after the deceased's death on whether the deceased would have had testamentary capacity at the time she made the 1992 will. Dr Feros provided a report to the plaintiff's firm dated 1 October 1998 (which is included in Ex 1). For the purpose of that report Dr Feros retrieved the deceased's medical records from his archives. On the basis of the reports which he held that suggested that memory loss had been in evidence for almost 4 years prior to 1988, Dr Todman's report dated 27 September 1998, Dr Berry's report when she reviewed the deceased on 19 August 1992 and Dr Berry's report dated 10 June 1993, Dr Feros expressed the opinion that the deceased would not have had testamentary capacity as at 24 July 1992. Although Mr Somers cross-examined Dr Feros on the basis that he did not have a report from Dr Berry dated 10 June 1993, I find that it is likely that Dr Feros did, in fact, have such a report. Dr Berry had originally assessed the deceased in August 1992 at the request of Dr Feros. It is therefore likely that Dr Berry would have also forwarded a report to Dr Feros after reviewing the deceased on 9 June 1993. In view of the fact that the report of Dr Feros dated 1 October 1998 was prepared by reference to the deceased's medical records which he then held, it is unlikely that Dr Feros would expressly refer to a letter to him from Dr Berry dated 10 June 1993, if that were not with the medical records.

[64] Although Dr Feros was the deceased's treating doctor, his records relating to the deceased were then lost, when the place where they were archived was flooded in 2001. Dr Feros provided a report to the defendant dated 5 October 2003 which was included in Ex1, but which was prepared without reference to any patient records.

[65] Dr Feros stated in his report that he had determined from his earliest contact with the deceased that she was a "battler" and that life had been a struggle. He described that the deceased seemed to possess what he referred to as "street smarts" and that this allowed her to present as someone who was functioning at a higher level cognitively than she possibly was.

[66] For the purpose of preparing this report, Dr Feros must have had access to a note by Dr Veola Feros dated 24 May 1991 which certified that the deceased was "capable of understanding the meaning of giving a Power of Attorney". Dr Feros commented that his sister was not the deceased's usual doctor, that the deceased managed to present reasonably well, particularly if supported by a family member, and that the deceased's "street smarts" could have possibly allowed her to retain an understanding of what a power of attorney entailed.

[67] Dr Feros stated in his report:

> "Mrs Smith lacked insight into her condition. She strongly denied the diagnosis of cognitive decline. Her daughter Joanne would most often bring her mother to see me. She was therefore the family member with whom I had the most contact. Joanne, also, seemed not

> prepared to recognise her mother's declining abilities, even though she had begun paying her mother's bills for her. I think this would have been around 1989 or 1990. Mrs Smith was unable to cope with this herself. In fact, at one stage her electricity was cut off for non payment!
>
> It was not my practice to enquire into family affairs, but it always seemed clear to me, from sentiments expressed to me by Mrs Smith from time to time, that she wished all her children to be treated equally and fairly in her will.
>
> I was told that a changed will was to be executed in mid 1992 and strongly urged Joanne to have an independent assessment of her mother's capacity performed. I suggested either a private clinical psychologist (who had performed similar assessments on my patients previously) or else a psychogeriatrician."

[68] Dr Feros expressed the opinion that the deceased did not have the capacity to make a will in July 1992. This was a retrospective opinion, as Dr Feros was not requested to assess the deceased's testamentary capacity in July 1992. It was apparent from Dr Feros' evidence that he had an accurate understanding of what is meant by testamentary capacity. Dr Feros had the advantage of treating the deceased over a number of years which encompassed July 1992. It is pertinent that Dr Feros saw the need for the deceased to be independently assessed as to her capacity to make a will in mid 1992, when the possibility of the deceased changing her will was raised with him by the intervener and the deceased.

[69] During submissions, I expressed a concern that as Dr Feros treated the deceased until 1993 (when there was no question about the deterioration of her mental capacity) and as he did not have the benefit of his records for the deceased, he may not have been able to discriminate accurately in his assessment of the deceased's capacity between July 1992 and the latter period of his treatment of the deceased. On closer examination of Dr Feros' evidence, he was able to relate the deceased's capacity in mid July 1992 to the occasion when he was asked in mid 1992 about the deceased changing her will. This eliminates the provisional concern which I had about Dr Feros' evidence.

Dr Kingswell's evidence

[70] Psychiatrist, Dr William Kingswell, prepared a report dated 15 July 2002 on the testamentary capacity of the deceased, at the request of the defendant's solicitors. Dr Kingswell never saw the deceased while she was alive, but prepared his report on the basis of reading the medical reports regarding the deceased from Drs Feros, Brown, Todman, Roberts, Berry and Dodds and from interviewing the defendant and his wife and Mrs Helmrich.

[71] Dr Kingswell expressed a preference for Dr Berry's views expressed in her report of 26 August 1992, rather than those expressed in her report of 5 March 1999, on the basis that "the earlier report must represent her views contemporaneous with the making of the second will". Dr Kingswell concluded that it was more likely than not that testamentary capacity was absent on 24 July 1992 on the basis that the deceased would have been unable to reliably identify the extent of her estate and her

memory difficulties were so severe that, having made a will in July 1992, she would have almost immediately forgotten its existence or its contents and that she did not have the capacity to express a consistent view as to how her estate should be distributed.

[72] The only information that Dr Kingswell had for the purpose of his report on the circumstances in which the deceased gave instructions for the 1992 will was Dr Berry's summary in her report of 5 March 1999 of what she had been told by the plaintiff of the instructions given by the deceased. It would have been far preferable if Dr Kingswell had also been given full statements of evidence from the plaintiff and Mrs McLaughlin, before his opinion was sought.

[73] When asked to explain what he understood by testamentary capacity, Dr Kingswell stated:

> "Well, my understanding is that a person has to know the extent of their estate, know who would ordinarily make claim against that estate and be able to express a wish, consistent wish as to how that estate should be distributed."

In cross-examination, Dr Kingswell was asked to identify the factors used to test capacity to make a will. He stated:

> "Well, my – my simple understanding of it is, you have to know the nature of the will, you have to now *(sic)* what a will is, you have to know the extent of your estate and you have to be able to express the wishes to who you want that distributed to and you have to be aware of who might make some call against your estate or challenge against your estate."

Although Dr Kingswell appreciated what the law requires for proof of testamentary capacity, he was of the view that the test for testamentary capacity should be broader than an understanding of the nature of a will and an appreciation of who might benefit under the will and who might benefit from the estate. Dr Kingswell superimposed a requirement of "consistency". Dr Kingswell stated:

> "You must be able to express a consistent will about who should receive that estate and you must be able to do that without any abnormality of mind affecting your judgment."

To some extent, this view coloured Dr Kingswell's evidence. Notwithstanding this, Dr Kingswell was able to articulate those observations and assessments of the deceased on which he relied to reach his opinion and which could be related to the test for testamentary capacity set out in *Banks v Goodfellow*.

[74] Dr Kingswell was of the opinion that, as at July 1992, the deceased had such a degree of short term memory deficit that testamentary capacity was precluded.

[75] When cross-examined on Mrs McLaughlin's evidence, Dr Kingswell stated:

> "… but I think if you sat with Mrs Smith with the will that she'd written and reminded her of what had been read she probably would be able to agree, or it was likely that she would have been able to agree that, you know, that was the will and that's what should happen."

[76] Although Dr Kingswell was of the opinion that the deceased would have forgotten what instructions she gave to the plaintiff within moments of her having given them on 21 July 1992, he conceded that there might have been some aspects that she would remember, particularly the well learnt aspects that were emotive. Dr Kingswell stated that he was interested to know whether Mrs Helmrich had won Gold Lotto, in view of Mrs McLaughlin's diary note about the deceased being concerned whether she should leave a gift to Mrs Helmrich or not, because Mrs Helmrich had won Gold Lotto. Dr Kingswell stated he was told that it was true, but that Mrs Helmrich had won Gold Lotto in the 1970's. He considered that was the sort of thing that was retained in long term memory.

[77] Dr Kingswell considered that if the letter dated 12 May 1990 (Ex 3) were put in front of the deceased prior to taking instructions from her for her will, then that letter would have been a prompt for her memory. Dr Kingswell stated in re-examination in response to the proposition that after the letter of May 1990 had been sent by the deceased to the plaintiff, she did not give the impression that she harboured any ill will towards the defendant during contact with the defendant between May 1990 and July 1992:

> "I think there's a number of possibilities. One is, that she had a consistent wish arising from some well remembered grievance that would not be inconsistent with dementia. The other possibility is that somebody with severe short-term memory deficit is very suggestible, because they have no reliable memory of their own, they can be easily led to believe anything that you wish to tell them, and if that letter were pushed in front of Mrs Smith prior to her giving instructions to Mr Conroy, it would be a very good reminder of her previously expressed wish she might adopt that one rather than some other wish and she would forget it no sooner than it was written."

Dr Dodds' evidence

[78] Dr Dodds conducted an examination of the deceased on 11 June 1993 in his role as visiting psychogeriatrician to the Princess Alexandra Hospital. Dr Dodds provided the plaintiff's firm with a report dated 29 October 1993 (which is included in Ex 1). He stated:

> "In this regard, examination revealed moderate to severe cognitive deficits. She was disorientated in time and place and she had very poor short term memory. She could give no reliable account of recent events, nor of current affairs. She displayed deficits in all but simple calculations in arithmetic. She displayed no awareness of her financial affairs. She had no insight into the degree of her cognitive deficits.
>
> My assessment concluded that on 9 June 1993, Mrs Marjorie Phyllis Smith was incapable of managing her affairs as a result of being mentally ill.
>
> I would add, that in my opinion, this level of impaired functioning was not of recent origin."

[79] For the purpose of giving evidence Dr Dodds was shown the reports of Dr Berry, Dr Kingswell, Dr Todman and Dr Feros. Taking into account the assessments and the

reports of other doctors and Dr Dodds' own assessment of the deceased in 1993, Dr Dodds was of the opinion that it was unlikely that the deceased would have had testamentary capacity in 1992. It would have also been preferable if Dr Dodds' opinion had been sought, after being provided with full statements of evidence from the plaintiff and Mrs McLaughlin.

[80] Dr Dodds explained what tests he would use to establish testamentary capacity:

> "I would want to assess whether the patient actually understood the nature and the meaning and the effect of the will. I would want to know whether she had any knowledge of the nature and extent of her assets and to the person's *(sic)* to whom she should have regard to in making that will. I would add to that that I would also be really looking at her cognitive mental state examination. I would particularly wanting to know about her ability to remember, her ability to think abstractedly to reason and judge, her ability to abstract things; for example, proverbs, so that I can see she could think beyond the concrete. That she had some memory of her family, that she had some memory and knowledge of her assets as they stood. You know, so that would be the sort of main things I'd look at. I'd do a full cognitive test of her memory, concentration, orientation, time and place, personal awareness of recent events, those sorts of things."

[81] Dr Dodds accepted that there was a distinction between whether a person could manage their affairs and whether that same person had testamentary capacity, but he made the point that people may appear to have some understanding of things, but when you properly assess their thinking ability and their memory ability, you can find deficits that would not necessarily be apparent in normal conversation.

[82] Dr Dodds conceded that on the basis of the evidence given by the plaintiff and Mrs McLaughlin, it seemed that the deceased had given clear instructions of a consistent wish to exclude the defendant from her will, but made the point that, in his opinion, their evidence did not address whether the deceased actually understood the extent of her assets and the persons to whom she should have regard to in making her will.

Dr Todman's evidence

[83] Dr Todman provided a report to the defendant dated 12 August 2003 (which is included in Ex 1). For the purpose of preparing that report, Dr Todman was provided with a file which included reports from other doctors including Dr Berry's reports. It would have been useful, if Dr Todman's opinion had been sought in the light of statements from the plaintiff and Mrs McLaughlin. Dr Todman expressed the opinion that by 24 July 1992, it was most unlikely that the deceased had sufficient reasoning ability or cognitive ability to make a will. He noted that the dementia was of gradual onset and progression and by July 1992 she had symptoms of dementia of at least 8 years' duration.

[84] Dr Todman clarified that his opinion when he diagnosed the deceased in 1988 was that she would have had Alzheimer's disease of moderate severity. In his opinion in 1988 the deceased's testamentary capacity would have been seriously in question, in view of the fact that on simple testing she was unable to remember any of 4 items after 5 minutes. On the basis of the reports, Dr Todman noted that there was

evidence of a decline in the deceased's mental health between 1992 and 1993 which would make it likely that there had been a progressive decline between 1988 and 1992, in view of Alzheimer's disease being a progressive condition.

[85] Dr Todman explained that he understood testamentary capacity required sufficient mental and cognitive ability to make reasoned judgments about one's own affairs and to formulate a will. He considered that a person could not make a reasoned judgment about anything, if that person had severely impaired memory, ie. memory was integral with reasoning. Dr Todman considered that short term memory was relevant in the context of making a change to a will.

The defendant's evidence

[86] The defendant described his relationship with the deceased, particularly in her later years. In about 1980 the deceased was living at Bracken Ridge. The defendant helped with looking after the yard. The defendant then helped the deceased move to an apartment at Toombul where she lived for a couple of years. According to the defendant, the deceased acquired the house at Taringa Parade, Indooroopilly in about 1985. The defendant and his family were then living at Chapel Hill. The defendant described the regular contact which he and his family had with the deceased. The defendant stated that the deceased was in the habit of showing him letters that she received and talking to him about her affairs. There was no real challenge to the defendant's evidence on his relationship with the deceased until May 1992. I accept that the defendant had the regular contact which he described with the deceased until May 1992.

[87] During this period when the deceased lived at Indooroopilly, it is apparent that the relationship between the defendant and the intervener was strained. It was also apparent from the defendant's evidence that the animosity between the defendant and the intervener of which the plaintiff was aware prior to making the 1992 will has not subsided.

[88] When the defendant took the deceased to Mackay for her sister's funeral in 1990, he recalled that after the funeral the deceased was washing up in the presence of the defendant's cousin Jeffrey and that the deceased said "Where's Joyce?" and "Has she gone to bed?". The defendant observed that even though the deceased had attended her own sister's funeral that day, she spoke as if she did not know that her sister had died.

[89] The defendant's recollection of the appointment with the plaintiff which he attended with the deceased was that the deceased was confused and could not respond when the plaintiff asked what he could do for her. This evidence was not challenged. The defendant stated that the plaintiff asked whether it was about the house she was buying and that the deceased then said "Yes, I thought it was $33,000". The sum of $33,000 was, in fact, the deposit which had been paid by the deceased. The defendant stated that during that appointment, when the plaintiff asked what else he could do for the deceased, that she responded "I want to (*sic*) the power of attorney changed. I want all my children to have equal say".

[90] Although the plaintiff has no recollection of the course of the conversation at this meeting, he could recall that he was guarded in what he said, because the deceased was accompanied by the defendant and the plaintiff was aware of the views that the deceased had previously expressed to him about the defendant. Whatever was said

at that appointment did not result in the plaintiff considering that he was instructed to take any step (such as preparing a new enduring power of attorney) on behalf of the deceased. That is reflected by the account that was sent by the plaintiff's firm which was a fee for an attendance only and confirmed, to some extent, by the content of the telephone calls exchanged by the plaintiff with the intervener and the defendant on 5 May 1992.

[91] Even though this appointment on 1 May 1992 was initiated as a result of the defendant's concerns, I accept his observations of how the deceased was confused in responding to the plaintiff's questions.

What there is no evidence about

[92] During submissions Mr Murphy drew attention to the fact there was no evidence from the intervener who brought the deceased to the plaintiff's office on both 21 and 24 July 1992 and would have therefore been able to give evidence of her observations of the deceased's mental state around that time. This raised whether any inference could be drawn against the plaintiff that the intervener's evidence would not have assisted the plaintiff's case, in accordance with the rule in *Jones v Dunkel* (1959) 101 CLR 298.

[93] It is usual, though not essential, in a proceeding in which testamentary capacity is in issue for evidence to be given by those who had an opportunity to observe or otherwise deal with the testator or testatrix at or about the time that instructions were given for the impugned will or that will was executed.

[94] The plaintiff as the proponent of the 1992 will elected to discharge the onus by calling evidence from himself, Mrs McLaughlin and Dr Berry. That covered evidence which was directly relevant to the circumstances of the giving of the instructions for the 1992 will by the deceased and the execution of that will, in addition to the assessment of Dr Berry of the deceased on 19 August 2002 (which was based to some extent on information provided to Dr Berry by the intervener) and the retrospective opinion of Dr Berry on testamentary capacity.

[95] The evidence of the intervener of what the deceased may have said immediately before or after attending at the plaintiff's firm on 21 and 24 July 1992 about what she had done and how the deceased appeared to be functioning at that time, though admissible, would not have fallen strictly into the category of evidence required to explain or contradict evidence relevant to the issue of testamentary capacity. It is not a case where any inference in accordance with the rule in *Jones v Dunkel* (1959) 101 CLR 298 can be drawn against the plaintiff.

[96] There is no evidence on whether or not the deceased had the gold chain and matching gold earrings which were left to her granddaughter Lauren under the 1992 will or the other gold chain which was left to her granddaughter Catherine under the 1992 will. These granddaughters are children of the intervener. The submissions made on behalf of the defendant proceeded on the basis that there were such gold chains in existence.

The law

[97] The classic statement of the meaning of testamentary capacity is found in *Banks v Goodfellow* at 565:

> "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 the 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 being about a disposal of it which, if the mind had been sound, would not have been made."

[98] A modern restatement of the test in *Banks v Goodfellow* is found in an unreported judgment of the New South Wales Court of Appeal *Read v Carmody* (NSWCA 23 July 1998 unreported) which is set out in *Grynberg v Muller* [2001] NSWSC 532 at para 18:

> Powell JA restated the general test in **Read v Carmody** supra as follows:
>
> "It is clear from the first of the passages in Brownie J's Judgment which I have set out above that his Honour was aware of the various matters which he was required to consider in determining whether or not at the relevant time the deceased had testamentary capacity. Those matters have, over the years, been expressed in varying forms and in differing language, but all formulations seem agreed that `testamentary capacity' encompasses the following concepts:
>
> 1 that the testator - or testatrix - is aware, and appreciates the significance, of the act in the law which he - or she - is about to embark upon;
>
> 2 that the testator - or testatrix - is aware, at least in general terms, of the nature, and extent, and value, of the estate over which he - or she - has a disposing power;
>
> 3 that the testator - or testatrix - is aware of those or (*sic*) may reasonably be thought to have a claim upon his - or her - testamentary bounty, and the basis for, and nature of, the claims of such persons;
>
> 4 that the testator - or testatrix - has the ability to evaluate, and to discriminate between, the respective strengths of the claims of such persons.
>
> The necessary corollary of this is that, if, at the relevant time the testator - or testatrix - is found to suffer from a condition - whether `mental illness' (or psychosis) in the strict sense or any other form of `mental disorder' (including, but not limited to, deterioration in higher intellectual function or dementia) - which detrimentally affects his - or her - consciousness or sense of orientation, or has brought about disturbances to his - or her - intelligence, cognition, thought content and thought processes, judgment and the like, then, even though that condition may be transient, or, if appropriately treated, reversible, the testator - or testatrix - will, more probably than not, be held to lack testamentary capacity."

[99] It is common ground that the onus of proving that the 1992 will was made at a time when the deceased had testamentary capacity lies on the plaintiff as the party propounding that will. The onus continues throughout the whole case and is determined upon the balance of probabilities on the whole of the evidence: *Bailey v Bailey* (1924) 34 CLR 558, 570 ("*Bailey*").

[100] The proponent's duty is, in the first place, discharged by establishing a *prima facie* case which follows from a duly executed will that is rational on its face: *Bailey* at 570 and *Re Hodges; Shorter v Hodges* (1988) 14 NSWLR 698, 706. Although the authorities speak in terms that once the proponent establishes a *prima facie* case of testamentary capacity, the *onus probandi* lies upon the party impeaching the will to show that it ought not to be admitted to proof (*Bailey* at 571), it becomes a question of looking at the evidence as a whole to determine whether it establishes affirmatively that it was more probable that not that the testator or testatrix (as the case may be) had testamentary capacity when he or she executed the will: *Timbury v Coffee* (1941) 66 CLR 277, 282.

[101] The significance of the onus and burden of proof where the issue of testamentary capacity is raised is made clear by the joint judgment of the court in *Worth v Clasohm* (1953) 86 CLR 439, 453:

> "A doubt being raised as to the existence of testamentary capacity at the relevant time, there undoubtedly rested upon the plaintiff the burden of satisfying the conscience of the court that the testatrix retained her mental powers to the requisite extent. But that is not to say that he was required to answer the doubt of proof to the point of complete demonstration, or by proof beyond a reasonable doubt. The criminal standard of proof has no place in the trial of an issue as to testamentary capacity in a probate action. The effect of a doubt initially is to require a vigilant examination of the whole of the evidence which the parties place before the court; but, that examination having been made, a residual doubt is not enough to defeat the plaintiff's claim for probate unless it is felt by the court to be substantial enough to preclude a belief that the document propounded is the will of a testatrix who possessed sound mind, memory and understanding at the time of its execution."

[102] The following working propositions extracted by Isaacs J from authorities and set out in *Bailey* at 572 are particularly pertinent to the task that must be undertaken in this proceeding:

> "(10) The opinion of witnesses as to the testamentary capacity of the alleged testator is usually for various reasons of little weight on the direct issue.
>
> (11) While, for instance, the opinions of the attesting witnesses that the testator was competent are not without some weight, the Court must judge from the facts they state and not from their opinions.
>
> (12) Where instructions for a will are given on a day antecedent to its execution, the former is by long established law the crucial date."
>
> *(footnotes omitted)*

Use of the medical evidence

[103] Although all the doctors purported to express an opinion on whether or not the deceased had testamentary capacity on 21 July 1992, that is the question for the court to decide. The medical evidence was helpful in providing expert opinion on the effect of Alzheimer's disease on a person such as the deceased.

[104] The medical evidence also highlighted aspects of the deceased's presentation and behaviour which could assist in making a determination of the degree to which the deceased's mental capacity in July 1992 was affected by Alzheimer's disease.

Whether the deceased had testamentary capacity

[105] The critical evidence on the observations of the deceased at the time she gave instructions for her will was that of the plaintiff. The problem with the plaintiff's recollection is that his attitude to the deceased on 21 July 1992 was influenced by the expectation which he held as a result of the deceased's letter of 12 May 1990 (Ex 3) that the deceased had an intention to exclude the defendant as a beneficiary under her will.

[106] The plaintiff had prepared for the appointment with the deceased on 21 July 1992 by refreshing his memory on what the 1988 will provided for and the contents of the deceased's letter dated 12 May 1990.

[107] The plaintiff's note in his diary note (Ex 8) that he read out to the deceased her letter to him dated 12 May 1990 appears at the top of the first page of the diary note. As the plaintiff started the appointment by referring the deceased to what her 1988 will provided and the letter of 12 May 1990 which was being held by the plaintiff with that will, I infer that it was early in the appointment that the plaintiff read out to the deceased her letter to him dated 12 May 1990.

[108] The reality was that in July 1992 the deceased had been suffering from Alzheimer's disease for about 8 years and I accept the medical evidence that there would have been a deterioration in her cognitive ability between diagnosis of Alzheimer's disease of moderate severity made by Dr Todman in September 1988 and the time when she gave instructions for the will. The defendant's evidence about the deceased's conversation after Mrs Scott's funeral was a good example of her short term memory deficit in 1990. Despite the observations that I made during the course of the trial to the effect that the evidence of Drs Kingswell, Dodds and Todman may have taken a stricter view on what is required for testamentary capacity than is required by the test in *Banks v Goodfellow*, there was no dissent in the medical evidence on the effect of the natural progression of Alzheimer's disease.

[109] Although the plaintiff had been informed of the diagnosis that the deceased had Alzheimer's disease by Dr Feros in August 1989, the plaintiff was not alert to the possible consequences of that for the deceased, when he took instructions. The plaintiff merely referred to being "aware there was some concerns".

[110] Taking instructions by reference to the contents of the 1988 will and after reading to the deceased the letter which she wrote on 12 May 1990 enabled the deceased to be responsive, rather than active, in the giving of instructions for her will. Although the plaintiff denied prompting the deceased to obtain instructions, the manner in which he proceeded to obtain the instructions amounted to providing prompts to the deceased.

[111] All that the plaintiff's opinion that the deceased had testamentary capacity indicates is that nothing alerted the plaintiff at the time of taking instructions to any lack of testamentary capacity on the part of the deceased. The problem, however, with the plaintiff's opinion is that, on the basis of his evidence, he did not direct his attention to testing the deceased's testamentary capacity, but instead conducted his interview with the deceased with a view to obtaining instructions from a person with whose affairs and family he was well acquainted and from whom he was expecting certain instructions.

[112] The plaintiff's evidence of the instructions was in respect of his conversation with the deceased which took place 11 years 7 months prior to the giving of his evidence. Although some aspects of the attendance are reflected by the plaintiff's diary note, it is likely that the plaintiff did not endeavour to recall the consultation in any detail until after the death of the deceased which was almost 6 years after the giving of the instructions for the will. To the extent that the plaintiff has recorded an instruction in writing on his diary note, I consider that is generally supportive of the plaintiff's recollection of that part of the conversation with the deceased that is reflected by what is written in the diary note. To the extent that the plaintiff has given evidence of matters that are not recorded in the diary note, I am not as confident as to the reliability of the plaintiff's recollection on these aspects, because of the passage of time and the plaintiff's expectation with which he approached the appointment coloured his recollection.

[113] The reliance of the plaintiff on his diary note was exemplified by his evidence-in-chief on the instructions which he said the deceased gave about the bequests to the granddaughters. Although by clause 3 of the will the deceased gave her gold chain and matching gold earring to her granddaughter Lauren, the plaintiff said that the deceased said "I've got some gold chains and a watch – a watch and a gold earring". The reference to a "watch" appears to have come from the plaintiff's reading of his own handwriting on the diary note, where he has mistakenly read "watch" instead of "matching".

[114] Although the plaintiff did not refer to it in evidence-in-chief, he stated in cross-examination that he did ask the deceased about her assets. It is clear from this evidence of the plaintiff that he listed the assets of the deceased with which he was familiar, and the deceased confirmed that they were her assets.

[115] As the 1992 will shows the deceased's address at Taringa Parade, Indooroopilly, I infer that the deceased did not tell the plaintiff that she was living with the intervener at that stage, pending the completion of the townhouse. In fact, the plaintiff's evidence is to the contrary, as he stated that the deceased raised "that in the future *(sic)* was going into buy a residence with her daughter, Joanne, because she was thinking of leaving her residence at 105 Taringa Parade, Taringa".

[116] The diary note records in relation to the townhouse "50% ? TinC". The diary note suggests that either the extent of the deceased's interest in the townhouse was undecided or that the manner in which the interest of the deceased was to be held with the intervener was undecided. Yet the evidence given by the plaintiff was that he received express instructions from the deceased that she would have a 50% interest and that she wanted to hold the interest as a tenancy in common.

[117] The plaintiff did not in the diary note record any explanation from the deceased for why the defendant was to be omitted as a beneficiary (other than by inference from noting that the deceased's letter of 12 May 1990 was read). The plaintiff did not in his evidence endeavour to set out the terms of what the deceased actually had to say on 21 July 1992 about excluding the defendant, other than in terms by which the deceased referred the plaintiff to what he already knew or confirmed contents of the letter of 12 May 1990 which did not involve referring to any explanation given by the deceased.

[118] I accept from the plaintiff's evidence that the deceased was able to convey on 21 July 1992 that she wished to change her will. There are two aspects of the instructions recorded by the plaintiff which are consistent with instructions being given by the deceased to the plaintiff, rather than the deceased merely confirming suggestions made to her by the plaintiff. One is the confirmation that the plaintiff was to be the executor "to avoid fights" and the other is the express instruction about the gold chains to be left to the granddaughters. The friction within the deceased's family was long standing and the effect of the medical evidence was that Alzheimer's disease had an effect on short term memory, before long term memory. The significance of the deceased being able to give an instruction in relation to the two gold chains (if they existed) is not great, when they were subsidiary gifts. These gifts may also be explicable by reason of the deceased's long term memory. At the time the instructions for this will were given on 21 July 1992, the deceased's significant asset was her house at Indooroopilly which was to be sold and the proceeds used to pay for the deceased's interest in the townhouse that she had already contracted to buy with the intervener.

[119] The manner in which Mrs McLaughlin sought to establish the deceased's understanding of the terms of the 1992 will was such as to elicit responses from the deceased, rather than test testamentary capacity. Most of the talking on that occasion was done by Mrs McLaughlin. It is noteworthy that the preoccupation of the deceased at that attendance with Mrs McLaughlin on 24 July 1992 was with whether Mrs Helmrich should be a beneficiary.

[120] Mrs McLaughlin's evidence of her attendance on the deceased on 12 November 1992 suggests that the deceased was capable of understanding a relatively complicated side agreement in relation to the purchase of the townhouse. Mrs McLaughlin again conducted that interview by eliciting responses from the deceased rather than drawing the deceased out on what the arrangement between the deceased and the intervener was meant to be. The only evidence about the side agreement was that given by Mrs McLaughlin who was at a disadvantage in not being able to refer to her file, in order to explain how the instructions were obtained for the side agreement and from whom and what had preceded the attendance on 12 November 1992. I therefore consider that the limited evidence about the side agreement is not sufficient to rely on to draw any inferences about the deceased's testamentary capacity in July 1992.

[121] The nature of the deficits in memory from which the deceased was suffering on 19 August 1992 is apparent from Dr Berry's assessment conducted on that date. Dr Berry had no difficulty in concluding on that date that the deceased was incapable of managing her business affairs and was concerned about whether the deceased would have had capacity to grant an enduring power of attorney at that time. Although Dr Berry was prepared to express an opinion in her report dated 5 March

1999 which she confirmed in evidence that inability to conduct business affairs did not necessarily equate with testamentary capacity, the reasons which caused Dr Berry to draw that distinction have not been borne out by the evidence at this trial.

[122] The first reason is what Dr Berry understood was the consistency between the deceased's wish to exclude the defendant from her will disclosed in the letter dated 12 May 1990 and the instruction to that effect given on 21 July 1992. What was curious about the evidence concerning this letter dated 12 May 1990 was that no action was taken by the deceased before 21 July 1992 to implement the wish expressed in that letter, notwithstanding that there were opportunities for the deceased to carry out that wish, in the intervening period of 2 years 2 months, such as when the deceased made her enduring power of attorney in May 1991. There was no suggestion from the plaintiff that the deceased sought to do so. My analysis above of the plaintiff's evidence about the expression by the deceased of her complaints against the defendant show that the plaintiff failed to identify any occasions after 12 May 1990 when the deceased expressed those complaints.

[123] All that the letter of 12 May 1990 shows is that was the view that the deceased held of the defendant at the time she wrote that letter. It was not a view that she conveyed to the defendant with whom she continued to have contact. There is no evidence on which to find that the deceased maintained that view in the intervening period of 2 years 2 months. The instruction which the plaintiff took from the deceased on 21 July 1992 merely accorded with what was in the letter of 12 May 1990.

[124] The second reason for Dr Berry's conclusion that the deceased may have had testamentary capacity (despite not having capacity to manage her business affairs) was the manner in which the plaintiff reported to Dr Berry for the purpose of her March 1999 report about how the deceased gave instructions for the 1992 will. Dr Berry's summary of those specific instructions makes it appear that the deceased was active in initiating the instructions, rather than being responsive to matters raised by the plaintiff. Despite the two aspects on which I accept the deceased initiated instructions to the plaintiff to some degree, my overall conclusion about the giving of the instructions by the deceased on 21 July 1992 was that it was a responsive exercise on her part that depended on suggestions made to her by the plaintiff.

[125] Taking into account the objective aspects of Dr Berry's assessment of the deceased on 19 August 1992, the reservations by Dr Feros which he expressed in mid 1992 about the need for an independent assessment of the deceased's capacity if she were to change her will in the light of his observations of the deceased, the defendant's observations of the deceased on 1 May 1992 and the opinions of Drs Kingswell, Dodds and Todman on the likely progression of the deceased's dementia by July 1992, I am not satisfied on the balance of probabilities that the deceased, despite her appearance to the plaintiff of being able to give instructions for a will, had the capacity to fulfil each of the requirements of understanding and reasoning which are required by the test in *Banks v Goodfellow* on either 21or 24 July 1992.

[126] I have no doubt that the plaintiff has sought to prove the 1992 will, because he believed that the 1992 will reflected the deceased's intentions in the light of his dealings with her prior to 21 July 1992. It was apparent from the plaintiff's evidence that he believed he had an obligation to protect what he considered were

the deceased's interests and wishes. The problem was that by 21 July 1992 it was too late, having regard to the deterioration of the deceased's mental capacity due to dementia, for the deceased to change her will.

The 1988 will

[127] Ultimately there was no issue about the deceased's testamentary capacity at the time of making the 1988 will. It is therefore appropriate to make the order which reflects proof of that will in solemn form.

Orders

[128] It is apparent from Ecclesiastical File No 8445 of 1999 that the plaintiff gave notice of intention to apply for grant of a probate of the 1992 will and undertook the advertising required of that notice, when he applied for a grant in common form in respect of the 1992 will. There is no point in requiring a similar notice to be given and published in respect of the 1988 will, in connection with an application for a grant in common form in respect of the 1988 will.

[129] The orders which I make are:

1. The plaintiff's claim is dismissed.

2. The Court pronounces for the full force and validity of the will of Marjorie Phyllis Smith made on 9 December 1988 and being Exhibit 2 in this proceeding.

3. The requirements for the giving of a notice of intention to apply for grant of probate of the will of the late Marjorie Phyllis Smith made on 9 December 1988 and the publication of that notice be dispensed with.

[130] I will hear the parties on the question of costs of the proceeding.