OUTER HOUSE, COURT OF SESSION

[2014] CSOH 150

A781/10

OPINION OF LORD GLENNIE

In the cause

ELIZABETH SMYTH

Pursuer;

against

(FIRST) JOHN CAMPBELL RAFFERTY, (SECOND) WILLIAM SHIELDS HENDERSON and (THIRD) ANGUS DONALD MACKINTOSH MACDONALD

Defenders:

Pursuer: Party, Lay Representative
Defender: McNeill QC, Ross; Turcan Connell

16 October 2014

Introduction

The claim

[1] Deirdre Romanes died of cancer on 17 May 2010. She had known for some weeks that her death was imminent, and was in considerable pain over the last days and weeks of her life. As recently as 2008, at a time when she already knew that her cancer was terminal, she had made a will leaving by far the greater part of her estate to her younger sister Elizabeth (or Lizzie) Smyth; and in the weeks leading up to her death she had shown no signs of wanting to change it. Yet change it she did. Less than two weeks before she died she executed a codicil under which she left a preferential legacy of £3 million free of tax to the trustees of the Deirdre Romanes Liferent Trust with the intention that they use that sum to assist in re-financing the Dunfermline Press Limited, a company which she had built up and in which she remained actively involved until her death. In consequence she had to reduce substantially the legacy which, up until then, was to go to Elizabeth. This change, together with others, was consolidated in a new will a few days later.

[2] Her sister Elizabeth is the biggest loser by these changes. She cannot accept that Deirdre wanted to do this. In this action, as pursuer, she seeks production and reduction of the new will, and the codicil to the previous will, on grounds of (i) lack of testamentary capacity, (ii) undue influence and/or (iii) facility and circumvention. Put short, she contends that, by the time she came to make the codicil and the new will, Deirdre was so frail mentally, as a result of the pain she was suffering, that she was incapable of understanding what she was doing; or, even if capable of

understanding, was in no state to resist the undue influence of those in whom she trusted or the pressure to which she was subjected.

The defenders

[3] The defenders are John Campbell Rafferty ("JCR"), William Shields Henderson ("WSH") and Angus Donald Mackintosh MacDonald ("DMD"). They are sued in their capacity as executors of the new will. However, as noted below, they also have a close involvement in the matters with which this action is concerned. They were close personal friends of Deirdre and trusted advisers. They were trustees of the Deirdre Romanes Liferent Trust and directors of the Dunfermline Press Limited. They were also friends of Iain Romanes, Deirdre's former husband. They were at Deirdre's side, giving her advice, when she made the codicil and the new will.

The proceedings

[4] Although the pursuer had legal representation at various stages of this litigation, she conducted the proof in person as a party litigant. With leave of the court (Lord Doherty, 7 February 2014), she was assisted throughout by her son, Timothy Smyth, who is legally qualified as a solicitor in Ireland. He guided her line of questioning, prompting individual questions and turning up relevant documents; made closing written and oral submissions after the evidence had been led; and also addressed the court when procedural points arose during the course of the proof. When the time came for the pursuer to give evidence, it appeared to me that it would be easier both for her, for the defenders and for the court if her evidence was taken from her in chief by her son; and, with the consent of the defenders, I allowed this to be done. I am grateful to him for his assistance. With his help, his mother conducted what was on any view a difficult case for her, both legally and emotionally, with dignity and restraint. I am also grateful to counsel for the defenders, not only for the assistance which they gave the court on the legal and evidential matters relevant to the issues in this case but also for the consideration and cooperation which they extended to the pursuer and her son.

The principal issues

[5] The relevant legal principles were not in dispute. I shall refer to them in more detail later. In essence the case turns on a detailed consideration of the physical and mental frailty of Deirdre Romanes at the time she made the codicil and the new will in May 2010; the decisions she took and her reasons for taking them; who was around her and who was excluded; the actions of the people around her, the influence they exerted on her and the advice they gave her; and the independent advice she received. It will be necessary to look closely at the events of the last three weeks of her life and, in particular, in the period from 3 to 9 May 2010. To make sense of this, however, I must first introduce the main characters (individuals, companies and trusts); summarise the terms of the 2008 will and the circumstances in which it was made; identify the changes made by the codicil and the 2010 will; and explain how those changes appeared to the pursuer at the time of her sister's death.

The main characters involved in the events of May 2010

Deirdre Romanes

[6] Deirdre Romanes is obviously the central figure in the dispute about her will. A large number of witnesses spoke to her character, her health, her involvement with the Dunfermline Press and her relationship with family members, friends and business associates. These included the pursuer and her husband, Charles Smyth; the defenders; Iain Romanes, Deirdre's former husband; Sandra Thomson, her private secretary; Iris Gibson, a close friend and confidante who came in to help her regularly during the last year or so of her life; Sandra and Brian Maxwell, friends and carers during the last weeks; their daughter Jennifer (Deirdre's goddaughter); and a number of other friends, acquaintances and business associates whom it is not necessary to name here.

[7] The following introduction is largely uncontroversial. It is unnecessary, therefore, to recite in detail the evidence given by the individual witnesses. Save as indicated, no issues of credibility or reliability arose. I was satisfied that all the witnesses were doing their best to assist the court and, in general, they were able to paint a reasonably accurate and consistent picture of Deirdre Romanes at this time.

[8] Deirdre Romanes (née Donnelly), referred to in evidence as "Deirdre" or "Dee", was the eldest of four children. I shall generally refer to her as "Deirdre". She had two sisters, Susan and Elizabeth (the pursuer), and a brother, John. Both Susan and John had children, of whom I need only mention Hugh Donnelly, John's son. In 1973 she married Iain Romanes ("Iain" or "IR"). It was through her marriage to Iain that she became closely involved in the Dunfermline Press Limited, an involvement that was to feature prominently in her decisions right at the end of her life. She and Iain separated in 2001 and later divorced. There were no children of their marriage. Iain subsequently remarried but Deirdre did not. It was clear from the evidence that Iain's re-marriage upset her considerably.

The Dunfermline Press

[9] The Dunfermline Press Limited ("DPL") was established by the Romanes family in the 19th century. In the 1980s, Deirdre and Iain bought out the shareholdings of the other family members and took over the management of the business. The business expanded considerably during the 1990s, initially as a result of acquisitions of provincial titles in the West of Scotland and subsequently Scotland-wide, and later as a result of an investment in Celtic Media Group ("CMG") in Ireland.

[10] After her separation from Iain in 2001, Deirdre took over the active management of the business of DPL. That was a role which she continued to play right up to her death, though by that time day-to-day management was in the hands of two managers, Graham Faulds ("GF") and Graham Morrison ("GM"), sometimes referred to as "the two Grahams". WSH and DMD were directors of DPL up to the time of Deirdre's death and continued to be so for some time afterwards; JCR had been a director but resigned in about March 2014, some two months before her death. Iain remained a director throughout, notwithstanding their divorce.

[11] Deirdre and Iain held the bulk of the shares in DPL, both directly and through their respective Liferent trusts. As at May 2010 those shares were held as to 20% by Deirdre and a further 31% by the Deirdre Romanes Liferent Trust. The Iain Romanes Liferent Trust held approximately 48.7%, of which 2,000 shares were "ring fenced" for Deirdre.

[12] Up until the time of her death, Deirdre was also the managing director of CMG. The other directors of CMG included the defenders, JCR, WSH and DMD. As at May 2010 the shares in CMG were held as to 51% by Deirdre, 25% by Iain, 10% by DPL, 12% by DMD and 2.2% by WSH.

The Deirdre Romanes Liferent Trust ("DRLT")

[13] On 24 November 1988, while she was still married to Iain, Deirdre executed a Deed of Trust creating the Deirdre Romanes Liferent Trust ("DRLT"). Iain also created a similar Trust, the Iain Romanes Liferent Trust ("IRLT"). Until its repatriation in 2008, the DRLT was an offshore trust, established to minimise exposure to capital gains tax in the event that the deceased sold her shares in DPL. The Deed of Trust was governed by the law of Bermuda. The original trustees were W&J Burness (Trustees) (Overseas) Limited. The defenders, JCR, WSH and DMD, became the new trustees in June 2008 when the trust was brought back onshore.

[14] The principal asset of the trust (the "trust fund") was the 31% shareholding in DPL. The trust fund was held upon trust to pay the income to the settlor (Deirdre) during her life: clause 4. After her death, the income was to go to Iain for his lifetime – the Deed uses the expression "the Surviving Spouse" but this is defined to mean Iain, despite their subsequent divorce, provided that he did not predecease Deirdre. Subject thereto, the trust fund and income from it were held on trust for Deirdre's children if any (there were none) and thereafter for the Discretionary Beneficiaries, a category which included all her nephews and nieces but not Iain. Thus Iain had a life interest in the income from the trust but no interest in the trust fund itself. However, the trustees were given the power to alter the categories of beneficiaries: clauses 10 and 12. In May 2011, about a year after Deirdre's death, the trustees removed Iain from his position as a liferent beneficiary, entitled to the income from the trust for his lifetime, and included him instead within the class of Discretionary Beneficiaries, with a discretionary interest in the trust fund itself. Both Iain's original interest as a liferent beneficiary and the alteration in May 2011 to add him to the class of Discretionary Beneficiaries helped fuel the pursuer's concerns about the events surrounding the changes to the deceased's will in May 2010.

Deirdre's health

[15] In 2004 Deirdre was diagnosed with breast cancer. She kept it a closely guarded secret from all but a very few. It was not made known to any of her family or, indeed, to her friends and business associates. In 2008 she was found to have a metastatic bone disease of the right hip, pelvis and ribs. The cancer had spread. She realised that her cancer was terminal. But she still kept it secret. From that time on she would often walk with a limp, sometimes (though not always) requiring the use of a stick. She passed this off to friends, family and work colleagues as a bad hip. Later she would sometimes wear a neck brace, but would pass this off as a strain or something similar. She tried to lead as normal a life as possible. In this vein she made a number of trips as late as 2009, when she appeared to those who were not in the know as though she was in good spirits and, apart from the apparent neck strain or bad hip, in reasonably good health. These included a visit to Canada in 2009 to attend a family wedding, a trip to New York with the pursuer and her husband on the way back, a trip to Ireland (to the Wexford Opera Festival and to Dublin) in October 2009 and a visit to Guernsey in November 2009 when her mother died. I need not go

into the details. But by this time, despite intensive medical treatment, her breast cancer had progressed and, from early 2010, the treatment she received was largely palliative.

Other relevant individuals

[16] I should mention here a few other individuals who feature in the story, and gave evidence about Deirdre's condition, to avoid having to do so later and thereby interrupt the flow. Iris Gibson (or Grieg) had met Deirdre in 2004. They formed a really good friendship which lasted until her death. She was neither a business associate nor a relative. She moved into the Mews flat behind Deirdre's house in Heriot Row and subsequently bought it from her. They spent a lot of time in each other's company. Over the last two years or so of Deirdre's life Ms Gibson saw her and cared for her at least twice a week and later, from Christmas 2009 onwards, when Deirdre was virtually housebound, did so on a daily basis. At the end of March 2010 she moved out to the Gyle (still in Edinburgh) but continued to visit and look after Deirdre often and with some regularity. But Deirdre never told her that she was suffering from cancer, presumably so as not to alter the basis of the relationship. Sandra and Brian Maxwell had been friends of Deirdre for some considerable time. Their daughter, Jennifer (who became Jennifer Baird) was Deirdre's goddaughter. In addition, Sandra was a professional carer. Sandra and Brian moved in to live in Heriot Row at about the beginning of April 2010 when Deirdre's condition became critical. They were in Heriot Row at the time when all the decisions were made concerning the codicil and the will. Sandra Thomson was Deirdre's personal assistant at DPL for about 13 years. Her duties were mainly secretarial, covering administration, travel organisation and personal tasks, such as booking restaurants and taxis. She would deal with e-mails coming into the office and, when Deirdre was not there, would read them to her and take down her reply which she would then send out. It was a demanding job and she and Deirdre had a good and very close working relationship. She last saw Deirdre at the end of November 2009. Before that she tended to see her every 4 to 6 weeks. Between meetings they spoke regularly by telephone, usually several times a day. From January 2010 she saw Deirdre less frequently. Their conversations became fewer but longer. Sandra Thomson began to be a bit concerned about Deirdre's condition. She was becoming forgetful, sometimes leaving emails unanswered. Until she was told in late April/early May 2010, she was not aware how seriously ill Deirdre was.

The 2008 will

[17] In 2008, after she became aware that her cancer was terminal, Deirdre decided to review her will. It is necessary to look at this in some detail for two reasons: first, because it provides the reference point by which to assess the importance of the changes made by the codicil and new will in May 2010; and second to show the contrast between, on the one hand, the time and effort spent on, and detailed consideration given to, deciding on her affairs in 2008 and, on the other, the relatively brief discussions leading to the decisions taken in May 2010.

[18] Deirdre was assisted in making her will in 2008 by Heather Thompson ("HT"), her solicitor, a partner in Turcan Connell specialising in trusts and succession and related tax matters. Deirdre had first met HT in 1988, when she and Iain were setting up their respective Liferent Trusts. HT was then with Burness WS, working under the supervision of the first defender, JCR, a partner in the firm. She met Deirdre occasionally thereafter on social occasions. In 2004 Deirdre contacted

her in connection with some aspects of her divorce, and she had a meeting with Deirdre and the family law partner in the firm who was handling the divorce. There was some discussion about the Liferent Trust at that stage and possibly also about Deirdre's will.

[19] Deirdre telephoned HT on 3 June 2008 "to sort out her personal arrangements including the trust" (as HT recorded it in her attendance note of that date). She already had a will, but wanted to carry out a thorough review of all matters connected with succession in the event of her death. A meeting was arranged for 11 June 2008. At Deirdre's request, it was attended by JCR and DMD (the file note of the meeting does not record WSH being there as well, though Deirdre had asked that he should be – presumably he was away or otherwise unavailable). The meeting was held at the offices of Burness, where JCR was still a partner.

[20] At the meeting on 11 June they discussed what changes were to be made to the existing will. They also reviewed the shareholdings in DPL, the provisions of the DRLT and the overall tax position. According to HT, whose evidence I found to be truthful and reliable, Deirdre was very clear both about what changes she wanted to make and about matters which she wanted to mull over. She wanted Iain to remain a liferent beneficiary of the DRLT and, in consequence, to continue after her death to receive income (in the form of dividends from the shares held by the Trust) deriving from the business of DPL. She wanted to bring the Trust back onshore, subject to the agreement of the offshore trustee company, and to appoint UK trustees. She also decided to make a new will, and wanted the defenders, JCR, WSH and DMD, to be executors of that will as well as the new trustees of the DRLT. HT explained that Deirdre did not want to involve members of her family in her business affairs and, since her estate was closely intertwined with aspects of her business, she did not want any members of her family to act as executors. She also wanted JCR, WSH and DMD to have a Power of Attorney to enable them to deal with her affairs in the event she was unable to deal with them herself. HT said that Deirdre made it clear that she wanted the business (i.e. DPL) to continue in the event of her death.

[21] In a letter to Deirdre of 18 June 2008 HT summarised the various points discussed at the meeting and enclosed a draft will. Among the points mentioned was the likely inheritance tax ("IHT") liability in the event of her death. As she was UK domiciled, IHT would be payable on her worldwide assets at a rate of 40%. The IHT free allowance at the time was £312,000. The 40% charge would apply to her assets in excess of that figure, subject to a possibility that the shares in DPL might qualify for business property relief and be tax exempt. The rest of her assets, principally heritable property, would be taxable. Deirdre had death in service cover of £1 million and a SIPP fund of about £600,000 to £700,000. Those could be earmarked to cover IHT. HT recommended that values should be obtained for the heritable properties, so as to make a rough assessment of the likely IHT liability and give a better idea of whether the death in service cover and the SIPP would be enough to cover it. At Deirdre's request, that letter was copied to JCR, WSH and DMD. This is of relevance to an assessment of what happened in May 2010, since it shows a level of openness with JCR, WSH and DMD and a willingness to involve them in her financial affairs.

[22] It should be noted at this point, since it is mentioned from time to time though ultimately it is of no great importance, that Deirdre's Guernsey properties were to be dealt with in a separate will drafted by one of HT's Guernsey colleagues.

[23] On 27 June 2008 HT wrote to Deirdre, again copied to JCR, WSH and DMD, enclosing a will "updated … in light of my discussions with you and John [i.e. JCR] since our meeting", a draft Letter of Wishes to accompany her will, a Continuing Power of Attorney in favour of JCR, WSH and DMD, and other documents, including an updated statement of her assets with estimated values. The letter referred to this statement of assets in a section dealing with IHT. I quote from that section of the letter to illustrate the detailed consideration given to this question:

> "I enclose a statement of your assets with a rough inheritance tax calculation at the end. This assumes that your shares in Dunfermline Press Ltd and CMG will not be subject to inheritance tax because they will qualify for inheritance tax business property relief. The estimated inheritance tax on your estate is approximately £1.33m based on your estimates. For illustration purposes I have shown the position if higher values are taken for Heriot Row and its contents. Liability for the inheritance tax falls on your executors and it is payable out of the residue of your estate. The main assets in residue will be your CMG shares, the remainder of your DPL shares after the trust bequests to employees, any cash and investments and any other assets you have which have not been specifically bequeathed under the will. I do not know what the value of the residue might be and it will clearly not all be in ready cash that can be used to pay the tax bill. However you also have around £1.6/7m available in death benefits under your Standard Life SIPP and the company's death-in-service cover. The nomination letters spell out that you would like this money to be used to meet any inheritance tax that is not covered by the residue of your estate. On the estimates you gave me that should be more than enough to meet the inheritance tax and it means that the beneficiaries of your will would receive the properties you have left them without having to pay anything towards the inheritance tax liability on them. If it is insufficient the executors would either have to sell assets in your estate to meet the tax, or ask the beneficiaries to pay a contribution to the tax bill before releasing the assets to them."

The statement of assets included, in some cases, both a "low" and a "high" value for Deirdre's assets as at June 2008. The low values were those provided by Deirdre the high values were included for purposes of illustration. The house at 33 Heriot Row, Edinburgh, where Deirdre lived, together with 33 Jamaica Street Lane at the back, was given a low value of £1.5m and a high value of £3m. Deirdre owned two properties in George Street, Cellardykes, Fife, which were valued at £230,000 for number 45 and £400,000 for number 49. Two properties in Guernsey were valued at £600,000 each. The contents of her heritable properties were valued at between £150,000 (low) and £500,000 (high). Her cars were valued at £50,000 and her boat, "PRESS AHEAD", which was moored in Guernsey, at £100,000. No value was put on her jewellery or her shares in DPL and CMG. A question mark was put against cash, investments and other assets. On those figures, the total assets were valued at between £3.63m (low) and £5.63m (high), the taxable estate (i.e. in excess of the nil rate band of £312,000) at between £3,318m (low) and £5.318m (high), and liability for IHT at 40% at between £1.3272m (low) and £2.1272m (high). On the basis of Deirdre's estimated values (i.e. the low values), the death in service cover of £1m and the SIPP of between £600,000 and £700,000 would be sufficient to cover any IHT liability; but they would not necessarily be sufficient to cover IHT liability if the value of her assets was significantly higher.

The terms of the 2008 will

[24] Clause 1 of the 2008 will appointed JCR, WSH and DMD as executors and trustees. Clause 4 set out the legacies. It is necessary to set them out in full:

"4. **Legacies**

4.1 I direct the Trustees to pay and make over the following legacies as soon as convenient after my death free of tax but without interest to the date of payment.

4.2 I direct the Trustees to sell my properties at 33 Heriot Row, Edinburgh … and 33 Jamaica Street Lane, Edinburgh and the contents of such properties other than any contents which I have bequeathed elsewhere and to pay and make it over the net sale proceeds to my sister, MRS ELIZABETH SMYTH.

4.3 (a) I direct the Trustees to hold my heritable property at 45 George Street, Cellardykes, Fife (which, together with any property representing it or added to it in the future and any accumulations of income is referred to as "Jennifer's Fund") for my goddaughter MRS JENNIFER BAIRD ("Jennifer") … to pay to Jennifer during her lifetime the income of Jennifer's Fund and to allow her the use and enjoyment of any part of Jennifer's Fund which does not produce income. The Trustee shall have power during the subsistence of Jennifer's interest in their sole and absolute discretion at any time or times:

(i) to make over to Jennifer any part or even whole of the capital of Jennifer's Fund; and

(ii) to terminate Jennifer's interest in whole or in part.

(b) Subject to that the Trustees shall hold Jennifer's Fund for such of Jennifer, Jennifer's parents, Jennifer's spouse, children and remoter issue in such shares and on such terms and conditions as the Trustees in their sole and absolute discretion shall appoint; and failing any such appointment for Jennifer's children in equal shares absolutely.

(c) I direct the Trustees to make over the contents of 45 George Street, Cellardykes, Fife to Jennifer absolutely.

4.4 To BRIAN MAXWELL and SANDRA MAXWELL … in equal *pro indiviso* shares my heritable property at 49 George Street, Cellardykes, Fife and the contents of it.

4.5 To my nephew HUGH DONNELLY my boat, "Press Ahead", moored in St Peter Port, Guernsey or any other boat owned by me at the date of my death.

4.6 To Elizabeth all of my jewellery, to be retained by her or divided amongst my family and friends as Elizabeth in her sole and absolute discretion shall decide."

Finally, in clause 4.7, Deirdre left shares in Dunfermline Press to various named employees of the company. So far as concerns the residue of her estate (other than her heritable property in Guernsey), she directed the trustees to hold it for one or more of (i) her mother, (ii) the issue in all degrees of her mother and (iii) the spouses, civil partners, widows, widowers or surviving civil partners of such issue: see clause 5. It is unnecessary to go into any further detail.

[25] It is clear that the principal beneficiary of the 2008 will was the pursuer. She was to have the proceeds of sale of Heriot Row and the mews house in Jamaica Street Lane which backed onto it (together "Heriot Row"), estimated at between £1.5m and £3m, the house contents, and the jewellery (to keep or distribute as she thought fit). The properties in Fife were to go to or for the benefit of the Maxwells (Brian and Sandra Maxwell and their daughter Jennifer Baird), the boat was to go to a nephew (Hugh Donnelly) and some shares were to go to named employees of DPL. The residue was left for the benefit of her family (brothers and sisters and their partners and children). Nothing was left to the DRLT. Nor was anything left to her former husband, Iain.

The codicil and the 2010 will

[26] It is convenient at this point to jump ahead to 2010 when Deirdre executed the codicil and the 2010 will. She executed the codicil on 6 May 2010. It was very soon superseded by the 2010 will executed on 9 May 2010. The pursuer was unaware of the existence of either document until after Deirdre's death. She was not alone in this. Other members of the family were all equally ignorant. They all expected the pursuer to be the main beneficiary. The terms of the codicil and the 2010 will changed all that and came as a surprise. At this point it is necessary only to identify the main terms both of the codicil and the 2010 will. I shall consider later, in more detail, the reasons for the changes.

The codicil

[27] The relevant provisions of the codicil signed on 6 May 2010 are as follows:

> "1.1 I direct my Executors to pay and make it over to the trustees for the time being of the [DRLT] ("the Trust") as from time to time constituted the sum of THREE MILLION POUNDS (£3,000,000) as an addition to the trust fund of the Trust to be held subject to and with the benefit of the whole trusts powers and provisions of the Trust.
>
> 1.2 My Executors shall have power to satisfy this bequest in such manner as they think fit, including, but without limitation by the appropriation or sale of assets, borrowing and granting security (including the appropriation, sale or granting security over any asset forming part of my estate in any part of the world whether or not the subject of a specific legacy or bequest).
>
> 1.3 I express the wish, without imposing any binding obligation on them, that the trustees of the Trust use and apply this bequest to take such action as they think fit to secure the future prosperity of [DPL] … ("the Company") including but without limitation by lending funds to, or investing in the Company or any holding company of it.

1.4 This bequest and any tax on it shall be preferential to all other legacies and bequests under my Will or otherwise; and the provisions of clauses 3 and 4 of my Will shall take effect subject to this Codicil.

1.5 This bequest shall be free of tax."

I shall explain later the circumstances giving rise to the preferential legacy and the wish that it be applied to secure the future prosperity of DPL. For present purposes, the important point to note is that legacy was preferential to all other legacies (clause 1.4); and it was to be free of tax (clause 1.5). The executors of the will, JCR, WSH and DMD, who were also trustees of the DRLT, were given wide powers as to how it was to be satisfied (clause 1.2). They could satisfy it by selling assets even though such assets were the subject of a specific legacy. Depending on the value of the estate and the IHT payable, it might well have a significant impact on the bequests to the pursuer, as well as those to the Maxwells. On the basis of 2008 estimated values it was likely that it would have such an impact.

The 2010 will

[28] Clause 1 of the 2010 will again appointed the defenders, JCR, WSH and DMD as executors and trustees. The Preferential Legacy created by the codicil was repeated in clause 4. Clause 5 dealt with the specific legacies:

"5. **Legacies**

5.1 I direct the Trustees to pay and make over the following legacies as soon as convenient after my death free of tax but without interest to the date of payment:

5.2 to my sister, MRS ELIZABETH SMYTH ("Elizabeth"), the sum of £1,000,000

5.3 to BRIAN MAXWELL, SANDRA MAXWELL and JENNIFER BAIRD in equal pro indiviso shares my heritable property at 49 George Street, Cellardykes, Fife and the contents of it

5.4 to Iain Blair Romanes the following items at 33 Heriot Row, Edinburgh:

(a) the crystal (Waterford) chandelier located in the drawing room.

(b) the crystal chandelier located in the television room (this was purchased in Paris).

(c) The table and chairs located in the dining room.

(d) the glass-fronted bookcase located in the drawing room.

(e) the John Bellany painting of a boat (LH 52), located in the staircase.

(f) two John Devlin paintings of boats and the marina, both located in the staircase.

(g) the John Bellany painting of a bust located in the small hallway.

(h) the Burney painting of a girl in a French restaurant, located in the drawing room.

(i) the rug in the television room.

5.5 to my secretary Sandra Thompson, the sum of £30,000"

The will dealt in clause 5.6 with the bequest of shares in DPL to employees of the company on similar terms to those in the 2008 will. In addition, clause 6 directed the Trustees to hold the residue of her estate (i) for the issue in all degrees of her late mother, (ii) the spouses, civil partners, widows or surviving civil partners of such issue and (iii) employees of DPL at the date of her death who did not benefit from the proposed bank refinancing scheme.

[29] In the 2008 will, Deirdre had left her jewellery to the pursuer, to be retained by her or divided amongst family and friends as she decided. The 2010 will contained no such provision. The jewellery formed part of the residue and was covered by a letter of wishes signed by Deirdre and directed to her executors. That letter of wishes stated that she had selected items of jewellery and other items to be given to various beneficiaries, and place them in sealed envelopes marked with the names of the beneficiaries for whom they were intended and held in her safe. She directed the executors to make over those items to the named beneficiaries. In addition, the letter of wishes gave certain other directions concerning books and personal possessions to be given to individual beneficiaries. At the end of the letter she said that she had made her choices for her jewellery known to IR, and she wished the executors to be guided by him in the event of any uncertainty.

[30] The new will not only repeated the preferential legacy first introduced three days earlier in the codicil but also made a number of other changes of significance. The bequest to the Maxwells was reduced to reflect the fact that the property at 45 Cellardykes had been sold. Sandra and Brian Maxwell and their daughter Jennifer (Baird) were now to share 49 Cellardykes. More importantly, at least from the pursuer's point of view, was the change in the legacy to the pursuer. Putting to one side of the change in the provision concerning her jewellery, the main bequest to the pursuer was substantially reduced. Instead of getting the proceeds of sale of the property at Heriot Row (estimated in 2008 as worth between £1.5 and £3m), she was given a legacy of £1m. Not only was that significantly less than the legacy under the 2008 will; more to the point, it was by no means certain that that legacy could be met. The preferential tax free legacy of £3m to the DRLT made it at least questionable whether there would be enough left in the estate to satisfy other bequests without some abatement. Much would depend upon the value of the estate and the IHT liability. Further, as was made clear by LM in her evidence, if the value of the estate was insufficient to meet

all the bequests, any abatement would strike first at the cash legacies, such as the legacy to the pursuer, before any abatement of the bequests of property.

The pursuer's concerns in outline

[31] The pursuer is concerned that the codicil and the 2010 will were executed when her sister Deirdre did not know what she was doing; or, that she executed them under pressure from others or as a result of undue influence exerted on when she was physically in pain and mentally fragile. I leave aside the legal terminology for present purposes. The pursuer's case is a straightforward one. She was not there when the codicil and the 2010 will were executed. But the contents of those documents, changing fundamentally what up until then had appeared to be Deirdre's settled intentions, give rise to legitimate concerns that she was not of sound mind when she revised her will or was put upon by others in whom she trusted; and/or that she was forced or persuaded, in her weakened condition, to do things which she would not otherwise have wanted to do.

[32] Because she was not there, the pursuer's case inevitably has to be made by inference from a comparison of the 2008 will with the documents executed in 2010 and from evidence from those (including herself) who knew Deirdre well and who were, or believed they were, privy to her innermost thoughts. The pursuer herself gave evidence that her sister Deirdre had always made it clear that she would leave her well provided for in her will. Her husband, Charles Smyth gave evidence of a conversation in June 2008 in which Deirdre had told him that she had left Lizzie (the pursuer) very well off in her will. There had been no inkling of any change. The pursuer adduced evidence from a number of other witnesses broadly to the same effect. They included Mark Channing, a financial journalist and first cousin, and Adele de la Fosse, a close friend in the fashion business. I need not set out their evidence in detail because it was not really challenged. Those witnesses all bore to be close friends of Deirdre. I have no reason to doubt that they were. I have no doubt that they were intimate with her and that she would speak to them, on occasions, about such matters. They confirmed the pursuer's own evidence. Deirdre had always favoured the pursuer, who was less well off than her siblings, and intended to leave the bulk of her estate to her. She talked of making sure she was looked after. When they had last seen her, variously in late 2009 and 2010, they had detected no change in her intentions in this respect. They all confirmed that Deirdre was a careful person. She would think things through thoroughly before making a decision. Having made a will in 2008 when she knew she was dying, and invested a great deal of time and effort into deciding its contents, it was to say the least surprising that less than two years later she should make fundamental changes to it, changes which had the effect of reducing significantly the amount left to the pursuer. This was particularly surprising given that the changes, first in the codicil and then in the 2010 will, appeared to have been made in a rush, almost on her deathbed, without the sort of detailed consideration that they would have expected.

[33] In addition, certain features of the new testamentary arrangements raised obvious questions. The 2008 will had left nothing to Deirdre's former husband, Iain, and witnesses spoke to the fact that Deirdre had said on a number of occasions that he was getting no more from her. Yet the 2010 will bequeathed him a number of personal items (furniture, paintings, etc.). It left him in charge of allocating the jewellery, whereas previously that had been left to the pursuer to keep or distribute as she thought fit. Further, the preferential legacy to the DRLT had the effect of benefiting IR at the expense of the pursuer. If the £3m left to the trust was invested in DPL, with a

successful outcome in terms of DPL's profitability or at least continued existence, IR stood to benefit both because of his shareholding in DPL and because as sole liferent beneficiary he would receive during his lifetime any income coming to the trust in the form of dividends. If, on the other hand, the £3m was not invested in DPL, it would remain in the trust; and IR, as liferent beneficiary, would receive any income from it during his lifetime. Why would Deirdre change her will so as to benefit her former husband, when their divorce and his subsequent remarriage had caused her so much upset? Add to this the fact that Deirdre was in great pain at the time; that IR came back to live in the house during the last two or three weeks of Deirdre's life (and was in the house at the time she made the codicil and the 2010 will); that other members of the family, including the pursuer, were kept in the dark and effectively prevented from contacting D during this period; and that Deirdre was being advised by the defenders, who were friends of IR and, as directors of DPL, had an interest in ensuring the survival and profitability of the company; and it was not difficult to draw the inference that the changes brought about by the codicil and the 2010 will were the result of influence or pressure exerted on her by IR and the defenders when she was physically and mentally unable to resist.

[34] It might be said in response to this that the 2010 will still left the pursuer a legacy of £1m. Although that was significantly less than what had been provided for in the 2008 will, it still on the face of it left the pursuer a rich woman. It was consistent with Deirdre's intention, spoken to by a number of witnesses, to look after the pursuer after her death. That is all true. However, the changes effected a substantial reduction in the legacy to the pursuer, £1m instead of the net value of Heriot Row. Further, and more importantly, it became clear after Deirdre's death that although the value of the estate was sufficient to pay the tax free preferential legacy and meet IHT liabilities, it was not sufficient to pay other bequests in full. Indeed it is clear that the legacy to the pursuer stood to be very substantially abated. Other legacies to work affected. Whatever Deirdre may have intended, therefore, in terms of looking after the pursuer, the fact is that the terms of her 2010 will did not achieve this. The pursuer's contention is that had Deirdre not been so weak and struggling with pain, she would have wanted a very thorough assessment to be undertaken of the value of her estate and the potential tax liabilities before signing off on a new will which had the effect of depriving the pursuer of such a significant sum.

The law

[35] It is convenient at this stage to put the pursuer's concerns and suspicions into a legal framework. Her case was advanced under three headings, although the evidence and submissions necessarily overlapped. They were: testamentary incapacity; undue influence; and facility and circumvention. The defenders adopted the same analysis, though Mr McNeill QC was at pains to submit that unless the pursuer could show testamentary incapacity her claim was bound to fail, since the evidence did not support a finding of undue influence or facility and circumvention.

[36] There was no significant disagreement between parties as to the law applicable under each head, and I shall set out the essential principles at this stage before turning to consider the evidence in more detail.

Overview

[37] A helpful summary of the relevant principles and how they fit together can be found in para 39.02 of Gloag & Henderson, The Law of Scotland (13th Edition):

> "A testament executed by a person who at the time lacked mental capacity is ineffectual. It is necessary to the exercise of the power of testing that the testator should be capable of comprehending the nature and effect of the testamentary act. If a person who lacks capacity has a lucid interval, a will made in that interval may be sustained. Where there is no general incapacity on the part of the testator but merely delusions, it must appear that these delusions influenced the dispositions made in the will in order to deprive them of effect.
>
> The law also recognises the existence of a state known as facility, in which, while there is no incapacity to test, there is such weakness or pliability as exposes the testator to improper practices and solicitations by interested parties. This facility may be due to natural disposition, or to old age or to ill-health. It is not in itself fatal to the will; but, if, in addition, either fraud or circumvention has been used to impetrate the will, it will be reduced.
>
> Apart from cases of mental weakness, a will may be set aside on the ground that it was executed under error induced by misrepresentation, or was obtained by undue influence (that is, an influence exercised by fraud, coercion or a dominant person in whom the testator trusted)."

This provides a comprehensive overview of the principles and, perhaps, no more is really needed. But I was helpfully referred to a number of cases under each head and it is useful to go into the individual grounds of challenge in a little more detail.

Testamentary incapacity

[38] The essential validity of a will (as distinct from its formal validity) is dependent upon the testator having the requisite testamentary capacity. The leading cases on the subject are *Banks* v *Goodfellow* (1870) LR 5 QB 549, an English decision often referred to with approval in Scots cases, and *Sivewright* v *Sivewright's Trustees* 1920 SC (HL) 63.

[39] The relevant principles appear from the following two passages. The first is from the speech of Viscount Haldane in *Sivewright* at p.64:

> "The question whether there is such unsoundness of mind as renders it impossible in law to make a testamentary disposition is one of degree. A testator must be able to exercise a rational appreciation of what he is doing. He must understand the nature of his act. But, if he does, he is not required to be highly intelligent. He may be stupid, or he may even be improperly, so far as ethics go, actuated by ill-feeling. He may, again, make his will only in the lucid intervals between two periods of insanity. The question is simply whether he understands what he is about. On the other hand, if his act is the outcome of a delusion so irrational that it is not to be taken as that of one having appreciated what he was doing sufficiently to make his action in the particular case that of a mind sane upon the question, the will cannot stand. But in that case if the testator is not generally insane, the will must be shown to have been the outcome of the special delusion. It is not sufficient that the man

who disposes of his property should be occasionally the subject of a delusion. The delusion must be shown to have been an actual and impelling influence."

The second is from the judgment of Cockburn CJ in *Banks* v *Goodfellow* at p.565, quoted with approval by Lord Atkinson in *Sivewright* at p.66:

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

I was referred also to *Boyle* v *Boyle's Executor* 1999 SC 479, 487E (Lord Eassie) and *Stewart* v *Franks and Others* [2013] CSOH 63 (Lord Brailsford) at para [35]. The principles upon which the English and Scots courts have proceeded in this area of the law are very similar and it is appropriate, with the usual caution, to refer to English decisions. Mr McNeill QC referred me to four recent English decisions, namely *Sharp* v *Adam* [2006] EWCA 449 (Civ), *Gill* v *Woodall and Others* [2011] Ch. 380, *Burgess* v *Hawes* [2013] WTLR 453 and *Simon* v *Byford* [2014] EWCA 280 (Civ), which help to flesh out certain aspects of the principle identified in the leading cases.

[40] Mr McNeill identified certain characteristics of intellectual capacity which a testator must have, namely:

> (i) an ability to understand the nature of the act (i.e. making a will) and its effects,
> (ii) an ability to understand the extent of the property being disposed of and
> (iii) an ability to comprehend and appreciate claims on him to which he might give effect.

These requirements will be absent if the testator suffers from some disorder of the mind preventing him exercising his natural faculties. But the testator does not have to have an actual understanding of the nature of the act, the extent of the property and the claims of those who might expect or be expected to benefit. The question is whether he was <u>capable</u> of understanding such matters, not whether he actually understood them on the occasion in question: see *Simon* v *Byford* at paras 39-42. The capacity to understand is not to be equated with a test of memory (*ibid* at para 40) or intelligence. Nor is there any requirement that the testator has an understanding of, or capacity to understand, the collateral (or knock-on) consequences of a disposition as opposed to its direct consequences: *ibid* at paras 44-45.

[41] The burden of proving capacity lies on the person seeking to rely on the will or other disposition. Few cases nowadays turn on the burden of proof, but it is useful as a point of departure. In many cases little is required to displace the initial burden. If, on the other hand, the testator appears to have behaved in a confused manner, or the content of the will excites "a suspicion of the court" (see *Gill* v *Woodall* at para 13), a more detailed examination of the circumstances in which it was made may be necessary. It has been observed that if a properly executed will has been professionally prepared and then explained to the maker by an

independent and experienced solicitor, it will be markedly more difficult to challenge its validity on the grounds of lack of mental capacity than in a case where those prudent procedures have not been followed: *Burgess* v *Hawes* at para 13 per Mummery LJ. The policy argument in support of such an approach was expressed by Lord Neuberger MR in *Gill* v *Woodall,* at para 16:

> "There is also a policy argument … which reinforces the proposition that a court should be very cautious about accepting a contention that a will executed in such circumstances is open to challenge. Wills frequently give rise to feelings of disappointment or worse on the part of relatives and other would-be beneficiaries. Human nature being what it is, such people will often be able to find evidence, or to persuade themselves that evidence exists, which shows that the will did not, could not, or was unlikely to, represent the intention of the testatrix, or that the testatrix was in some way mentally affected so as to cast doubt on the will. If judges were too ready to accept such contentions, it would risk undermining what may be regarded as a fundamental principle of English law, namely that people should in general be free to leave their property as they choose, and it would run the danger of encouraging people to contest wills, which could result in many estates being diminished by substantial legal costs."

But every case must turn on its own facts.

[42] I was referred to the so-called "golden rule" which, it is said, requires the making of a will by an old and infirm testator to be witnessed and approved by a medical practitioner who satisfies himself as to the testator's capacity and understanding. That is not a rule of law. At most it is a rule of good practice: see *Sharp* v *Adam* at para 27. There is no general duty on solicitors to obtain medical evidence on every occasion on which they are instructed by an elderly client. Such a requirement would be both insulting and unnecessary: *Hill* v *Fellowes Solicitors LLP* [2011] EWHC 61 (QB), per Sharp J (as she then was) at paras 77-82. Over-strict compliance with this so-called rule might result in a solicitor being criticised (or even sued) for delay in carrying out his instructions, e.g. if the delay meant that the will was not executed before the would-be testator died. The rule has no relevance in a case such as this, where the issue is as to the testator's capacity rather than the competence or professional conduct of the solicitor. If the rule is observed, all well and good. The medical evidence obtained by the solicitor will be available to the court in its overall assessment of the testator's mental capacity. If not, there will be no such medical evidence. The court will have to do its best with the evidence it has. The determination of whether the testator did or did not have capacity to make a will does not depend solely upon medical evidence: *Simon* v *Byford* at para 17. The criteria for assessment of capacity are not directly medical questions, though medical evidence, if available, may be highly relevant. Even where medical evidence is available, the court will not be bound to prefer it over other evidence. It will form its view of the testator's capacity on the basis of all the evidence, both medical and non-medical. Whether the solicitor should or should not have taken steps in accordance with the rule is, in such proceedings, beside the point. It may, of course, be relevant in a professional negligence or disciplinary context, but that is entirely different. Even in that context that may be many reasons why the solicitor would not be expected to take those steps: see above, and see also the observations of Norris J in *Wharton v Bancroft* [2011] EWHC 3250 (Ch).

Undue influence

[43] The essence of undue influence is the abuse of a relationship of trust and confidence: *Broadway v Clydesdale Bank* 2003 SLT 707 para [26]. Lord Macfadyen's Opinion in that case provides a useful modern summary of the principles. Although I was referred in argument to a number of other authorities – including *Gray* v *Binny* (1879) 7 R 332, *Honeyman's Executors* v *Sharp* 1978 SC 223 and *Horne* v *Whyte* [2005] CSOH 115 – it is unnecessary for present purposes to go beyond what is said in *Broadway*.

[44] For the doctrine of undue influence to apply, there must first be shown to be a relationship of trust and confidence, where one party places trust and confidence in the other, although the relationship need not be one-sided: *Broadway* at para 29. It is not the case, as was once thought, that the concept is restricted to particular types of relationship. What is required is a relationship in which one party is capable of exerting a strong influence upon the other. The expression "dominant or ascendant" influence has at times been used to describe the sort of relationship where this principle may apply (see e.g. *Gray* v *Binny* at p.347), but to my mind that tends to point to a one-sided relationship whereas, as noted above, the principal may apply also in the case of a mutual inter-dependency.

[45] The other necessary element is that of abuse. The party in the position of trust and influence must not abuse his position or the power that that position gives him: *Broadway* at para [26]. There must be no coercion, inappropriate acting or concealment. But there are many other ways, some overt or blatant and some more subtle, falling far short of coercion or deceit, in which a position of trust and influence may be abused. I shall refer to them compendiously as "pressure". Each case must turn on its own facts. What is required is evidence of some such pressure having overpowered the will or freedom of action of the testator. Mere persuasion of a testator who is capable of resisting and able to express his own wishes is insufficient: *Wharton* v *Bancroft* at para 30.

[46] It is important to be clear what is meant by "abuse" of a position of trust and confidence. The image conjured up is of someone abusing his position for personal gain. But it is not necessary that the influence be used for the personal benefit of the person exercising it or someone connected to him. This is made clear in *Broadway* at para [28], where Lord Macfadyen said this:

> "A person in a relationship of trust may use his influence to procure a benefit for another party whom he favours … or in some other way to achieve an end which he regards as desirable, and that may be just as much an abuse of the relationship of trust as it would be to obtain benefit for himself."

This point is an important one. The word abuse may tend to give a misleading flavour of what is involved. The person exercising the influence may genuinely believe that the course which he is persuading the other party to pursue is desirable and for the benefit of that party; and, indeed, may even believe that is in accordance with that party's real wishes. The mischief lies not in the act induced by the application of pressure being itself objectionable in some way, but in the fact that it results from the undue exercise of influence by the person in the position of trust. In *Broadway* at para [29], at p.721 D-E, Lord Macfadyen comments about the particular transaction in that case that it cannot be said to be proved that "when the transaction was viewed from the perspective of the family as a whole, it was untenable to regard it as the right and appropriate thing to do". Lord

Macfadyen did not consider this to be the critical question and neither do I. I understood Mr McNeill to agree with this analysis.

[47] How, then, can someone in a position of trust who is concerned to ensure that the other party enters into a transaction for that party's own benefit, or for the benefit of others who that party wishes to benefit, avoid having such a transaction reduced. The answer is not difficult. He can ensure that before the transaction is concluded the other party obtains separate and independent advice. It need not be advice from a professional lawyer or accountant. But it must be independent. It need not be given at the same time or as part of the same discussion. Even a transaction which *prima facie* results from abuse of a position of trust may be saved if there has been independent advice or assistance given before the transaction is concluded: *Gray* v *Binny* at 347.

Facility and circumvention

[48] To succeed in a plea of facility and circumvention in circumstances such as the present it is necessary to establish (i) that the deceased was *facile* and (ii) that he was pressurised to make the new will by acts of circumvention or fraud: *Horne* v *Whyte* [2005] CSOH 115 at para [51]. Where that is the case, there is no requirement for any separate proof of harm (usually regarded as the third necessary ingredient of the plea) having been caused – the very fact of the new will having been made in such circumstances is sufficient: *Pascoe-Watson* v *Brock's Exr* 1998 SLT 40 at 47K-L

[49] The words "facile", "facility" and "circumvention" as used in this context in scots law are not in common usage. But the concept is straightforward. A person is said to be "facile" if his mind is so weak or pliable so that he is unlikely to be able to resist pressure applied by another: *Pascoe-Watson* v *Brock's Exr* 1998 SLT 40 at 47F-G. Circumvention is the name given to improper pressure applied to such a person by another in such circumstances. That pressure may, at one extreme, be direct, forceful and overpowering or, at the other, be more subtle or insidious, working by solicitation or importuning. Fraud is one example of the way in which a facile mind maybe subverted but it is not an essential part of the principle. Bullying or browbeating may equally amount to circumvention. A robust individual will usually be able to resist pressure, or at least decide whether or not he wants to resist it. A facile person may not. But facility is a spectrum; it comes in degrees. A deed will only be at risk of being reduced (or set aside) if the pressure applied is unacceptable having regard to the extent to which the person on whom it is exerted is facile. If a person with a weak and pliable mind – whether that condition is permanent or temporary and whether caused by age, infirmity, pain, grief or something else altogether – is pushed or led by fraud, force or solicitation to do what he would, or might, otherwise have resisted doing had his mind been stronger, then his act can be reduced by the court.

General observations relating to all three heads

[50] Two points of general application arise from a consideration of these three heads of challenge.

[51] First, it is clear that testamentary capacity may come and go over time. A person may have rational moments followed by moments when he is incapable of thinking or acting rationally. In the context of testamentary capacity, a testamentary disposition will only be reduced if it can be shown that it was executed while the testator was incapable. By the same token, a person may be

facile on some occasions and not on others, and degrees of facility may vary depending on time and circumstance. A person suffering from a grave, debilitating and painful illness will have moments when he is able to discuss matters calmly and sensibly and to resist pressure exerted by others, while at other moments he may be in such pain or so tired that, though capable of reasoning clearly, he simply goes along with what is proposed even though it is not what he would otherwise have done. The same applies, to some extent, to the existence of a relationship of trust relevant to the question of undue influence. The influence of one person upon another may arise by virtue of a particular relationship of trust (a priest, a lawyer, or a respected member of the family). Or it may be caused by age or infirmity, tiredness or pain, leading the individual to lean heavily on a carer or friend. In this latter case, the doctrine of undue influence may overlap with that of facility and circumvention, and the degree of reliance may similarly be greater or less depending on time and circumstance.

[52] Secondly, as pointed out under reference to *Broadway*, although a person taking advantage of another may do so for his own benefit, he may also do so to encourage that person to pursue a course which he regards as sensible and genuinely considers that the other person would also regard it as sensible. Such transactions are nonetheless in danger of being set aside if they are entered into as a result of undue pressure. The point may arise under the heading of undue influence as well as under that of facility and circumvention. The essence of the complaint, as I have said, is not what was done but what means were used to achieve its being done. A similar point may arise in the context of incapacity where, for example, the testator, being incapable at the time, executes a will which is drafted to reflect what are known to be his wishes. If he was incapable when he executed the document, it cannot stand even if it reflects what he would have done had he been capable.

[53] These observations point to the necessity of looking closely at the particular circumstances of the case before reaching a conclusion under any of these heads.

The events of early May 2010 – detailed assessment

[54] I turn, therefore, to consider more closely, the events of early May 2010 when Deirdre first executed the codicil to her will and then prepared and executed a new will. In doing so, because of the importance of capturing precisely what occurred, what was discussed and what advice was given on particular occasions, I shall go into more detail than might otherwise be thought desirable and shall at times quote extensively from communications and notes of meetings and discussions.

[55] First, however, it is necessary to consider two matters in rather more detail than previously, because of the impact they each had upon the discussions and decisions made during this time. These matters are, first, Deirdre's medical condition at the time and, second, the financial difficulties faced by DPL.

Deirdre's physical and mental condition as at May 2010

[56] Evidence relating to Deirdre's physical and mental condition as at May 2010 came from a variety of sources. One source was in the testimony of a number of individuals who knew Deirdre well and who expressed concerns about her capacity to make a will in the last two or three weeks of her life. One such was Iris Gibson, who knew Deirdre as a meticulous person who would not leave anything to the last minute. Against that background, her concern was that she had made

major changes to her will at a time when she was not in a fit state to make important decisions. Further, the changes she made, for example leaving certain items to IR and putting him in charge of allocating the jewellery and other personal items, were contrary to the way Deirdre had always intended to act. She attributed this to the pain that Deirdre was suffering in the last month or two of her life as well as to the painkillers she was taking. Ms Gibson explained that from Christmas 2009 onwards, Deirdre became increasingly frail and was practically housebound. She had to be nursed on a daily basis for the bed sores. Ms Gibson considered that Deirdre was not capable of instructing a will in May 2010. According to her evidence, Deirdre had moments of lucidity but would drift in and out of consciousness. Nine times out of ten when speaking to her, Deirdre would be, in her words, "semi-conscious". Often she would just be staring into space, with her eyes far back in her head, but she could come back to a state of lucidity very quickly. In the last 6 to 8 weeks before Deirdre died, Ms Gibson would help her open her mail and daily reports as usual but Deirdre would not be able to focus on or even look at them. Once when she tried to get Deirdre to sign a letter which her secretary at DPL had sent her and which needed to be returned, it took nearly a day to get her to sign it – Deirdre kept having to be reminded that it needed to be done; Deirdre could hardly hold the paper and kept falling asleep.

[57] The pursuer also led evidence from Sandra Thomson, who was personal assistant to Deirdre for about 13 years and dealt with emails coming into the office. She would read them to Deirdre and Deirdre would dictate a reply for her to send. They established a good and very close working relationship. They spoke regularly by telephone. She explained that from January 2010 the pattern of communication changed. Instead of talking several times a day, as had been the case, the conversations became fewer but longer. Deirdre began to be a little forgetful and Sandra Thomson was beginning to have concerns. About three weeks before Deirdre died Ms Thomson spoke to Sandra Maxwell who told her about Deirdre's condition. By this time Deirdre was sometimes leaving a whole day's emails unanswered (on one day some 52 emails were left unanswered). Her observation about Deirdre's deterioration since January 2010 was that it was mainly forgetfulness. But she was never concerned even in the spring of 2010 about Deirdre failing to deal with the issues when required to respond to something. She was not concerned with Deirdre's mental ability to respond, it was simply the forgetfulness. Nothing about Deirdre's condition caused Sandra Thomson any concern that she was susceptible to be imposed upon by others.

[58] It is obvious that Deirdre's condition was deteriorating fast from January 2010, and that her decline accelerated in the last six or eight weeks of her life. There was no real dispute about that. But I do not accept the suggestion that throughout the last six or eight weeks she was, in effect, sleepwalking through a world of semi-consciousness. The evidence of how Deirdre coped with the meetings in early May at which she discussed and effected changes to her will is testament to the fact that she was capable of focusing on business issues and maintaining concentration, albeit with the occasional break, for lengthy periods. The accounts given by those who were close personal friends and advisers, such as JCR and WSH, are consistent with the evidence given by the various lawyers who attended some or all of these meetings, namely CS, HT and LM.

Medical records

[59] From 2008 until (at least) April 2010 Deirdre was registered as a patient with Dr Peter Copp,

a general practitioner practising from the Edinburgh Clinic, Colinton Road, Edinburgh. Deirdre had registered with the practice in 2008 at the time of her diagnosis of terminal cancer. She wanted put in place a system of palliative care to allow her to continue to work. She was independent and independently minded, and keen not to be put in the position where her powers might be undermined. This "really mattered" to her. Dr Copp said that he had about six long face-to-face consultations with Deirdre, and another six or so long telephone conversations with her. He had no concerns about her ability to communicate. He was aware that she had recently been admitted to hospital, reportedly because of a high calcium level and a minor concern about possible cognitive impairment, a matter which was resolved within a day or two, but he was not involved personally in this. His last discussion with Deirdre was in a long telephone conversation in March 2010. Asked about her reaction to pain, he replied that he felt that she was prepared to put up with a little more pain than many people would put up with – she felt she would rather focus on her clarity of mind and decision-making. It was not impractical for a person like her to accept a certain level of pain and also carry out their normal tasks. To that end, a person might refuse pain relief medications in order to keep alert. In cross-examination Dr Copp accepted that it would surprise him (to some extent at least) that Deirdre should leave making or revising her will to the last eight days of her life. However, he said that Deirdre had never discussed her will with him. He was unclear as to whether Deirdre was intending to wind down the business or keep it going for as long as possible. He had the impression that she was winding it up but that was just a guess.

[60] It was clear from Dr Copp's evidence that he was to some extent aware of the dosage of painkillers and other medicines which Deirdre was taking, and the fact that changes were being made to her medication from time to time to give her the best chance of maintaining her independence and alertness. However, he had no direct involvement in this. The best evidence of the medicinal regime to which she was subject was provided by hospital and carers' records lodged in process. It is useful, first, to give a brief summary of her attendance at hospitals and like institutions over this period.

[61] Deirdre was diagnosed with locally advanced breast cancer in 2004. She underwent a radical course of radiotherapy to the right breast and peripheral lymphatics. She was prescribed letrozole. In 2008 it was revealed that a secondary tumour had developed. An MRI scan revealed metastatic bone disease in the right hip and pelvis. It was at this time that it was recognised that the cancer was terminal. Despite treatment, the cancer spread. Scans in 2009 showed metastatic bone disease in her skull and neck as well as her chest, lower back, ribs and pelvis and extensive retro peritoneal lymph nodes. Her consultant (Prof Kunkler) observed that the "pace of her bone disease [was] clearly accelerating" and that it was a "horrible disease". A neurosurgeon (Lynn Myles) diagnosed that her cervical spine was "potentially unstable". She wanted to operate but Deirdre refused. It was about this time that Deirdre took to wearing a surgical collar to splint the neck and prevent pressure on the spinal column. A CT scan at about that time, as interpreted by her consultant, showed "extensive bony metastatic disease involving the pelvis, left sacroiliac area, the whole of the spine and many of the ribs".

[62] In the last two months of her life, Deirdre was receiving domiciliary care from a number of people and organisations. She was on a variety of painkillers, the details of which will be discussed below. On 26 March 2010 she was admitted to the Spire Murrayfield Hospital for a blood transfusion to treat anaemia. Her analgesic was increased. Her calcium was noted to be

high, despite her having received her monthly Zometa infusion at home before admission. On 1 April 2010 she was visited at home by Dr Kemp (of St Columba's Hospice), who described her as being "quite sleepy and a bit muddled and clearly was teetering on the edge of opiate toxicity", a state to which Dr Kemp thought that hypercalcaemia might have contributed. This was not Dr Kemp's first involvement with Deirdre – she had visited her on at least two occasions in January and possibly on other occasions. As a result of those most recent observations on the home visit, Deirdre was admitted to St Columba's Hospice on 2 April 2010. Her admission was reported by Dr Kemp to have been "a resounding success". She was prescribed celecoxib (with gastro-protection) twice daily which resulted in a generalised improvement in her pain without running into problems of opiate toxicity. Nausea seemed to be less of a problem now she was on regular cyclizine. Her bedsores needed habitual dressing and management. Her calcium level rose during her stay. She was discharged on 8 April 2010. While expressing a wish to continue seeing Dr Copp, she registered as a patient of Dr Sayers at the Green Practice in Stockbridge. She was admitted to the Murrayfield Hospital again on 13 April 2010 and discharged on about 18 April.

[63] At about the beginning of April 2010 Sandra Maxwell moved in to live with her. This seems to have caused some friction with Iris Gibson who saw it as her role to provide the necessary home care. Sandra Maxwell was not only a friend but also a qualified health visitor. In addition, Aspen Hamilton Homecare, a commercial homecare company, started to provide home care assistance before Deirdre, with nurses living in with her and providing services of a personal nature, such as dressing, washing, dealing with bedsores and the like. One such nurse was Judy Hamilton. They may have been involved in administering her medicines, but it is possible that Sandra Maxwell was in charge of this.

[64] There was evidence about the medication which Deirdre was under during the last few months and weeks of her life. A convenient starting point is a letter from Dr Kemp, written on 8 April 2010 when she was discharged from the St Columba's Hospice, which listed her medications on discharge as follows: Exemestane 25 mg once daily; Cyclizine 50 mg tds; Celecoxib 200 mg tds; Lansoprazole FasTab 30 mg once daily; Movicol (to maintain regular bowel habit) ½ – 1 sachet daily; Fentanyl DTrans 125 microgram patch changed every 72 hours; Oxynorm capsules (Oxycodone) 40 mgs prn for pain; and Oxynorm Liquid (10 mgs per ml) of 40 mgs prn for pain. Of these the most relevant for present purposes are fentanyl and oxycodone/oxynorm. Both were taken to relieve pain. Both had side effects.

[65] Dr Skett, a forensic pharmacologist called by the defenders as an expert witness, described the side effects of fentanyl and oxycodone/oxynorm. Fentanyl is an opioid analgesic used in the treatment of chronic pain that only responds to opiates/opioids. It is absorbed through the skin from a transdermal patch over a period of 72 hours, and reaches steady-state concentrations in the blood after 15 – 24 hours, after which use of a new patch every 72 hours maintains a fairly constant concentration of fentanyl in the blood. Removal of the patch results in a slow decline in fentanyl concentration in the blood over a period of 24 – 36 hours with a half-life of, on average, 21 hours. In paragraphs 4.1.4 of his Report Dr Skett described the side effects of fentanyl in these terms:

> "4.1.4 The relevant side effects of fentanyl are headache, dizziness, lack of appetite and somnolence (classed as very common (> 1 in 10 patients)), paraesthesia (a sensation of tickling or prickling on the skin), confusion, depression, insomnia, nervousness, (all classed as common (> 1 in 100 patients)), tremor, memory impairment, sleep disorders (including

nightmares), agitation, restlessness and hallucinations (classed as uncommon (> 1 in 1000 patients)). Long-term treatment with fentanyl can lead to dependence and tolerance developing where an increased dose of the drug is required to achieve the same the therapeutic effect."

Oxycodone is an opiate analgesic, similar to morphine, used in the treatment of severe pain associated with cancer. The dose of oxycodone is titrated in the individual patient to achieve the desired pain control with the minimum of side effects. The effects of oxycodone are noted within one hour of its administration and last for about 3-4 hours. In paragraph 4.2.4 Dr Skett described the side effects of oxycodone in this way:

"4.2.4 The relevant side effects of oxycodone are anxiety, confusion, insomnia, thinking disturbances, abnormal dreams, sedation and somnolence (all classed as common (> 1 in 100 patients)), agitation, depression, euphoria, hallucinations, restlessness, amnesia and visual disturbances (all classed as uncommon (< 1 in 100 patients)). Not all patients suffer all of the noted side-effects and, indeed, some patients suffer none of the side effects."

Oxycodone is administered as a tablet. Oxynorm in liquid form, which was also prescribed, is taken under the tongue (sub lingual) and is absorbed more readily. It provides faster pain relief when the pain is intense. It has similar side effects to oxycodone.

[66] Dr Skett explained in his oral evidence that an individual would become tolerant to these drugs over a period. Further, the side effects would wear off as the effect of the drugs decreased but this would mean increased pain. Accordingly, prescribing the right dosage involved striking a balance between reducing pain on the one hand and lessening the side effects of the drugs on the other. He went on to say that symptoms of overdose with oxycodone were an exacerbation of the generally observed side-effects noted above as well as pin-point pupils, respiratory depression, low blood pressure, coma and muscular flaccidity. Dr Wahlrab, who was called as an expert by the pursuer (as to which, see below) took no issue with this summary of the side effects of fentanyl and oxycodone. He was concerned, however, with the possible interaction between those two drugs. In other words, he was concerned – though he did not know whether it was the case – that taking both drugs in tandem might accentuate the relevant side effects and/or increase the likelihood of such side effects being felt. Neither he nor Dr Skett was aware of any research into this. Dr Skett considered that it could have this effect, essentially because of an increased (combined) dosage, though he made the point that one could not be sure about this because individuals respond differently in different circumstances (e.g. tiredness, stress, acquired tolerance). Dr Wahlrab also questioned whether dehydration and the alteration in serum blood calcium concentrations (hypercalcaemia) could have a significant impact on the opioid drug levels and therefore the clinical impact of such opioid levels on legal capacity. However I did not understand Dr Wahlrab to be putting forward a positive case on this; and Dr Skett indicated that, although he was aware that hypercalcaemia had been reported to cause dementia, confusion and depression, such matters were outside his area of expertise.

[67] There was no challenge to Dr Skett's undoubted expertise in forensic pharmacology. Some questions were, however, raised in connection with Dr Wahlrab's qualifications and I should deal briefly with those matters. Dr Wahlrab is a general practitioner of some 30 years standing

practising in County Meath, Republic of Ireland. The pursuer is a long term patient of his. Questions were raised as to his ability to act as an expert witness, both because he was said to lack independence and also because he was "only" a general practitioner and not a specialist in the particular areas of medicine with which this case is concerned. As to the first point, it is trite that an expert witness owes a duty to the court to give his evidence honestly and impartially, without regard to the interests of those by whom he is instructed. But there is no requirement in law that an expert witness be wholly unconnected with the parties. Of course, if he is connected in some way with a party, or involved in some way in the circumstances giving rise to the litigation, he will have to be particularly careful to ensure that this connection or involvement does not cloud his judgement or otherwise interfere with his duty to the court. In such circumstances, the court is likely to scrutinise his evidence with particular care. But connection to a party or involvement in the matters which are the subject of the dispute does not of itself preclude his giving expert opinion evidence. As to the latter point, there is no reason why a general practitioner should not be an expert witness on matters with which a general practitioner is familiar. That is likely to include the day-to-day pain experienced by a cancer sufferer and the effect on such a person of various medications. Further, as Dr Wahlrab explained in his evidence, he has been involved in training young doctors in the care of cancer sufferers. He has given expert reports in medical negligence cases many times over the last 13 years or so. I had no difficulty in treating him as an expert witness in this case; and, for the avoidance of doubt, I should make it clear that he (like Dr Skett) gave his evidence clearly and impartially, based on his own experience and expertise, wholly in accordance with his duty to the court. He did, however, particularly in his Medical Report dated 31 December 2013 and subsequently in his oral evidence, sometimes offer his opinion on legal and other non-medical issues, such as the legal test for capacity and as to how a prudent legal practitioner would act when dealing with the testamentary wishes of a person in Deirdre's condition, and the undesirability of a person in that condition being allowed to make significant and substantial alterations to her will without a professional medical assessment of capacity having been carried out. Such evidence is clearly inadmissible. When this was pointed out, however, Dr Wahlrab quite properly attempted to confine his evidence to medical issues. I found his evidence helpful.

[68] Both Dr Skett and Dr Wahlrab picked out certain aspects of the treatment Deirdre received over the last few months of her life to illustrate both the change in her medication, the effectiveness or otherwise of that medication in relieving pain, and the inevitable side-effects which she would have suffered as a result of taking the prescribed drugs. They took the information from medical notes and records lodged in process. I need not set that out in full. It is, however, useful to refer to some of the episodes noted by them in their Reports. It appears that Deirdre started using fentanyl patches from mid October 2009 and started on oxycodone/oxynorm early in January 2010. The records show that her dose of oxycodone increased from an initial 10 mg on 7 January 2010 to 20 mg on 19 January 2010 and 40 mg on 23 February 2010, that dose being taken every four hours or so. That was the level being prescribed on her release from St Columba's Hospice on 8 April 2010, but within a very short time her dose of oxycodone was increased to 50 mg, being taken approximately every three hours. Her dose of fentanyl increased over time from 25 μg/hour on 16 October 2009 to 75 μg/hour on 12 March 2010 and 87 μg/hour on 18 March 2010. By early April 2010 the fentanyl treatment had increased to 125 μg/hour (the level on her release from St

Columba's Hospice on 8 April); and by mid-April it was up 175 μg/hour. On admission to St Columba's Hospice on 2 April 2010 it was noted that Deirdre was "sleepy, heavy-eyed and a bit confused/forgetful"; but on her release on 8 April 2010 it was remarked that the opiate treatment was not causing any toxicity. On 23 April 2010, however, the dose of opiates was said to be "verging on toxicity", with signs that Deirdre was "mildly confused". Dr Sayers wrote to the St Columba's Hospice in an out of hours referral noting that the fentanyl patch was now 175 μg and that Deirdre continued to take oxycodone in 50 mg doses approximately every three hours. She commented that "pain relief [was] still difficult to achieve". She reported intermittent nausea, though no vomiting, and said that she was starting her on buccastem at a rate of up to 3/day in addition to cyclizine to suppress the nausea. On 27 April 2010 Deirdre herself felt that she was "over medicated" and was reported as being "confused and drowsy". As a result the fentanyl was reduced back to 125 μg/hour (or possibly 150 μg/hour) and the oxycodone dosage was reduced back to 40 mg as required. On 30 April 2010 Deirdre was prescribed diamorphine for additional pain relief, but she did not begin taking this until 12 May 2010, after the events with which this action is concerned. Her nausea was reported to be much improved since starting the cyclizine. There was some discussion about what to do if Deirdre took a turn for the worse over the weekend.

[69] The dosage of fentanyl and oxycodone, along with other drugs, continued through April and into May 2010. Handwritten drug sheets were available for the whole of this period and were lodged in process. They show, in general terms, a regular intake of 40 mg of oxycodone between five and seven times a day, at intervals averaging between 3½ and five hours. She continued with a fentanyl patch of 125 μg/ hour. It is useful to pick up the detail from 28 April 2010. On that day she took oxynorm on four occasions, at 0600, 1200, 1800 and 2145. On 29 April 2010 she took oxynorm in 40 mg doses five times, at 0200, 0630, 1030, 1425 and 2230, as well as a nausea tablet at 0400. On 30 April 2010 she took oxynorm in 40 mg doses five times, at 0315, 0700, 1100, 1500 and 2200, with a nausea tablet at 0430. On 1 May 2010 she took oxynorm in 40 mg doses six times, at 0130, 0545, 1045, 1445, 1900 and 2300. On Sunday 2 May 2010 she took oxynorm in 40 mg doses five times, at 0500, 1000, 1340, 1810 and 2040, the last two doses both in liquid form for faster pain relief. On 3 May 2010 she took oxynorm in 40 mg doses six times, at 0025, 0510, 0930, 1315, 1745 and 2230, the doses at 0930 and 1315 being taken in liquid form. On Tuesday 4 May 2010 it was noted that her nausea had been controlled over the weekend by taking cyclizine and that she had not needed to take buccastem. But she did take 3 mg prochlorperazine (a form of buccastem) at 0530 on that day. She took oxynorm in 40 mg doses five times, at 0530, 0830, 1300, 1700 and 2050. The record is not entirely clear as to whether some of those doses were in liquid form. In the morning of 5 May 2010 Deirdre reported that she felt that her pain control was the best that it had been for some time. It was reported that her nausea had been well controlled until yesterday (4 May 2010). She was made aware of the risk of side-effects due to the similarity between that and cyclizine. She took oxynorm in 40 mg doses seven times, at 0015, 0515, 0925, 1310, 1545, 1845, and 2215. Again, it is possible that some doses, particularly at 1310 and 1545 were taken in liquid form. She also took a breakthrough nausea tablet at 0515. On 6 May 2010, the day on which Deirdre signed the codicil, Dr Sayers wrote to Prof Kunkler at Spire Murrayfield Hospital asking for information about her blood results taken prior to her infusions. She commented about Deirdre's "drowsiness", which had caused them to query her serum calcium levels; noted that

Deirdre's "opiate requirements" had increased and that her general condition had "deteriorated markedly over the past few weeks"; and described her as "more alert, less confused/drowsy". On that day Deirdre took oxynorm in 40 mg doses six times, at 0310, 0630, 1000 (in liquid form for faster pain relief), 1345, 1745 and 2005. On the following day, 7 May 2010, increased nausea was noted and corrected. She took oxynorm in 40 mg doses six times that day, at 0200, 0730, 1130, 1540, 1845 and 2200. On 8 May 2010 she took oxynorm in 40 mg doses five times, at 0600, 1000, 1300, 1745 and 2145. Again she took 3 mg prochlorperazine (for nausea) at 1125. On Sunday 9 May 2010, the day on which she attested her new will, it was noted that she had had increasing problems with nausea over the weekend. There is a record of a telephone call at 1350 to the out of hours service from Judy Hamilton (the homecare assistant at Deirdre's house), asking whether anything else can be given to help with nausea as Deirdre was "struggling a bit". The doctor recommended adding levomepromazine to her current medicines. That day she again took 3 mg prochlorperazine (for nausea) and took oxynorm in 40 mg doses at 0215, 0645, 1445, 1850 and 2105. The gap between the second dose at 0645 and the third dose at 1445 was eight hours, much longer than usual. On 10 May 2010 it was reported at 1030 that Deirdre was "deteriorating, sleeping more, struggling with transfer". Pain was noted and it was said that nausea had been problematic over the weekend. She took oxynorm in 40 mg doses on that day at 0150, 0600, 1000, 1425, 1830 and 2305. I need not go further forward in time.

[70] It is clear from the above, and from all the evidence both lay and medical which was adduced at the proof, that from early April at least, and probably much earlier than that, Deirdre was nauseous for a large part of the time and was suffering extreme pain virtually all the time. The pain was reduced to some extent by the administration of painkillers such as fentanyl and oxycodone/oxynorm, fentanyl constantly from a patch and oxynorm by periodic dose, but the frequency with which oxynorm had to be administered suggests that the pain was not only ever present but also at times very severe indeed. As noted above, oxycodone (in pill form) takes effect within about one hour of its administration and lasts for about 3-4 hours – the liquid form takes effect more rapidly. Except during the night, the gaps between doses of oxynorm during this period were seldom longer than four hours. That suggests that she needed another dose as soon as the effects of the previous dose had begun to wear off. On some days the gap between some of the doses of oxynorm was three hours or less, suggesting the recurrence of pain even when the previous dose should still have been effective. The administration of oxynorm in liquid form, for example on 2, 3 and 6 May 2010 (and possibly also on 4 and 5 May), points to acute pain and the need for more rapid pain relief.

[71] It is averred by the defenders on record that throughout the period up until about 13 May 2010, when medication began to be administered intravenously, Deirdre was in control of her decision-making in respect of her medication and administered her own medication. She was aware of the side-effects of that medication, including potential drowsiness. She timed the self-administration of her medication in order to remain clear-headed for periods during the day. When she knew that she required to attend to business or other important matters, she would restrict her medication accordingly. Whether this was so or not, and I make no finding either way about this, it is clear that a fine balance had to be struck between relieving pain and avoiding the side-effects of the drugs such as fentanyl and oxynorm spoken to by Dr Skett. If she delayed taking medication to avoid the associated side-effects, the pain would increase. If she took her medication

to ease the pain, she would be likely to suffer the side-effects. It is apparent that Deirdre would sometimes need to take another dose of oxynorm earlier than would have been expected in the ordinary course. Conversely, she would sometimes leave longer between doses. A stark example of this occurred on 9 May 2010, the day on which she signed her new will, when she took a dose of oxynorm at 0645 and did not take another until 1445, eight hours later. While this may have alleviated the side-effects of the medication, it must have left her in very considerable pain for a long period.

[72] Both Dr Wahlrab and Dr Skett gave their opinions as to Deirdre's overall condition in the weeks prior to the execution of the codicil and the new will. Dr Wahlrab said that, in that period, Deirdre had been independently diagnosed by her general practitioner and by her palliative care specialist as suffering from both hypercalcaemia and opiate toxicity, both conditions which could significantly alter consciousness and mental capacity, particularly if coupled with severe pain. In his experience, patients in severe pain receiving high-dose opiates and suffering from high levels of serum calcium could significantly alter their opinions and the value which they attached to close family members and carers. Dr Skett did not, I think, disagree that that was a possibility; but he considered that the treatment with opiates at the doses given during the period up to May 2010 was "appropriate and measured", having regard to Deirdre's deteriorating medical condition. Although there were references to opiate toxicity on 2 and 23 April 2010, each occasion was followed by a reduction in the dose, leading to an observed decrease in toxicity. He considered that there was no clear indication of opiate toxicity during the period 6-9 May 2010. In consequence he found no reason to believe that between 6 and 9 May 2010 Deirdre lacked capacity to make decisions concerning her will, in the sense of being unable to understand or appreciate the nature of what she was doing, the extent of the property being disposed of in her will or the interests of family, friends and acquaintances who ought to be considered.

[73] Ultimately the question of capacity is one for the court and does not depend solely upon an assessment of the expert medical evidence. Greater weight might have been placed on such evidence had it come from people who had seen and observed her during the critical discussions. No such medical evidence is available in the present case, and any assessment of Deirdre's physical and mental condition, whether in relation to capacity or in relation to questions of facility or undue influence, must depend to a significant extent on the observations of those who were with her at critical moments. That is not to say that the expert evidence given by Dr Wahlrab and Dr Skett is unimportant. It is not. What it confirms, and there was a great deal of agreement between them on these matters, is that throughout the critical period, from late April onwards at the very least, and probably long before that, Deirdre was almost constantly in great pain, was often suffering from nausea and would have been affected by the side-effects of the medications taken to relieve her pain. The side-effects, allied to the pain and nausea, would very likely have affected her consciousness and mental stamina. At times her mental capacity may have been affected. But I cannot conclude on the medical evidence alone that in any general sense she no longer had mental capacity throughout this period. I did not understand Dr Wahlrab to suggest that her mental capacity was completely and permanently undermined. As I understood it, he was saying that there was the potential, because of the pain and the side-effects of the drugs, for her to be at times mentally incapacitated. I can accept that. I do not think that Dr Skett would dispute

that. The effect of his evidence, as I understood it, was that he could not say that she would necessarily be incapacitated at all times during this period.

[74] That being the case any answer to the question of whether she lacked capacity at the time she executed the codicil and the new will must depend upon a close examination of how she was and how she acted at the relevant times, but always bearing in mind the medical background, the pain, the nausea and the side-effects of the drugs discussed above.

Continuing financial difficulties at DPL

[75] The main driver behind the changes made to Deirdre's will in May 2010 was the on-going attempt to resolve the financial difficulties at DPL. This was something in which Deirdre had already been closely involved. It was also something which the defenders, JCR, WSH and DMD, believed that Deirdre wanted to see to a conclusion or at least to make arrangements for that to be achieved after her death. Decisions made in respect of that issue had a direct bearing on the determination of Deirdre and those around her to change her will. It is therefore necessary to give a brief account of the difficulties at DPL and attempts at a resolution.

[76] DPL ran into financial difficulties during the banking crisis of 2008 and the recession that followed. By early 2010 it was in breach of covenants under loan agreements with Lloyds Banking Group ("LBG"). Ernst & Young ("EY") were brought in to consider the options available to it and to help negotiate a refinancing package ensuring continued bank support. Their involvement led in late April to the emergence of an idea that the refinancing might be achieved on more attractive terms if it proceeded on the basis of a fresh equity injection of £3m by shareholders and/or management.

[77] On 27 January 2010 Deirdre and WSH attended a meeting with Gary Davison and Richard Williams of EY. The two Grahams (GF and GM) were also present. The project was given the name "Project Destiny". The proposal being discussed with LBG involved the bank continuing to support the company in return for a preference share of £13.5m, split 90% to LBG and 10% to management, and LBG taking an equity share of 45%. This was not attractive to the company since, without a reduction of the loan, the cost of servicing the debt would absorb any profits it might otherwise have made. Another proposal being discussed within EY and DPL in April 2010 involved a fresh equity injection of £3m, no preference share, and retention by management of 100% of the equity in the company. The suggestion of a "new money" or "fresh equity" structure, as it was variously called, was outlined in an e-mail from Richard Williams of EY to Deirdre, GF, GM, WSH and DMD on 26 April 2010 in these terms (having discussed the bank's apparent softening of its position and a possible reduction of the preference share to £8.7m):

> "Further to this the bank outlined that the structure would be materially changed if 'fresh equity' was available. The bank entertained a theoretical conversation with "fresh equity" of £3m being able to purchase today's equity gap of £8.7m."

It was noted that this fresh equity model removed the need for the bank to take an equity stake in the business.

[78] According to the e-mail of 26 April, these matters were to be discussed "early next week", in advance of the meeting with the bank arranged for Friday 30 April. The word "next" suggests that

the e-mail had been drafted at the end of the previous week. In the event the meeting was cancelled as Deirdre's condition deteriorated.

[79] Jumping ahead, I should note that on 4 May 2010 Richard Williams of EY sent a further e-mail attaching "illustrative returns" for the different scenarios, including the new money option which had not yet been discussed in detail with LBG. This showed that returns to management were materially improved under the new money scenario, though there was still value with the LBG proposal. The e-mail was sent only to DMD and WSH. By this time they both knew that Deirdre was dying. It was not sent to either of the two Grahams. Nor was it sent to Deirdre, though why that was so was not explained in evidence. The suggestion made by the pursuer was that Deirdre was being deliberately kept out of the loop while others worked up a proposal intended to lead her on her deathbed to inject new equity into the company. I am unable to accept that suggestion. While the omission of Deirdre from the list of recipients was unexplained, there is no reason to suppose that anyone perceived any advantage in not keeping Deirdre in the picture. Whether or not those involved in the re-financing knew that she was dying – and it is clear that some of them did know – they would all have assumed at that time that the matter would have to be considered in detail by Deirdre and others before it could be taken any further. The same observation applies also to the next e-mail from Richard Williams, which was sent on 14 May 2010, just three days before Deirdre's death. This time it was sent only to DMD. Again there was no explanation why it was not sent also to Deirdre; but since her condition was by then more widely known perhaps no explanation is needed.

[80] Deirdre was fully aware of the various proposals. According to GM's evidence, which I accept, she telephoned him in the afternoon of 3 May 2010 asking him for an update on the current banking situation. He made a note of that conversation when requested to do so by WSH in June 2010. Although by the time the note was requested it was clear that the new will was likely to be challenged, I have no reason to think that GM did other than record the conversation as he remembered it. I accept his note as accurate in its essentials. GM and Deirdre discussed LBG's stance on an equity stake in the company and the preference share, which they both agreed was "outrageous". After Deirdre had expressed her confidence in the current management team (GF and GM),

> "… she mentioned that new money would be put in the business, and when I asked how much she said a figure of £3m was likely."

This is the background to the decisions that were taken over the following few days. It should be noted that it came before the question of her changing her will was ever raised with Deirdre.

[81] The pursuer led expert evidence from Mr William McKay to the effect that the proposed equity injection into DPL was "financial nonsense from the viewpoint of existing shareholders". Mr McKay is a retired chartered accountant and retired stockbroker who has advised private and public companies on the sale and purchase of businesses and has held a number of very senior positions in business in Northern Ireland. He was well qualified to give expert evidence. He was a cousin of the pursuer's husband, Charles Smyth, but no objection was taken (nor could it have been) to him giving expert evidence simply because of this relationship. He could see no logical reason why such a proposal would even have been considered. No one in their right mind would consider investing £3 million into a company which, on his assessment, was completely insolvent.

Had it been a normal business, DPL would have been shut down. It depended for its survival on the bank being willing to defer repayment of its own debt while allowing payment to other creditors. He did not see why the bank would have been willing to allow Deirdre or her trustees to continue to hold a significant equity in DPL for what to them would have seemed like a nominal amount. The bank had not even been approached, at least formally, about the proposal. But even if it had been willing to go down this route, the investment of £3 million would not have made a material difference to the future prospect of DPL and the outcome would have been to increase shareholders' already substantial losses. Mr McKay was cross-examined, particularly on the assumptions he had made and the information which he would have liked to have had before coming to a final view on the matter. In addition, the defenders led evidence from Gary Davison, a partner in EY and one of the contributors to the EY assessments of how to proceed with Project Destiny.

[82] Interesting as this chapter of evidence was, however, I have come to the view that I do not have to make any decision about the financial sense of the proposed equity injection. There are two reasons for that. The first is that Deirdre was not prevailed upon to make any decision about whether or not to go down the road of injecting £3 million into DPL. That decision was, in terms of the codicil and the new will, a decision to be taken at a future date by the Trustees of the DRLT. They were given a discretion as to whether to invest the money in the company. The doubt they would only do so if they considered that such an investment made sense. By the terms of her codicil and subsequently her new will, Deirdre was content to leave that assessment to them. The second reason is this. It is not for the court to decide whether or not money should or should not have been invested in DPL. The court does not have to decide whether such an investment would have been beneficial to the shareholders in the company. An assessment of the benefits or disadvantages of such an investment is relevant only to the question of whether Deirdre, in deciding to go down this route, did something which shows that she cannot have been in her right mind, to put it colloquially, or must have been giving in to undue influence or pressure. The evidence from Mr McKay goes nowhere near establishing this; nor could it since, as I have said, Deirdre took no decision to invest new equity in the company but simply left it to others to consider whether or not to make that investment.

Events from end April to 10 May 2010

[83] Sandra Maxwell moved into Heriot Row in about April 2010. During this period Deirdre's condition continued to deteriorate. Deirdre wished her deterioration to be kept secret both from her family and from the directors of the company, and Sandra Maxwell was aware of this. It is obvious, therefore, that at this stage she had given no thought to changing her will so as to enable new equity to be invested in the company after her death.

[84] On 27 April 2010 Deirdre nearly died, or so it was thought. On that day, or perhaps a couple of days later, WSH telephoned the house to speak to Deirdre in connection with the planned meeting with the bank due to take place on 30 April 2010 in connection with the on-going discussions about the future financing of DPL. In the event the meeting was cancelled and only took place later after Deirdre's death. Sandra Maxwell took that call. She told WSH that Deirdre was dying. It was this that set in train the course of events leading to the execution of the codicil and the 2010 will.

[85] On being told by Sandra Maxwell that Deirdre was dying, WSH told Sandra Thomson, and Sandra Thomson told the two managers, GF and GM. They were therefore aware of Deirdre's condition at the time of the conversation on 3 May 2010 between GM and Deirdre in which Deirdre told GM that new money was to be put into the business and that it was likely to be £3m. That conversation is evidence – from a source which, if not disinterested (since anything that affected the survival of DPL obviously affected GM too), is at arm's length from those who were around Deirdre when she made the changes to her will – that by that time Deirdre had formed a view favourable to investing a significant sum in the company.

[86] Another consequence of Sandra Maxwell telling WSH that Deirdre was dying was that her husband, Brian Maxwell, then felt free to reveal the truth about Deirdre's condition to IR. Why he should have felt free to do so was unclear – he knew that Deirdre did not want her condition revealed to anyone unless really necessary – but IR and Brian Maxwell were old friends; and Brian appears to have considered himself to be under some kind of personal obligation to IR, though the nature of that obligation was never made clear and does not matter. IR was then living in Monaco with his second wife. When he received the phone call from Brian Maxwell, he was about to board a plane for Singapore. His luggage had already been loaded so he continued on his journey. However, he took steps to arrange to come back to Edinburgh. On 3 May 2010 he arrived in Edinburgh and went straight to Heriot Row. He remained there, living in the Mews property attached to the house, until after Deirdre's death. This was in many ways unfortunate, not principally because of anything IR did while he was there but because his presence in the house at this pivotal time gave rise to suspicions in the mind of the pursuer which, regardless of whether or not they were justified, were at least understandable.

[87] Once Sandra Maxwell had told WSH of Deirdre's condition, it was inevitable that JCR and DMD would also be made aware of it. This was natural in view of the fact that there were on-going discussions about the possibility of Deirdre investing £3m of new money into DPL. WSH passed on the information to JCR. Although JCR was no longer a director of the DPL, he was intimately involved in and knowledgeable about Deirdre's affairs. He was also a lawyer. WSH asked JCR to consider whether there was some way in which that investment of new money into DPL could go ahead in the event that Deirdre died before negotiations with the bank were concluded.

[88] The pursuer heard about Deirdre's illness when she telephoned to speak to her on 29 April 2010. Sandra Maxwell answered the telephone. After initially saying that Deirdre was fine, she went on to say that she had in fact been very ill and, after much prompting and questioning, eventually told the pursuer how serious Deirdre's condition was, though she did not mention the fact that she had bone cancer. The pursuer said that she wanted to come over straight away but Sandra Maxwell was adamant that Deirdre would not want that. Over the next few days she came to know that IR was staying at Heriot Row. She spoke to him a few times and he gave her more detail about Deirdre's condition. Her understanding from IR was that Deirdre was very weak, in no condition to do things by herself or to make any decisions, and in no condition to see her or other members of the family.

4 May 2010

[89] Events gathered pace after this. It appears that on 4 May 2010 WSH had a further telephone

conversation with Deirdre. On the same day, JCR contacted HT at Turcan Connell. Just after 5.30 pm on that day he left a message for HT to call him, and outlined to her what the problem was. He explained that Deirdre had been in the middle of refinancing DPL, involving her putting in a sum of £3m. He wanted advice on how that refinancing could proceed in the event of her death. JCR met HT at Turcan Connell's offices on 5 May 2010. He explained the problem in more detail. Deirdre had been suffering from bone cancer and might only have a few weeks left. They were in the middle of a major refinancing of DPL. The company had a loan which it could not possibly repay. The bank could end up with a large part of the equity on penal terms. However, it might agree to more beneficial terms if new money to the tune of £3m was put in. Having explained the problem, he and HT went on to consider the position under the existing 2008 will. They noted that Jamaica Street and one of the Cellardykes properties had been sold. The cash was with the bank (Adam & Co). The DPL shares were currently valueless. They discussed the possibility of Deirdre altering her will so as to leave the DRLT a sum sufficient to enable it to help with the restructuring by investing in DPL (or in a holding company). HT advised that the DRLT trustees had the necessary powers to use any money given to them in that way provided they could show that they had given proper consideration to doing so. The justification would be that any recovery made by DPL as a result of the injection of new money would ultimately benefit the beneficiaries of the trust. Reference was made to the fact that the 2008 will did not cover the deceased's Guernsey property. The meeting concluded on the basis that JCR would try to discuss the Guernsey property and any Guernsey will with Deirdre when he met her later that day; and that meanwhile HT would draft and circulate a suggested codicil to the 2008 will.

[90] HT explained in her evidence, which I accept, that the idea of a legacy to the DRLT came from her. The trust was already a shareholder in the company. It was Deirdre's alter ego. If the bequest was not used for investment in DPL it would remain in the trust for the benefit of Deirdre's family. HT suggested a preferential legacy to the trust, in other words a legacy which took preference over all other bequests in the will. This was because she did not know the extent of the deceased's assets at that time or the likely amount of IHT. She was concerned that, unless the legacy to the trust was a preferential legacy, it might be proportionally reduced with all the other legacies if the value of the estate and the requirement to meet IHT liabilities required some abatement of the bequests.

5 May 2010

[91] HT went to Guernsey on business on 5 May 2010. She did not return until the evening of Friday 7 May. Before she left for Guernsey she drew up a codicil to give effect to her idea of a preferential legacy in favour of the DRLT. She e-mailed it to JCR that afternoon. He was to discuss it with Deirdre. HT then left for the airport.

[92] HT's e-mail to JCR attaching the draft codicil reads, so far as material, as follows:

> "I attach a draft Codicil based on our discussions today. This contains a bequest of £3m to Deirdre's liferent trust. The bequest is made with the express wish that the trustees use the money for the benefit of Dunfermline Press Limited, but that is not a binding condition. The bequest is to be payable in priority to all other legacies and bequests under the Will. The bequest is to be free of tax. This means that any tax on it would be paid out of residue. If

the residue is insufficient to meet the tax, then the tax is also to be paid in full ahead of all other legacies.

The effect of this is that on Deirdre's death the trust would be entitled to receive the sum of £3m from her estate. The executors can satisfy this bequest in a number of ways, including a direct payment of money, a transfer of an asset, or the granting of a security. It is up to the executors to decide how best to satisfy the bequest. They can sell assets to raise funds, including assets which have been specifically bequeathed to other beneficiaries.

If not all of the money is required for the company, it can remain in the trust and be used to benefit the beneficiaries of the trust (who currently are Deirdre, Iain and Deirdre's nieces and nephews). The trust permits other beneficiaries to be added.

The Will that I am holding for Deirdre does not cover her Guernsey property. She intended to make a Will in Guernsey and I sent her details of a Guernsey lawyer last year, but I do not know if she followed it up. If she has not made a Guernsey Will her property there will pass under Guernsey intestacy law. I haven't been able to get definite confirmation of the position yet, but it looks as if the property would be divided equally between her brothers and sisters. One thing we did not discuss, but which would be possible, is for Deirdre now to make a bequest of her remaining Guernsey property in a Scottish Will. Guernsey will recognise a validly executed Scottish Will. I realise that it may be difficult to get Deirdre's instructions on this and it may not be appropriate to raise it with her at all. It may also be the case that there is an existing Guernsey will which we do not know about. I have not included anything about the Guernsey property within the Codicil for the moment."

It was put to HT in cross-examination that the reference to the possible difficulties in getting Deirdre's instructions showed that she was aware that Deirdre lacked the capacity to make a new will or other testamentary disposition. She rejected that suggestion. I accept her evidence on this point. I do not accept that the reference to such possible difficulties shows any such thing. HT had not recently seen Deirdre and was at that time in no position to have made any assessment of Deirdre's testamentary capacity. In any event, there is a significant difference between, on the one hand, getting clear instructions on a particular proposal of the kind drafted by HT on a matter – the possible capital injection into DPL – in which Deirdre had been closely involved and, on the other, expecting Deirdre to be in a position to give instructions on another matter – the Guernsey properties – which had not previously been raised in discussions or been dealt with in her Scottish will.

The meeting with Deirdre on 5 May 2010

[93] Later that afternoon, 5 May 2010, JCR, WSH and DMD went to visit Deirdre at her house in Heriot Row. They arranged to go there at 4pm. Jennifer Baird, the daughter of Sandra and Brian Maxwell, let them in. Deirdre was in the front room on the second floor. She had had her most recent doses of oxycodone/oxynorm at 1310 and 1545. These doses were fairly close together and were possibly taken in liquid form, suggesting that Deirdre was in pain and anxious to relieve the

pain before the deputation arrived. Iain was there too for some of the time. A note of the meeting made by JCR was lodged in process. This was in the following terms (substituting abbreviations for the names of individuals, "DR" standing for "Deirdre"):

> "DMD described the current state of negotiations with the Bank and said that in his view a better deal could be achieved if new equity of £3m could be provided. The question was where that could be found.
>
> JCR explained that he had met HT of Turcan Connell to discuss possible mechanics of the funding out of DR's estate and that she had suggested that DR's will could be amended to provide a prior ranking legacy of £3m. JCR asked DR if she wanted to give the introduction of equity to the Company priority over other beneficiaries of her estate. She said she did if the terms were right.
>
> JCR then described how the funding could be routed, by making the prior legacy to the trust and it would then subscribe for shares. The executors would be bound to pay the legacy in terms of the will but would then have discretion over whether or not to use the funds to subscribe for new shares. DR understood the plan. DMD stressed that the trustees (whom DR confirmed she knew were DMD, WSH and JCR) would only use the money for share subscription if the terms were, in their opinion, right, and that it was a sensible investment to make.
>
> DR said that she wanted to set up the prior ranking legacy as suggested and asked if it could be cancelled if she got better, JCR confirmed that and explained that it would only take effect when she was no longer with us.
>
> IR said he would be prepared to put new cash of up to £1m into the Company if the deal was right.
>
> JCR then explained that HT had drafted a codicil to give effect to the prior ranking legacy arrangement and that he had a copy with him which could be signed there and then. However DR's signature would need to be witnessed and none of those present could act as a witness. JCR knew that there was a nurse in the house who had brought in tea and suggested that she could act as a witness. DR said that she did not want the nurse to be involved in the matter. …"

It was agreed that JCR would come back the next day with a suitable witness. After further discussion Deirdre said that she would like Chris Scott, a solicitor in Burness who was known to her, to act as witness.

6 May 2010

[94] The next morning, 6 May 2010, JCR sent HT an e-mail thanking her for her help and explaining what had happened. He said that he had described HT's recommendation to DMD and WSH and they had all agreed to recommend it to Deirdre if she wanted the refinancing of the

company to have priority. He went on to say that they had seen Deirdre in the evening of 5 May "and whilst physically very frail she was fully alert and understood what was going on". She had confirmed that she did want the refinancing to have priority over other bequests. He said that they had explained that the refinancing would only proceed if the directors of the company and they as trustees were satisfied that it was a sensible investment to make. He then explained in the e-mail why the codicil had not been signed then and there and that it was going to be signed later that day. He added that he had been told by WSH that both houses in Guernsey had been sold and the proceeds were with Adam & Co in Edinburgh. He also added that they thought there was about £1.7m available including cash from the pension scheme, but they were not sure whether there was also death in-service cover for Deirdre. WSH was looking into it.

6 May 2010 – signing the codicil

[95] Later on 6 May, JCR and WSH again went to see Deirdre at Heriot Row. As arranged, Chris Scott ("CS") was with them. He was there to witness Deirdre's signature. There was some uncertainty about the time of the meeting. According to the note taken by JCR, it took place at 4 pm. CS also took a note. In his evidence he was able to confirm by reference to his diary that the meeting took place at 6pm. I accept his evidence as to the time of the meeting. It may have been intended at one point that the meeting would be earlier. This potentially has a bearing upon the deceased's condition at the time, because her condition at any particular time was dependent to some extent upon when she had taken her painkillers. The meeting lasted for about 30 minutes. On that basis, it would have been over by about 6.30 pm (1830). On that day, so far as relevant to this meeting, Deirdre took oxycodone/ oxynorm at 1345 and again at 1745. According to the expert medical evidence, the effect of the 1345 dose would be beginning to wear off by the time the meeting started, and the 1745 dose, in tablet form, would not begin to take effect until about 1830 or 1845. So Deirdre would clearly have been in some pain during the course of the meeting.

[96] JCR's note of the meeting was in these terms:

> "JCR described again how the prior ranking legacy would work by routing the funds to the Trustees to invest if they thought it was the right thing to do. [Deirdre] confirmed she wanted to change her will to bring in this legacy and signed the codicil which was the same document as JCR had in his possession the previous day. CS acted as witness.
>
> [Deirdre] then said she wanted to make some more changes to her will and JCR arranged to return the following day with a solicitor from Turcan Connell who would take her instructions.
>
> Throughout the meeting [Deirdre] seemed to be in some pain as she kept moving one hand over the other. She was in the same seat as the previous day and was tired but she understood what was being discussed.
>
> The meeting lasted about 30 minutes."

[97] CS's note records that when they arrived they were shown into a room on the top floor, where Deirdre was sitting in a chair beneath the east window covered in a blanket from the waist

down. He observed that

> "while she was evidently very ill, her appearance was better than I had feared. Her voice was weaker and she frequently rubbed her left thigh, possibly in response to discomfort but there was no other sign of pain."

He noted that there was some discussion of the thinking behind the codicil and the objectives intended to be achieved. He explained his understanding of the codicil based entirely on what he overheard of the discussions at the meeting. It is useful to set out that understanding, since it gives a contemporaneous impression of the extent and intelligibility of the discussion. The note records it in these terms:

> "The idea seemed to be that [Deirdre] had always wanted to leave interests in the Dunfermline Press etc publishing business to certain relatives and was also anxious to do what was right for the business to which she had dedicated much of her life. There had been negotiations with BoS as regards a debt to equity exchange in which BoS would convert the debt that could not realistically be serviced by the group into equity. Negotiations continued on the extent to which new equity should be introduced by the current shareholders. It appeared that the largest amount BoS would require from [Deirdre's] trust, which would succeed to her shares (or indeed perhaps already held them) was £3m. JCR and DMD were Trustees of this trust. Negotiations continued and it was possible that less than £3 million would be required but [Deirdre's] wish was for the sum to be available for investment in such a reorganisation.
>
> There was discussion of whether [Deirdre's] net assets were sufficient to cover this having regard to the other bequests etc she wished to leave. WSH thought that the house at Heriot Row would require to be sold. Account was also taken of the value of [Deirdre's] SIPP, death in-service payments from her employer etc.. Advice should be sought on whether the SIPP and death in-service payments could be the subject of trust nominations to remove them from the scope of the inheritance tax charge which would otherwise apply to her estate. None of those attending knew the answer and this would be referred to HT. There was also discussion of the carer couple [i.e. the Maxwells] getting [Deirdre's] house in Fife and that this would deal with her goddaughter (their daughter) also. [Deirdre] reported that her sister Elizabeth had been trying to contact her regularly because "she wants money". [Deirdre] seemed not to have been taking these calls, finding them a nuisance.
>
> WSH seemed to have the most detailed understanding of [Deirdre's] financial circumstances and he provided the bulk of the responses on what funds were available/assets existed etc.
>
> JCR produced the codicil and passed it to [Deirdre] who reviewed it briefly and then signed it. It was then passed to me and I counter-signed it and added my witness details. There was provision for a testing clause to be added but this was not undertaken at the time. …
>
> We then left and met the carer couple and IR on the ground floor. The carers explained that [Deirdre's] pain was being managed with morphine and that they had tried to get the

balance right so that she was clear enough to deal with business affairs but not in too much pain as to be distracted by it. There was agreement that [Deirdre] had been clear in her instructions and indeed a joke was made between JCR, WSH and IR that with [Deirdre] one was never in doubt as to what her instructions were. I remarked that I had found her very clear and also after leaving the property and speaking to JCR I commented that I had been impressed by her appearance and her continuing desire to do the right thing notwithstanding her health problems.

I thought that [Deirdre] was of full capacity throughout. All of the interactions were entirely clear and rational and while she took note of advice from JCR and WSH as long-term trusted advisors and co-directors, there was no question of facility and circumvention either. [Deirdre] continued to know her own mind and was able to articulate her wishes clearly."

The codicil of 6 May 2010

[98] I have set out the terms of the codicil earlier in this Opinion. I do not need to repeat its terms here. It is important to note that it was the codicil that introduced the fundamental change to Deirdre's will by inserting the preferential legacy in favour of the DRLT. This is, therefore, one of the critical moments at which to make an assessment of Deirdre's mental and physical state.

A meeting on 7 May 2010

[99] As had been anticipated at the meeting on 6 May 2010, there was another meeting in the afternoon of Friday 7 May 2010 at which Deirdre discussed the possibility of further changes to her will. This meeting was attended by JCR, WSH and DMD and, for part of the meeting only, IR. HT was still in Guernsey so her assistant, Lindsay McCulloch ("LM"), attended the meeting in her stead. The meeting lasted for about an hour or an hour and a quarter. It is not clear precisely when the meeting took place that afternoon. Deirdre took doses of oxynorm at regular intervals of almost 4 hours throughout the day.

[100] Before looking at LM's note of the meeting, it is useful first to look at that made by JCR. It is briefer and gives an overview of the whole meeting. JCR's note states that Deirdre "seemed in some pain but was alert". The note continues in the following terms to describe the way in which the meeting proceeded:

"LM went through her existing will and [Deirdre] gave her instructions on various changes she wanted to make. There was discussion about the amount of a legacy she wanted to leave to her secretary Sandra Thomson. [Deirdre] settled on £30,000 and remarked that Sandra would be singing from the hills over that amount.

Whilst IR was present there was discussion about various items such as paintings and rugs which he would like to have. A number of items were identified to LM. [Deirdre] said that he could not have the rug in the drawing room as that should go back to Guernsey. At one point IR raised the possibility of him having some more items but [Deirdre] said that was enough and that she did not want him to have any more. …

> JCR suggested that it would be better to prepare a new will so that the terms of the old Will were kept private from the beneficiaries, as especially [Deirdre's] sister Lizzie may be upset about the introduction of the prior ranking legacy. [Deirdre] said that this should be done.
>
> We left and LM arranged that the new will would be prepared by [Turcan Connell] and brought to [Deirdre] for signing."

The point made in the pre-penultimate paragraphs of that note – to the effect that Deirdre was strong enough to say "No" when Iain asked for some other item – is confirmed in LM's account of the meeting. In JCR's note it is suggested that the idea of a new will, to avoid beneficiaries being upset by changes made to their disadvantage, came from him, but LM's account suggests that it came from her.

[101] LM's account of the meeting is important, even as regards those parts of the will which do not directly form a part of the present dispute. I therefore set out her evidence on what was said at the meeting in some detail. LM said that HT had telephoned her from Guernsey and had explained that Deirdre, who was ill with cancer, wished to make further changes to her will. HT asked her to go to the meeting with the executors and Deirdre, LM had never met either Deirdre or Iain and, if I noted her evidence correctly, had never met the executors either. She took out the client file which contained the 2008 will and the new codicil. She made multiple copies of the 2008 will and took them to the meeting together with the codicil, a summary of which had been prepared for her, and a notebook. She met JCR, and possibly the other executors, outside Heriot Row. They went upstairs. Deirdre was in a chair in the corner. She was introduced and they shook hands. They all sat down, with Deirdre in the corner and the remainder of the people present being seated around a coffee table. Someone (she did not know who this was) brought in a tray of tea and biscuits. She noted that the relationship between Deirdre and Iain appeared to be "entirely comfortable". Deirdre asked if Iain could stay before the meeting but Iain himself said "No", he would leave. Only at a later stage did he come back into the room, at Deirdre's request, to discuss the destination of items purchased during their marriage.

[102] At Deirdre's request she gave everyone a copy of the 2008 will. Deirdre suggested that they should go through each clause in turn and that she would say what changes she wanted made to it. LM then went through the will clause by clause. She would read out a clause and then ask Deirdre whether she was happy with that or whether she wanted to make changes? If Deirdre wanted to change something, LM noted it down. She said that it was noted at the meeting that the preferential legacy in the codicil would have priority over other bequests. Under cross-examination in court, LM confirmed that the preferential legacy was simply noted as already having been dealt with. It had been signed off and put to bed. It was not discussed afresh. So far as concerned the legacy in clause 4.2 of the 2008 will, which was a direction to the trustees to sell Heriot Row and its contents and make over the net sale proceeds to the pursuer, LM said that it was recognised at the meeting that there would not be enough in Deirdre's estate to satisfy both that legacy and the preferential legacy added by the codicil. This had led to a discussion about the value of the estate. Each of the executors gave their views on this. At the end of the discussion it was agreed that the legacy to the pursuer should be changed; and a figure of £1 million was fixed upon as the legacy to her to be included in the new will. The conversation then turned to

clause 4.3, which was the bequest of the property at 45 George Street, Cellardykes, to her goddaughter, Jennifer Baird (the daughter of Sandra and Brian Maxwell). It was noted that it had been sold and that this clause therefore had to be deleted. It was decided to include Jennifer in the bequest to her parents of 49 George Street, Cellardykes, in clause 4.4 of the will. There was discussion about the boat "PRESS AHEAD" mentioned in clause 4.5. Deirdre was concerned about her nephew Hugh Donnelly getting the boat. He was young. The boat was powerful and possibly worth about £150,000. It would require expenditure on upkeep and maintenance. LM suggested setting up a trust but Deirdre did not think that was necessary. She wondered about giving him a cash legacy instead but in the end decided to leave the bequest as it was because she trusted his parents to look after him. They next discussed clause 4.6 of the 2008 will in which Deirdre had left her jewellery to the pursuer, "to be retained by her or divided amongst my family and friends as [she] in her sole and absolute discretion shall decide." She decided to leave this clause as it was. There was a lot of discussion about clause 4.7, which gave shares in the company to various employees. The background to this discussion was the proposed refinancing and she wanted to leave something to those who might not be involved in the refinanced company. Finally, there was discussion about the residue of her estate being held in discretionary trust in terms of clause 5.5 of the 2008 will. LM was told that Deirdre's mother had died but that the clause was still valid. LM explained that a letter of wishes could be prepared to accompany the discretionary trust; but, since she received no instructions to do this, she did not in fact draft one.

[103] After going through the provisions of the 2008 will and noting proposed changes, LM asked Deirdre if there was anything else she wanted to do. Deirdre said that she wanted to consider certain specific requests and legacies. She wanted to give a sum of money to Sandra Thomson. She asked the executors what they thought she should give her. They settled on £30,000 and expressed the view that they thought she would be "extremely happy" with that. There was a discussion about the bequest to the children of her sister Susan. They lived in the United States and it was agreed that the executors would pick something out for them. She wanted IR to have some items which they had bought together during their marriage. She also asked each of the executors to choose something, but they were embarrassed and said No, they were not comfortable with doing that.

[104] Towards the end of the meeting, LM suggested that it might be preferable to draft an entirely new will rather than make these changes by way of codicil. LM explained that sometimes a person would not want beneficiaries to know what they had been going to get before the changes. Deirdre agreed. She asked LM to draft a new will and e-mail it to JCR who would take it round to her.

[105] At this point IR came back into the room. It was agreed that once it had been decided which items he was to have, he would walk around the house with LM pointing them out. He and Deirdre spent some time talking about what items they had bought when they were married. Some were of sentimental value, one was bought in Paris, and so on. As regards at least one item which Iain wanted, Deirdre said: "no, that is going to someone else". LM thought that Deirdre clearly wanted him to be there.

[106] LM was asked about Deirdre's condition as she observed it during the meeting. She noted that before the meeting started Deirdre held her own cup of tea without assistance. She described her as "very ill", "frail", "pale", with a collar around her neck. She noted that Deirdre rubbed her

arm a little from time to time and thought that she must be in some pain. She said that Deirdre became tired at some stages of the meeting, and from time to time took a minute or two out to rest. She seemed tired and in pain. But she did not doze off. After a short rest she would resume. She was able to communicate effectively. She could be heard clearly. LM said that making a note of what was decided at the meeting was quite difficult because Deirdre was jumping forwards and backwards, from one point to another. From time to time she would have to say: "is this the final decision?" Even at the end of the meeting Deirdre was still able to communicate and, indeed, was at times quite forceful. LM said that nothing that she observed caused her any concern about Deirdre's capacity to make a will. She had no doubt that the instructions given by Deirdre were her instructions, and that it was she who asked others for their views rather than those others imposing their views on her. She thought that Deirdre was "very much in control". LM said that she was there to make her own judgment about whether Deirdre was able to carry on. In her view she was. LM said that she was using her legal training and knew that she was required to make a judgment about this. She asked herself: does Deirdre understand what is being discussed; and does she understand the nature of the bequests she is proposing to make? She was satisfied on both counts.

[107] The meeting ended by LM saying that she would report to HT over the telephone. Deirdre asked for one of them (i.e. LM or HT) to e-mail a draft of the proposed new will to JCR so that he could take it round to her. LM said goodbye and then walked around the house with IR for about 5-10 minutes, noting the items which it had been agreed would be left to him. She then phoned HT who was at that time in the airport. HT said that she would go straight into the office. It was agreed that LM would e-mail her the instructions which she had taken from Deirdre concerning the proposed new will. LM then typed the e-mail. It was agreed that she would leave the drafting of the will to HT.

[108] A copy of LM's e-mail to HT was referred to. It is timed at 1923 on 7 May 2010. It is relevant to note the introductory section of that e-mail, before it set out the detailed instructions concerning particular clauses in the will. LM said this:

> "I attach a copy of Deirdre's Will and Codicil.
>
> It was very difficult to get clear instructions as although Deirdre clearly knew what was going on and understood what was being discussed, she found the process very tiring and changed her mind about things several times.
>
> Deirdre confirmed that she was happy for a draft new Will/Codicil to be emailed to the trustees and John [i.e. JCR] agreed that he would take the draft round to Deirdre to make sure she is happy with it before signing. John would like you (or me or Donald [Simpson]) to go around and act as a witness when the signing is taking place.
>
> Deirdre and the trustees would like an entirely new Will to be drafted so that the old Will will not be seen by anyone. Although I think Deirdre will still be able to sign her name I agree with you that it may be too much for her to deal with the signing of an entirely new Will."

LM was cross-examined about the paragraph in which she said that it was difficult to get clear instructions. She said that this did not indicate any incapacity on the part of Deirdre; it was simply that Deirdre would chop and change, move on and then come back to things which had already been dealt with.

[109] Some time during the next week or so LM prepared a File Note setting out what happened at the meeting. I need not refer to this in detail. In that File Note, she described Deirdre's condition when she first met her on her arrival for the meeting as "quite alert". The File Note referred to Deirdre's nephew, Hugh Donnelly, being only 15 years old when in fact he was older than that. When asked about this in cross-examination she said she did not remember who had told her that he was only 15. Nor did she remember who had said that Deirdre's "nieces" were living in the United States. It was put to her, and indeed I took it to be accepted, that this was an error since one of the so-called "nieces" was a boy called "Gene", which LM had misunderstood to be "Jean". She had simply picked it up wrong. The File Note recorded that clause 4.6 (dealing with the jewellery) was "to be left as it is".

[110] Under cross-examination, LM said that she did not know the extent of Deirdre's estate. From listening to Deirdre's discussion with the executors at the meeting, it appeared to her that there would be sufficient assets to meet the proposed new legacies. Deirdre said that the proceeds of Heriot Row would form the legacy to the trust while the remainder would be available for the other legacies. LM did not explain to Deirdre that in the event of the estate being insufficient to meet all the legacies, the gift to the Maxwells of 59 George Street, Cellardykes, being a bequest of specific property, would rank above any monetary bequests other than the preferential legacy. Deirdre appeared to think that all her gifts in the proposed new will would be fulfilled. However, there was no discussion at the meeting about any gifts made by Deirdre during her lifetime which might fall to be taken into account for IHT purposes. As it turned out, the value of the assets left in Deirdre's will was insufficient to enable the executors to meet all the bequests. This was in large part due to the lifetime gifts made by Deirdre, and their effect on the calculation of IHT. It turned out that there had been substantial gifts and sales at an undervalue. As a result, a number of the legacies fell to be abated. This particularly affected the bequest of £1,000,000 to the pursuer, for the reasons set out above. But for the fact that there had been such lifetime gifts, the SIPP and the death in service benefits might well have been enough to cover all IHT liabilities.

[111] Finally, on this point, LM was asked in cross-examination whether she was not concerned about this a potential conflict of interest between Deirdre on the one hand and, on the other, the executors who were advising her (or were at least present) when she was making decisions about her will. They, as directors, had an interest in procuring that Deirdre left the preferential legacy of £3 million to the trust for the purposes of re-financing the company. LM said that she was not concerned about their presence at the meeting or their involvement in the discussions. There was no reason why a testator should not receive advice from someone who might have an interest in what was to go into a will. But in any event, the codicil to give effect to the preferential legacy had already been signed. That was what Deirdre wanted to do.

8 May 2010

[112] On the basis of LM's e-mail to her on the evening of Friday 7 May 2010, HT drafted a new will making the changes noted in that e-mail. At 2150 that evening she emailed JCR, WSH and

DMD, attaching a draft of the new will and inviting them to telephone or e-mail her "with any comments or to discuss". There was no problem with this; Deirdre had asked for the will to be circulated. The next afternoon (Saturday 8 May 2010) she attended Deirdre at Heriot Row. The meeting lasted for about an hour, from about 4.30 to 5.30 pm. She was let into Heriot Row by Jennifer Baird. She went up to the bedroom. Deirdre was sitting up in bed. She was awake and smiling. There was a lot of fuss about making tea. IR was in the room but left before there was any substantive discussion. HT and Deirdre were then left alone. She explained in evidence that she was trying to get a sense of Deirdre's condition. She explained that Deirdre was physically much altered from 2008, when she had last seen her. She appeared to be in pain – she rubbed her leg from time to time – but was extremely composed. The pain is not surprising. Deirdre had last taken and oxynorm tablet at 1300, some three hours and a half before the meeting began and four hours and a half before it finished. She took another oxynorm tablet at 1745, almost immediately after HT left. HT said that she appeared focused and not in any way distracted by the pain she must have been feeling. She would pause once or twice, but was perfectly rational. The meeting was perfectly normal. They would talk about something and, if Deirdre could not make her mind up, they would go on to talk about something else before coming back to it.

[113] HT described how she went through the draft new will with Deirdre she raised the question of the legacy to the trust and Deirdre confirmed that that was what she wanted. She explained that it was a preferential legacy, and explained what that meant, and Deirdre confirmed that she was happy with that. She explained that if the legacy to the trust did not in the event go to the company, for whatever reason, it would still be available to go to the family as discretionary beneficiaries thereunder. At the end of discussing the main terms of the will, Deirdre asked if Iain could join them. He did, and there was then discussion about jewellery and other items. Deirdre was going through her jewellery and selecting particular items for various people. Those were being put in envelopes, marked with the names of the intended beneficiaries, and then put back in her safe. Iain was helping her with this. There was discussion about the boat and a thought, which she then rejected, of giving it to Hugh's father, John, rather than directly to Hugh.

[114] HT's evidence about this meeting was confirmed by her file note. That file note recorded that during the meeting

> "… Deirdre appeared entirely clear about her intentions. She appeared to be in some discomfort or even pain, but this did not appear to affect her reasoning and communication."

HT returned to the office to make the amendments to the will indicated by Deirdre and telephoned IR about arranging to have it signed. IR felt that Deirdre was too tired that evening and it was agreed that HT would contact him again on Sunday 9 May.

9 May 2010 – signing the 2010 will

[115] HT returned to Heriot Row on Sunday 9 May 2010 at about 1 pm, according to her note. She was met by Brian Maxwell who took her up to see Deirdre. He explained that his wife, Sandra, had tried to ensure that Deirdre would be in as good a state as possible to sign the will. This suggests that Sandra Maxwell had a say in when Deirdre took her medication. According to HT, the meeting lasted about half an hour, though this does not tie-in with Sandra Maxwell's evidence

that it ended at about 1445. HT said that Deirdre seemed to be in much the same state as the day before. She did not notice any change in her physical demeanour. She did not have any concerns about Deirdre not understanding any aspect of what was going on. There was no issue about her ability to give instructions. She was frail and in pain, but that did not affect her ability to understand what she was doing. There was nothing to suggest that what she said did not reflect her firm and free will. IR appeared to be a comforting presence for her. IR was present when she arrived but left before she went through the will with Deirdre

[116] When IR was away, HT briefly summarised the changes that had been made to the previous draft. The bequests of personal items had been set out in separate informal writings. Deirdre confirmed that she was happy with that. She said that she felt able to sign the will personally, and did so. She also signed the letters of wishes. This caused her some difficulty, but her signature was quite clear.

[117] On the subject of the boat, "PRESS AHEAD", HT had removed this bequest from the will because she was uncertain what Deirdre intended to do about it. But she had brought a separate informal writing that could be signed or not depending upon what Deirdre decided. After some discussion with IR, Deirdre decided simply to leave an expression of wishes to her executors about it. The income from it was to go to her brother John and her nephew Hugh. She did not make any decision about whether the boat would be given to John in the longer term.

[118] The terms of the 2010 will have been set out above. I need not repeat them here.

[119] Whether the meeting started at 1 pm or some time later, and however long it took, Deirdre must have been in very great pain indeed throughout it. The only doses of oxycodone/oxynorm taken by her that day had been at 0215 and 0645. The next dose was at 1445, which on one view ties in with Sandra Maxwell's evidence about timing. The 0645 dose would have worn off long before the meeting started. It may be that Deirdre deliberately did not take another tablet before the meeting started so as to ensure that she had clear head, despite the heightened pain that that would produce. Be that as it may, HT was satisfied that, though frail and in pain, Deirdre was able to understand what was going on. I see no reason not to accept that evidence.

Later events up to and beyond Deirdre's death

[120] Deirdre died on 17 May 2010. Iain remained in the house until after her death. In the days before her death various members of her family came to see her. This led to a number of arguments and, for want of a better word, general unpleasantness. I do not propose to go into this in any detail. It is enough to give the flavour of what the pursuer understood was happening, though there are two sides to every story. It was the pursuer's understanding that, in the days before her death, Deirdre was being kept away from members of her immediate family. The pursuer's son, Timothy, arrived, though he had been told not to, and, according to the pursuer, was ignored by IR. Deirdre's brother, John, arrived. After some initial difficulties, he was able to see Deirdre and was shocked by her condition. He discovered Deirdre's jewellery laid out on a big table, with post-it notes being fixed onto the jewellery by IR. They had an argument and, according to the pursuer, John was treated as a troublemaker and was effectively excluded from the house. Whatever may be the truth of these allegations, the fact is that it helped confirm the pursuer's suspicion that something untoward was happening in her absence.

Decision and Reasons

Capacity

[121] It is convenient to consider first the question of capacity. This is a question which has to be taken seriously. The expert medical evidence suggests that, because of the combination of pain and nausea and the side effects of the painkillers, there were times when Deirdre may have been mentally disorientated or exhausted, unable to focus properly on the matter in hand. I do not say that this was necessarily the case, merely that there was the potential for it to be so. But even assuming this to be the case, none of the evidence suggests that she was permanently incapacitated mentally so as to lack all capacity throughout the period with which this case is concerned. That being so, the question has to be whether it can be shown that she had capacity on the particular occasions in May 2010 when she made decisions about her will. I put it that way because the burden of proving capacity lies on those seeking to enforce the will. That question must be answered on the basis of all the available evidence, including both the medical evidence and the evidence of those who were with Deirdre at the relevant times.

[122] It would be wrong to start from the position that the medical evidence makes it unlikely that she had capacity on any particular occasion. While she clearly suffered pain and nausea and was probably considerably affected by the side effects of the drugs she was taking, that does not necessarily mean that she never lacked capacity, still less lacked capacity on any particular occasion. The painkillers would have worked, to some extent at least, in alleviating the pain she was suffering. Nor do I draw any adverse inference from the fact that the contents of the codicil and the 2010 will came as a complete surprise to the pursuer and many of her family. The fact is that Deirdre had for some time been involved in discussions about resolving DPL's financial difficulties and had been amenable to the suggestion that she inject a considerable amount of equity into the company. Indeed, in her discussion with GM at the beginning of May 2010, before the idea of a preferential legacy was first raised by HT, Deirdre had mentioned the possibility of putting £3 million of new money into the business. That being the case, it was not a giant leap for her to agree a device by which she could leave that sum in her will to the trustees of the DRLT for them to invest in the company if that seemed to be the right decision at the time. In other words, the decisions which she made, and which were embodied in the codicil and the 2010 will, flowed naturally (albeit not inevitably) from the detailed consideration given to the matter by her and others in the preceding two or three weeks. The preferential legacy was not so wild, inexplicable or unheralded as to justify the inference that she cannot really have known what she was doing.

[123] I have set out at some length the evidence from HT, CS and LM about their discussions with Deirdre because, so it seems to me, apart from a very natural professional pride, they cannot be said to have had any interest in pretending that Deirdre was of sound mind when she was not or in upholding the validity of the codicil and the 2010 will. That is not to say that I had any doubts about the basic truthfulness of the evidence given by the defenders, JCR, WSH and DMD. I did not. Had theirs been the only evidence about the discussions which took place with Deirdre, I would happily have accepted and relied upon their evidence. But that is unnecessary in this case because of the presence on most, although not all, occasions of solicitors who were able to speak to what went on without any fear of being accused of partiality or self-interest. On the one occasion when no solicitor was present, namely the meeting on the afternoon of 5 May 2010, when JCR, WSH and DMD visited Deirdre at her house in Heriot Row, the account given in the note of the

meeting prepared by JCR is an account which is wholly consistent with what happened over the following days. The solicitors' notes of the subsequent meetings provides a cross check, confirming the reliability of JCR's note of the meeting of 5 May 2010.

[124] In their evidence, HT, CS and LM all gave their assessments of Deirdre's capacity to understand what was going on and to make decisions. CS, who saw her when she signed the codicil on 6 May 2010, noted that Deirdre seemed to be in pain but understood what was being discussed. Later in that note he observed that Deirdre seemed to be "of full capacity throughout", commenting that her interactions with others at the meeting "were entirely clear and rational". She "continued to know her own mind and was able to articulate her wishes clearly." It is clear from his note that the discussion at that meeting covered the same matters as had been discussed at the meeting the previous day when no solicitors were present. CS, who had no prior understanding of what was intended, was able to provide an accurate summary of the changes to the will and the reasons for such changes based on what he heard discussed in front of Deirdre. The meeting of 7 May 2010 was attended by LM, HT still being in Guernsey. The account she gave made it clear that there was a considerable amount of discussion between Deirdre, herself and others about the changes she wanted to her will, a discussion which included consideration of the value of the estate. In her evidence, LM said that she had been trained to make a judgment about the legal capacity of a testator, and she did so. She was clear that nothing that she observed caused her any concern about Deirdre's capacity to make a will. Deirdre, she thought, was "very much in control". HT attended on Deirdre on 8 and 9 May 2010, the first time with a draft will which they went through together and the second time with an amended will which Deirdre signed. She noted that at the meeting on 8 May 2010 Deirdre appeared "entirely clear" about her intentions. She stated in respect of the meeting of 9 May 2010 that she did not have any concerns about Deirdre not understanding any aspect of what was going on.

[125] I am persuaded by this evidence, in addition to evidence given by the defenders themselves, that at the time of discussing the changes she wished to make to her will, both in the codicil and the 2010 will, and at the time of executing those documents, Deirdre had full capacity. She understood what she was doing and she had the capacity to understand the assets at her disposal and the obligations to which she would or might wish to give consideration. The pursuer's case on incapacity fails.

Facility and circumvention/ undue influence

[126] Mr McNeill QC, for the defenders, submitted that if the pursuer's case on incapacity failed, it was bound to fail also on facility and circumvention and undue influence. I do not accept this. The question of legal capacity is quite different from these other questions and raises different issues. Indeed, fundamental to a consideration of facility and circumvention and undue influence is that the testator (or other actor) has capacity. The complaint which has to be addressed in such cases is a complaint that, to put it crudely, the deceased, having had the capacity to make decisions concerning her testamentary dispositions, came under pressure to make particular decisions when she was mentally too weak or facile to resist. In phrasing the issue like that I am not overlooking that there are distinctions between facility and circumvention on the one hand and undue influence on the other. But the premise underlying both concepts is that the testator is able to make and communicate decisions, knowing the nature of those decisions and understanding, or

being capable of understanding, the implications of those decisions (including such matters as the property being disposed of, the claims and obligations to which she might wish to give consideration, and so on); but that because his or her mind is facile (weak or pliable) or because he or she is overly trusting, the testator has allowed herself to be put upon or pressurised into making particular decisions, has allowed her independent judgment on such issues to be overborne by others.

[127] From the vantage point of the pursuer, it is not difficult to see how this impression has been created. It had been assumed that Deirdre was leaving a substantial part of her assets to the pursuer. Over the last two weeks or so of her life that changed considerably. Although under the new will she was to receive £1 million, that gift was illusory. Out of the blue Deirdre had decided to leave £3 million to the trustees of the DRLT, to be invested in the company if they thought that sensible but otherwise to be held as part of the trust assets. If the company prospered as a result, the net beneficiary was Deirdre's estranged husband, Iain. If the money was not invested in the company, but was added to the trust fund, the immediate beneficiary was Deirdre's estranged husband, Iain, who was entitled to the income from the trust. Iain was present throughout the last two or three weeks of Deirdre's life, while the pursuer and her family were, as they construed it, excluded, kept in ignorance of the severity of Deirdre's illness and discouraged from visiting her or being with her during her dying days. I have no reason to doubt the genuineness of the pursuer's belief that something untoward was going on. To her mind Deirdre was surrounded by a few close advisers who had the interests of the company at heart as well as the interests of IR, a person with whom they were on intimate terms. To her mind it was clear that Deirdre was put under pressure to change her will so as to make available that sum of £3 million for investment in the company and/or in the trust assets, at a time when Deirdre was desperately ill and in no position to resist that pressure.

[128] Having heard all the evidence, however, having listened carefully to and read the pursuer's submissions, and having given the matter careful consideration, I am satisfied for the reasons set out below that the pursuer's case on both of these points must fail.

[129] It is clear that the decision to use some of her capital to help rescue the company did not come "out of the blue" at all. It was a matter which was under discussion for quite some time. Even before the discussions towards the end of April, Deirdre was clearly toying with the idea of selling Heriot Row to release some money to help the company. That was made clear in the evidence of George Tait, a retired solicitor and friend of Deirdre. He was involved in buying and selling houses and had bought a house for Deirdre many years earlier. Back in September 2009 Deirdre spoke to him about the possibility of putting in train the sale of Heriot Row. No specific reasons were given for the sale except that she wanted to use the money "elsewhere". That suggested to Mr Tait that she was thinking of putting the money into her business. That seems to me to be a fair inference. Although two possible buyers expressed interest, the proposal to sell petered out. Nonetheless, it is of importance. Even if the money was not be put into the business, and it is difficult to think of any other reason why Deirdre would have wanted to sell Heriot Row at that time, the suggested sale meant that she was not necessarily fixed on her intention to leave Heriot Row or the proceeds thereof to the pursuer. But subsequent events, before any mention of the preferential legacy, showed that she was seriously considering investing in the company to prevent it from folding. Professor Percy, a chartered accountant who was involved with the DPL

pension scheme, gave evidence of discussions with Deirdre in 2009 which suggested that she planned to put money into the company. I accept that evidence, and the evidence given by a number of witnesses that the company meant everything to her and she was determined to do what she could to help save it. The Project Destiny discussions with EY show her to have been closely involved. EY were appointed by a letter of engagement dated 4 December 2009. There is no reason to doubt that Deirdre was privy to that appointment. She attended a meeting on 27 January 2010 with Gary Davison and Richard Williams of EY, along with WSH, GM and GF, at which various proposals were discussed. After Gary Davison of EY provided a document dated 16 March 2010 setting out an update of their findings and communicating their views and recommendations going forward, she was involved in a conference call on 18 March 2010 with him and Richard Williams. On 26 April 2010 Richard Williams sent her (and others) a long e-mail summarising the progress of Project Destiny. That email mentioned the "theoretical conversation" with the bank about the injection of fresh equity of £3 million. It was after that e-mail that Deirdre told GM that new money, likely to be in an amount of £3 million, would be put into the business. I note that Richard William's e-mails of 4 and 14 May 2010 setting out further developments were not copied to her but I infer that by then, after the cancellation of the meeting arranged for the week of 26 April 2010, EY had come to know that she was seriously ill. Whatever may be the explanation for them not copying her in on these two e-mails, they do not detract from the clear evidence that Deirdre was involved in and approved the tenor of the proposals coming from EY, which included proposals for the injection of fresh equity.

[130] The difficulty which presented itself as Deirdre's condition worsened was that there might not be time to resolve the discussions before she died. As matters stood, if she died before the discussions were resolved, hopes of an injection of fresh equity in that amount into the company would be dashed. On the other hand, she could not there and then put the money into the company. She did not have the liquid cash and there was no proposal as yet acceptable to the bank. Accordingly, it was to be expected that she would be delighted with the proposal put to her by JCR and others on 5 May 2010, at the suggestion of HT, that she could achieve what she wanted by the preferential legacy route, creating the possibility of that injection of fresh equity if that seemed the appropriate course but not committing her or her estate to put money in if it did not seem sensible. It appears from JCR's note of the meeting that Deirdre seized on the opportunity of going down that route, it being confirmed to her that if she got better she could cancel the provision in her will for a preferential legacy. In other words, she recognised that the preferential legacy was a fall-back position in case she died before the Project Destiny proposals were finalised and agreed with the bank. On 6 May 2010 Deirdre confirmed that she wanted to do this and signed the codicil. I have no reason to doubt that she did so being fully aware of what it entailed. I also have no reason to doubt that she did so because it represented a means of achieving what she wanted to achieve, namely to do her best to help save the company.

[131] It is true that before the suggestion was presented to her at the meeting on 5 May 2010, she had given no thought to the idea of leaving money for that purpose in her will. The question had not arisen, since until the end of April she was determined that no one else should know about her condition. But once her condition was known about, and JCR and WSH took steps to explore the legal position with HT, with the result that HT suggested the preferential legacy, there is no reason to think that Deirdre would have wanted to resist the idea. The company was what she lived for;

and she wanted if at all possible to ensure that the company survived. The preferential legacy was the means of achieving that if it were possible.

[132] I should add that there was no thought in anyone's minds of her doing it to benefit IR. The preferential legacy was conceived by HT without any thought that it might benefit IR.

[133] In some cases the terms of the deed or changes to the will might themselves excite suspicion that the actor or testator has been subjected to pressure, to do what he or she would not otherwise have done. This is not such a case. By executing the codicil and subsequently the 2010 will, Deirdre gave effect to a scheme which was being conceived, as part of Project Destiny, in the months and weeks leading up to her death. While it was only at the last moment that a solution was proffered to the problem of what would happen if she were to die before the proposals had been negotiated and agreed with the bank, that solution was wholly consistent with what had gone before. It was, of course, by no means inevitable that Deirdre should have agreed to this particular proposal. She might, on the contrary, have decided that she preferred, after all, to adhere to her previous will. But it comes as no surprise that she did decide to accept the idea of the preferential legacy and to change her will to give effect to it. It certainly does not raise any suspicion that undue pressure was put on her.

[134] The evidence from all who surrounded Deirdre at the critical times was to the effect that, in discussions concerning the codicil and subsequently the 2010 will, she was at all times lucid and coherent, clear in her own mind as to what she wanted to do. LM, for example, who attended the meeting on 7 May 2010 when the possibility of further changes to the will was discussed, was left in no doubt that the instructions given by Deirdre were her own instructions and that Deirdre was very much in control. Other evidence is to the same effect. I have mentioned this point in the context of the discussion about capacity, but the same points are apposite here. There is simply no evidence that her mental state was so fragile as to leave her capable of being easily swayed by pressure exerted by others. The clear impression given by the evidence is that if someone had tried to pressure her into doing something, she would have put her foot down. She was always in control at these meetings. A small incident confirming this is when she told IR at the meeting of 7 May 2010 that he could not have a particular item because it was going to someone else.

[135] Nor is there any evidence to suggest that she was unduly influenced by those whom she trusted. The defenders, JCR, WSH and DMD were close and trusted friends and business associates. That is why she had made them trustees and executors as well as directors of DPL and associated companies. But in my judgement the relationship was not such that she would simply do what they said. It is true that the suggestion of the preferential legacy was put to her without any forewarning in the afternoon of 5 May 2010 by the three of them. They appeared at Heriot Row with a codicil ready for her to sign. But she did not sign it then. Nor did they put any pressure on her to sign it then. She specifically chose CS, a solicitor with whom she was familiar, to come to her house and witness her signature. The next day, when he came to act as witness, the matters were discussed again in front of him and he was confident that she both understood what was being said and freely agreed to go ahead with the preferential legacy. Further, it was Deirdre herself who decided that she wanted to make further changes to her will. She mentioned this on 6 May 2010 and the matter was pursued the next day when LM attended. Although JCR, WSH and DMD were in attendance, it was LM who went through the will and took Deirdre's instructions on the changes she wanted to make. The fact that LM, in her e-mail to HT, noted that it was very

difficult to get clear instructions simply reflected the fact that Deirdre changed her mind on a number of occasions, constantly reverting back to matters which LM thought had been settled. This suggests an active and vigorous mind, not one which was capable of being easily subverted by undue pressure or undue influence.

[136] There is one matter which potentially gives rise to some concern. I have already said that Deirdre had the capacity to understand what was going on and that her mind was sufficiently active and robust for her to make her own decisions. But there is no doubt that she must have been very tired. This is apparent both from the medical evidence and from the observations of people such as LM who attended meetings with her. There was a limit as to how long she could keep going without a rest. It is possible that, suffering from physical and mental exhaustion as she was, she did not have the mental stamina to pursue matters in as much detail as she might otherwise have done. The contrast between the time taken to prepare her 2008 will and that taken to decide upon the changes to be made in the codicil and in the 2010 will is marked. In 2008 a schedule was drawn up giving estimated values for her assets and positing different outcomes on the basis of alternative values. None of this was done in 2010. At the time the preferential legacy was first decided upon, at the meeting of 5 May 2010, there appears to have been no discussion about the value of her estate. In his e-mail the following morning, JCR made some mention of some of her assets, but it is clear that there was considerable uncertainty. For example, JCR did not know whether there was death-in-service cover which might be relevant. From CS' note of the meeting later in the afternoon of 6 May 2010, it appears that there was some discussion of whether Deirdre's net assets were sufficient to cover the preferential legacy having regard to the other bequests Deirdre wished to make. There was discussion about selling the house at Heriot Row. Some mention was made of her SIPP and her death in service payments. But matters were not resolved. It was thought that there was need to take advice on whether the SIPP and death-in-service benefits could be the subject of trust nominations to remove them from the scope of IHT. No one attending the meeting knew the answer. Yet Deirdre decided to go ahead with the codicil despite this uncertainty. There was a further discussion about the value of her estate at the meeting of 7 May 2010. It was only at this point that it was recognised that there would not be enough in Deirdre's estate to satisfy both the preferential legacy and the amount previously intended for the pursuer. It was this realisation that caused Deirdre to change her legacy to the pursuer and leave her £1 million instead of what had previously been given – she could have decided that she preferred to give the original sum to her sister, and torn the codicil up, but she made the decision to go ahead with the preferential legacy and fashion everything else around that. There appears to have been an assumption that there was enough in the estate for this smaller legacy of £1 million to be realised. But the figures were not gone into in any detail. Nor was there any discussion about lifetime gifts which would have to be brought back into account in the assessment of IHT.

[137] Had Deirdre not been ill I would have expected there to have been a more in-depth scrutiny of her financial affairs. That is what she did in 2008 and I see no reason to think that she would not have done the same in 2010 had she been fitter. But that does not mean that the codicil and the 2010 will can be set aside. Her illness meant that she was tired and, perhaps, less willing to go into financial matters as thoroughly as she might otherwise have done. Her illness also meant that there was a degree of urgency. The preferential legacy had to be done as a matter of urgency if it

was to be done at all. So there were good reasons for going ahead notwithstanding residual uncertainties about her financial position. Many people make new wills towards the end of their lives, often at a time when they are less alert mentally than they were previously. In that condition they may be tempted to cut corners, make assumptions which they might otherwise not have made, reach quick decisions when ideally they might have thought about them at greater length and in greater depth, re-assess their priorities, become more hard-nosed on the one hand or sentimental on the other, change their minds and generally make all sorts of decisions that they might not earlier have dreamed of making. In such circumstances it may well be true that the deed or will was to some extent the result of physical, mental or emotional frailty, but that does not matter. Unless there was incapacity, in the sense described earlier, or unless undue pressure or influence was used to procure the deed or will in the form in which it was executed, then the deed or will must stand. There is no basis for setting it aside.

Disposal

[138] For the above reasons the pursuer's claim fails. I shall assoilzie the defenders from the conclusions of the summons. I shall reserve all questions of expenses.