

Transcript of Proceedings

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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

P MCMURDO J

No BS1036 of 2009

BRETT JOHN MAHLO

Plaintiff

and

JOHN MICHAEL HEHIR

First Defendant

and

BENJAMIN YURI SASONOW

Second Defendant

and

ANASTASIA JANE SASONOW

Third Defendant

BRISBANE

..DATE 10/08/2011

..DAY 3

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THE COURT RESUMED AT 10.05 A.M.

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MR NEVISON: Just a couple of housekeeping matters, your Honour. Firstly, there were a range of documents that were in the trial bundle that we were going to formally put in as an exhibits. I understand my learned friend has those. I have in addition something that was omitted from that group of documents, the full printout of Mr Gallo's report and the annexures as they appear in the trial bundle. They weren't included in the list that Ms Treston has. By agreement they are to go in as an exhibit. Given that Ms Treston has numbered hers from 18 forward. Perhaps they could go in first and then mine. Sorry, your Honour.

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HIS HONOUR: No, that's all right.

MR NEVISON: Secuitous explanation this morning.

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MS TRESTON: Your Honour, can I hand up the bundle which we have exhibited from number 18 up, numbered in advance Exhibit 18 to 38 assuming that otherwise accords with the record.

HIS HONOUR: Thank you. Yes, that's very helpful, thanks. Those documents will be Exhibits 18 to 38 as is anticipated by the index.

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ADMITTED AND MARKED "EXHIBIT 18 to 38"

MR NEVISON: Yes, that is by consent, your Honour. Fortunately for all of us, they continue to bear the number that they bear, of course, on the trial bundle.

HIS HONOUR: Yes.

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MR NEVISON: From my perspective might I hand up a folder containing the reports printed of Mr Gallo, their forensic expert, together with the printed annexures as they appear in the trial bundle, bearing the trial bundle page numbers.

HIS HONOUR: So there were two reports?

MR NEVISON: There are, your Honour. However, what the divider indicates is that the documents in the front of the divider are those that appear in volume 1 of the trial bundle and the documents behind the divider appear in volume 2 of the trial bundle, but as the index to the trial bundle evidences, the first report commences at page 208 of the trial bundle. The second report commences at page 398 of the trial bundle so it's rather buried in the pile of documents just I've handed your Honour.

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HIS HONOUR: Should I make this folder then an exhibit?

MR NEVISON: Yes, your Honour.

HIS HONOUR: Which would be 39.

ADMITTED AND MARKED "EXHIBIT 39"

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MR NEVISON: 39, thank you, your Honour.

HIS HONOUR: Yes, Ms Treston.

MS TRESTON: Thank you, your Honour.

JOHN MICHAEL HEHIR, CONTINUING:

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EXAMINATION-IN-CHIEF:

MS TRESTON: Mr Hehir, on the day of Karen's death, after the police and the ambulance had been to the house, on the morning of the 28th, you went back to the police station and - sorry, I think you went first to see Anna Sasonow, is that right?-- Yes, with the police.

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And then subsequently went back to the police station at some stage. Do you remember that?-- That's correct.

And then subsequently returned back to the house at some stage on the 28th?-- Yes.

All right. You told the police that you couldn't remember whether you had actually been inside the house on the day of the 28th of May 2008, at around that lunch time period?-- I'm unsure what I've told the police. I wouldn't have told them that in the statement. That must be at a later day you're referring to.

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When you were interviewed by them in-----?-- Yes.

----- January of this year, you told them that you couldn't remember going into the house because it was all so fuzzy. Do you remember saying something to that effect?-- Yes. I went to the door and I stood at the door. Whether I took a step inside, I don't know. I know I opened the door though.

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Okay?-- But I don't recall, to this day, I can't tell you whether I did or I didn't.

That would have been about lunch time, maybe somewhere between

1 and 2 o'clock?-- I would propose that it would be much earlier than that. The police dropped me back there and whatever time they dropped me back there, it would have been some minutes after that so I would assume more it would have been between 10 and 11 or 10 and 11.30.

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You can't be certain of the time now?-- No, I can't but it was before lunch.

In fact, you told the police you didn't know whether you were there for 10 minutes or for three hours. Does that sound familiar to you?-- I don't know how long I sat in the car but I met Grant Stone and Veronica for lunch, and I would assume that would have been around 12 or 1. That day is a blur to me.

10

It is a blur, all right. So you might have gone back in the house; you can't be sure, and you don't know precisely what time you were there. Are both those facts correct?-- I know I didn't walk through the house. I know I got to the door and I just had this absolutely - I can remember the feeling of being - standing in that door and I don't know whether I took a step inside or not. If I went in the house it was only by one step. I just remember the feeling.

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You never told the police that, that if you went into the house it was only by one step, did you?-- I think I did. I remember having - telling them about how I felt.

It's the case, isn't it, that you went and met Mr Stone and Veronica Wendt for coffee, not for lunch?-- No, I actually met them for lunch at Mooloolaba. I remember we had sandwiches. I could take you to the place.

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On the 23rd of May 2008, you told us in your evidence in chief that you had some discussions with Karen on that day about her reducing her life insurance. Do you remember that?-- Sorry, can you refer - what date was that again, please?

You told us yesterday it was a conversation you had with her on the 23rd of May 2005 - 23rd of May 2008, I beg your pardon?-- Yes.

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Do you remember that?-- Yes.

And you produced the file note of the 23rd of May 2008 from your conversation with her as part of the bundle of documents from FAA?-- Yes.

And that conversation was accurately reflected, you think, in your file note of the 23rd of May in the bundle of disclosure from FAA?-- I think so.

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So you didn't discuss any estate planning issues, if I can call it that, outside what's contained in the file note of the 23rd of May 2008?-- I couldn't swear to the Court today whether we did or we didn't.

Okay?-- I would assume-----

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Excuse me, please, Mr Hehir, just answer the questions.

HIS HONOUR: I'm not sure that he wasn't going to say that was responsive to your question.

MS TRESTON: I'm not sure that he was.

HIS HONOUR: Do confine yourself to the question?-- It was -----

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If you don't do that, then I will strike it out from the evidence. What else did you wish to say?-- I would think that the insurance issue was raised because of the issues that we were discussing at that particular time and the insurance would have been discussed in pertaining to Karen readjusting her Will for the amounts.

MS TRESTON: Mr Hehir, on the 28th of May - sorry, on the 27th of May, I beg your pardon, in the - late in the afternoon, you went around and collected the motorbike from the house at Moffat Beach?-- Yes.

20

That was because you and Karen had reached an agreement that you would take the motorbike, she would transfer it to you?-- Yes. I'd paid for it right from the outset but it was registered in Karen's name.

You both paid for it, didn't you - paid for it equally?-- Not equally, no. There was a portion of the gear that was paid for by Karen but I paid for the bike and there are receipts to prove that. You'll have them.

30

As part of the agreement that you had both reached when you moved out, you were to get the bike, weren't you?-- I think that was only discussed that day that I said to Karen I was going to collect the bike. I think I was going somewhere at the time. There was a reason I wanted the bike and both the jackets, and I can't remember exactly when it was agreed but it was only agreed that day or the day before that I was going to take the bike because I was going somewhere. I forget where I was going.

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I'm not talking about the agreement of physically taking the bike on the 27th of May; I'm talking about the agreement that you would have the motorbike registered in your own name. That had been reached prior to the 27th of May, hadn't it?-- Yes, it had. I believe that Karen had been down to Queensland Transport that day.

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And that agreement for her to transfer the motorbike out of her name into your name was part of the division, if I can call it, of your assets relating to the break-up of your relationship?-- There was no discussion pertaining to that.

No discussion at all between you and Karen pertaining to that division of assets?-- No.

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Okay. She just, towards the end of May, decided of her own volition to transfer the bike into your name for no reason whatsoever?-- I wouldn't suggest for no reason. There was a discussion prior to that. I don't know whether it was during that afternoon, the conversation, or whether it had been over the weekend. I can't give you the answer because I don't remember.

What was the reason for the transfer of the bike suddenly in your name on the 27th of May?-- The original reason why was put into Karen's name-----

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No, no, the reason why it was transferred into your name?-- I'm about to answer that.

I would like if you answer the question the I ask you and not a question of your own choosing.

MR NEVISON: I object, your Honour. I think he was going -----

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HIS HONOUR: It didn't sound as if he was going to answer this question?-- I am going to answer it, your Honour, but -----

Well-----?-- -----if I give the second answer, the first - it doesn't make sense.

What I will do is I will allow you to say what you want to say and if there is an objection to that being included in the record-----

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MS TRESTON: Thank you, your Honour.

HIS HONOUR: -----I'll deal with it. You say what you believe is a response to that question which is what was the reason for transferring it into your name on that day?-- It was transferred originally - it was originally put into Karen's name because we were concerned that Jenny may want to have claim to that. However-----

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MS TRESTON: Jenny, your ex-wife?-- Yes. However, it was discussed that there would be no claim there and so that was the reason it was put back into my name.

You put the asset of the motorbike into Karen's name to defeat any claim that your ex-wife might have had to that bike as part of the matrimonial assets of your marriage?-- Because it was done-----

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Is that right, Mr Hehir? Is that what I understand your evidence to be?-- Correct, I think.

HIS HONOUR: About how much did this bike cost?-- 13,000 or 15,000. I forget.

Has it been transferred to your name?-- Pardon?

Has it been transferred to your name?-- Karen signed the documents on that way. Veronica Wendt witnessed them when she came that evening at 5 o'clock and it was-----

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Sorry, what was that?-- When Veronica Wendt dropped me off at this particular time that Ms Treston is talking about, Veronica Wendt witnessed the documents that night because Karen had been to the Queensland Transport to get the papers that day.

10

What did Veronica witness?-- The transfer documents.

Somebody's signature?-- Karen's signature.

But she hadn't seen Karen sign it?-- Karen signed that transfer at 5 p.m. or 5.30 or around 6 o'clock that night when Veronica dropped me off.

I see?-- So Veronica witnessed Karen's signature at that stage.

20

No, my question was, was the bike ever registered in your name?-- No, it isn't.

Where is it? Do you still have it?-- Yes, I do.

MS TRESTON: I thought the evidence that you just gave a moment ago was that the actual transfer was effected on the 27th of May, that Karen went down to the registration office and effected the transfer on the 27th of May?-- She collected the paperwork and it had to be signed and she came back and she signed it about 5.30 or 6 o'clock that night and that transfer - those documents have never been submitted to Queensland Transport.

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Since her death?-- Correct. I believe those records will be in your possession.

I beg your pardon, Mr Hehir?-- I believe those records will be in your possession.

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The file note of the 7th of May 2008, which was not disclosed by FAA in these - in response to the notice of non-party disclosure but was tendered by your counsel in your case, do you know the file note I'm referring to?-- Sorry, which date again, I'm sorry, I missed it?

It was the 7th of May 2008?-- Yes.

Sorry, your Honour, we don't seem to have an exhibit list between us.

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HIS HONOUR: I think it is Exhibit 15.

MS TRESTON: Thank you, your Honour is right as usual. Might the witness see that document, please, Mr Bailiff, Exhibit 15. This document, you accept, wasn't disclosed by FAA at all in response to the notice of non-party disclosure. You accept

that, don't you?-- I don't quite a hundred per cent understand what it means but I think I accept it.

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Well, no copy at all was provided to the plaintiff's side of the record until late last week. Did you know that?-- I thought it had been disclosed much, much earlier, but if you say that, that will be correct.

In any event, you say that Veronica Wendt had access to an electronic file when she turned up all the relevant documents in response to the notice of non-party disclosure. Is that right?-- Correct.

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These file notes are automated, you say, in the sense that when you type in the client's name to your computer, when a client rings in, you type in Karen Mahlo and all the client's details pop in a file note preprogrammed, do they?-- There is a series of steps but, in effect, yes.

If you look down the bottom of Exhibit 15, you see that it shows that the document was printed on Tuesday the 19th of July 2011 at 11.11.41 p.m.?-- Yes.

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Do you see that? To your knowledge, is that the first time that you printed that document to give to your solicitors?-- No, it isn't. I have given it to them earlier.

Might the witness see the bundle of documents, your Honour, that is the non-party disclosure from FAA.

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HIS HONOUR: Yes.

MS TRESTON: Mr Hehir, can you turn to page 547 of that bundle. Have you got that page there, Mr Hehir?-- Yes, I do.

You see that, on the top right-hand side, where the email address, mobile phone number, business fax, home and business number come up automatically when the file note is created, you see that?-- Yes.

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On the one of the 23rd of May, there is an extra line that appears, "Email Karen_Mahlo@health.qld.g"?-- Yes.

That doesn't appear on the file note of the 7th of May 2008?-- Correct.

There was no change in the system that existed at FAA between the 7th of May and the 23rd of May in relation to the production of these file notes?-- Enormous-----

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Has there?-- Yes, there has been.

Between those dates of two days, the 7th of May and the 23rd of May, there was a change in the production of the file notes?-- Sorry, sorry, are you talking production - when you say production of file notes are you talking about what is printed or are you talking about the data that is associated?

All right. In the information that comes up on the automated file note, when you type in "file note for Karen Mahlo", the information that came up when you were making an entry did not change in between the 7th of May and the 23rd of May 2008, did it?-- The information that I type in has nothing to do with the data that appears in the record, so when we go through and clean out emails, because at the time of when the other file note was printed, we were still sending out mass - we weren't sending out mass emails. We have had a major change in our system where we are now able to go and mass mail out and so emails of all of those that either don't want to receive an email for us or where the email isn't applicable any more, so there are thousands of emails that were taken off the system.

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Not between the 7th of May and the 23rd of May though?-- But that doesn't actually have any bearing because the file note and the data attached at the top are - one is a reporting functionality and the other is a functionality of what you have typed in. The two - you can't correlate them.

20

Mr Hehir, what you type in when you prepare one of these file notes is the content that appears under the heading "Notes". Can you look at the documents?-- Yes.

What you type in is the content that appears under the heading "Notes"?-- Correct.

Otherwise when you type in a client's name, be it Karen Mahlo's or anybody else's, the pro forma details of name, address, email address, phone number, comes into file note automatically?-- Depending on what is there at the time, correct.

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But there would have been no change in Karen Mahlo's email details between the 7th of May and the 23rd of May, would there?-- No, but there would be between the time of printing the file note-----

I see, you are saying because this was printed years after the production of the actual file note itself in May '08, different information appears?-- If we printed-----

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On 7th of May. Sorry, is that what you are saying?-- Correct. If we were to print the file note of the 23rd of May, if we were print that on this same date that-----

11 July 2011?-- Yes, if we were to print that on that same day, it would have been the same information at the top. The pro forma information would be the same.

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I see. So, even though the client's file ceases to be current about a week, less than a week after the email of the 23rd of May 2008, someone goes back in and changes some of the details in her file to remove the email address of Karen_Mahlo@health.qld."-----?-- We had three girls employed for about two months going through our whole database which is 9 and a half thousand and they took out all the irrelevant emails addresses.

HIS HONOUR: Why would the one that remains, the one that remain, that is Mahlo@flexinet.com.au be a relevant email address, given that Dr Mahlo died?-- Because Karen had died, we wouldn't want to have any of our mass emails going to that address, so Karen's address would be taken off when we went through the database to just go and cleanse out as far as emails - so anybody that we didn't want to be getting a mass email, you wouldn't send an email to there - to that address.

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MS TRESTON: Sorry, are you saying at the time this was printed on the 19th of July 2011, your work is still sending mass emails addresses to Mahlo@flexinet.com.au?-- No, it isn't.

But it is not sending it to Mahlo_@health.gov.?-- It probably is, is to be honest. It probably is.

Probably is still sending them to Mahlo@flexinet address?-- I didn't pick that up but it probably is.

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See also in the document of the 23rd of May 2008, above the heading "date", on the 7 May document there is another heading called "Created". See that?-- Yes.

It doesn't exist on the 23 May 2008 document?-- Correct. As I said, there has been a mass - we've done a lot of changes within the database. So once again, that isn't to do with the printing of the document. Prior to this, the date created was never - it never used to come up. It's always been built in there but it wasn't displayed so we have had that changed so we could always tell who created it and when.

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So now, in 2011, when you produce a document that was created in 2008, the copy that you print now wouldn't be the same on its face as the original of that file note had, say, a copy of it been printed contemporaneously in 2008 and placed on the client's file - wouldn't look the same?-- For the 23rd of May, no, it wouldn't. No, it wouldn't, correct. The content would be the same but the display and the pro forma of the report is different.

40

You can go back in and change the content even today, can't you, for a file note from May of 2008?-- Yes, we can, and that is the reason why it's got the updated date and we've got a record of it, see to the right-hand side.

Yes?-- You can never change the creation date and you can never change a creation. Nothing can ever be deleted in our system. We had it built that way from the ground up, and so the updated - everybody that updates it, there is a record of it. That's why we wanted the report changed so as we could actually see that - how it had been built.

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I see. So with these improved systems, your record keeping at FAA should be even more accurate in 2011 than it was in 2008?-- I'd like to think that we're constantly improving our systems, yes.

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So how do you explain the fact that when the police executed a search warrant on FAA in 2011 this document of the 7th of May 2008 just wasn't there?-- This was put to me the other day, and I went to - because I would challenge-----

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No, no, don't-----?-- I would - you asked me the question, so I'm answering. And so I went-----

I am not asking you to tell me what someone else has told you is the explanation, Mr Hehir, so don't go there?-- You asked me for the explanation.

No, no, what's your explanation as to why this document wasn't produced to the police in response to a search warrant executed on FAA at the beginning of this year?-- We didn't produce the document to the police. The police, as I understand it - I haven't seen a copy of this, but I - we've got evidence from - to the opposite from the-----

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No, no, no, Mr Hehir?-- -----product developers to say that they actually - that document was created and it has been there from the outset, and they can prove it.

Mr Hehir, you were there when the search warrant was executed at FAA, weren't you?-- On the database, no, I went down the police station.

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Mr Hehir, you were at FAA when the police turned up with a search warrant to seize your computers, hard copy files, USB sticks, everything that they could lay their hands on in relation to Dr Karen Mahlo?-- I was-----

You were there, weren't you?-- Not for the duration, but at the outset, yes.

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You received service of the search warrant?-- Yes.

And you attempted to fully cooperate with the police by producing all the documentation that FAA had in relation to Dr Karen Mahlo?-- Correct.

And this document wasn't produced to the police?-- It's an electronic file.

Mr Hehir, FAA produced an enormous volume of electronic documents, didn't it, to the police in response to the search warrant?-- Yes.

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And this document did not form a part of the electronic file given to the police in response to the search warrant?-- You're telling me. I actually don't have a record of it to tell you whether they did or they didn't.

Well, the police officer has come before his Honour and told him that the document was not there in either hard copy or electronic copy?-- I haven't-----

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Was not there?-- I haven't been privy to any - any other witness statements.

I'm telling you what the evidence was, Mr Hehir, and I have no doubt that you have been told it already. The document was not there when the police executed the search warrant on FAA. You can't explain that, can you?-- No, but we could prove it was.

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MR NEVISON: Excuse me, your Honour, I just need to interrupt my learned friend and show her something.

MS TRESTON: You spoke to Ceinwen Mahlo on the 28th of May 2008 after Karen had died?-- Yes.

You rang Brett Mahlo's mobile phone and Ceinwen answered the phone?-- I forget exactly who I - which number I rang, but, yes, I remember speaking with Ceinwen.

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Right. You had never met her before, had you?-- I'd spoken to her but never met her personally, in person.

You opened the conversation to Mrs Mahlo by saying words to the effect, "Eddie had not meant to die but Karen did." Do you remember that?-- I don't. It was the most emotional phone call of the day and probably the most emotional phone call of everything to do with that.

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Why was the phone call to Ceinwen Mahlo, a person you'd never met, the most emotional phone call of the day?-- I had had a number of phone calls with Ceinwen before, and I was a very emotional person, and I think Ceinwen was. I was in a very emotional state.

You had had a number of conversations with Ceinwen, what, on the day of the 28th of May?-- No, previous to that.

40

Sorry, previous to that?-- Previous to that.

How many conversations have you previously had with Ceinwen Mahlo?-- I don't know. Three, four, five. I don't know how many.

Right?-- Probably more.

Probably more than five conversations you'd had with her; is that right?-- Most likely. I can probably bring about four or five conversations to mind right now.

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And, what, she was kind and understanding to you in those conversations so you felt you could outpour your emotions to her on the 28th of May?-- I think it was reciprocal. I think Ceinwen was also quite upset and two people upset on that same day.

Right. So this - of all the conversations you had on this day, this was the most emotional. Have you previously mentioned to your lawyers that you've had more than five - you think more than five conversations with Ceinwen prior to the 28th of May?-- I don't believe it came up or been discussed.

I see. Now, my question to you actually was that you said to Ceinwen words to the effect, "Eddie had not meant to die, but Karen did." You said that, didn't you?-- As I said a minute ago, I don't actually recall saying that.

All right. Can you remember much the conversation with Mrs Mahlo?-- No, I don't.

All right. You told Mrs Mahlo that you were at the office when you were ringing her?-- Yes, I was.

Do you remember saying that to her?-- I don't recall saying that to her, but I remember being at the office when I rang her.

All right. Do you remember saying to her that you had nowhere else to go?-- I certainly felt that way. So I may have, but, no, I don't remember it.

All right. You told her that Ben and Anna had shunned you?-- I don't recall. I hadn't had any conversation with Ben at that time.

Might you have said that, Ben and Anna had shunned you?-- I don't believe so, because I - I don't think I'd had a conversation with Anna from the - the morning. I don't - I don't think so. But I don't know. I'm telling you, all I remember from that conversation, was my daughter coming in at the end of it, and it was just - it was a tough day.

You told Ceinwen Mahlo that you thought Karen had a second Will; do you remember that?-- No, I don't remember that.

You told her that you thought that Brett was the executor of that Will?-- No. I couldn't have told her that. I didn't know. I couldn't know.

Well, you did know that, Mr Hehir, didn't you, because Karen had told you that herself?-- No, she hadn't.

Ceinwen Mahlo just made a lucky guess, did she, on the 28th of May when she took this file note?-- No.

No. You told her that you believed that Brett was the executor of the second Will, although you'd never seen it; do you remember that?-- Are you referring to a file note there that Ceinwen made on that day from that phone conversation?

Yes, Mr Hehir?-- I would challenge that she made a file note. She was so upset, just as I was.

Do you want to now get back to answering my question, that you told Ceinwen Mahlo that you believed Brett was the executor of the Will although you had never seen it?-- Definitely not. I couldn't know.

1

You told her that you were the executor of the other Will; do you remember that?-- No.

Are you saying you didn't speak to Ceinwen Mahlo about Karen's Wills at all?-- I don't believe so.

10

You told her that you had arrived at the house, that is Karen's house, before the emergency services had arrived; do you remember telling her that?-- No. I've told you - you can ask me a hundred questions. I've told you, I hardly remember anything about that phone call. I just remember how upset I was at the end of it.

You asked her if she was aware that you were not living with Karen anymore; do you remember that?-- The same answer. I don't recall.

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All right. Mr Hehir, I have to - I have to ask you about this, so persevere with me?-- Okay.

You told Ceinwen Mahlo that you had to get out - had to get out because Karen was changing you; do you remember that?-- No, I don't recall.

It would have been an accurate statement, though, of how you were feeling at the time?-- I felt like I was in a very black place at that minute in time, and Karen - I had been very strong at that stage, and I - the very reason for why we took on that unit was so as I could get some reprieve, so-----

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So you might well have said that, that you had to get out because she was changing you?-- Those words I would doubt, but I - I don't recall.

Okay. That you said to Ceinwen Mahlo that Karen was starting to bring you down?-- I would strongly doubt I would have said those words. I might have felt like I was going down, and I was getting into a darker space, but I don't recall.

40

All right. You had booked a holiday for you and Karen to go to New Zealand and she had cancelled it a couple of months before her death. That event had occurred, hadn't it?-- No, I don't believe that we had actually booked a holiday to go to New Zealand. We discussed it, but I don't believe we booked a holiday. There is no booking or no cancellation.

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Okay. You told Mrs Ceinwen Mahlo that - that when you were at the police station that Jenny Ruhno had rung you whilst you were at the police station?-- Jenny Ruhno did ring me while I was at the police station, but I don't recall telling Ceinwen.

All right. It's unlikely that Ceinwen would have had any other way of knowing that if you hadn't told her yourself?--

Yes.

1

You would accept that, wouldn't you?-- Yes.

Okay?-- Well-----

And that-----?-- -----Jenny could have told her.

And that you told Mrs Mahlo that Jenny Ruhno, who'd rung you whilst she was at the police station, had wanted to know all the gory details - sorry, had wanted to know "the gory details"?-- Yeah.

10

Had that been true, she'd wanted to know the gory details whilst you were at the police station?-- Yes.

And you had actually - you couldn't tell her and you had handed the phone over to the police to speak to her. That had happened, hadn't it?-- Yes, it did.

20

Okay. And other than Jenny Ruhno having told Ceinwen that, you think there's - you'd agree with me there's no other way Ceinwen could have known that other than you telling her?-- I would imagine just read my police report.

I beg your pardon?-- Read the police report. It would be in there, most likely.

The note is made on the 28th of May, Mr Hehir. There's no police report on the 28th of May?-- The note is dated that you have written on the 28th of May.

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Okay. You have-----?-- I would strongly doubt that Ceinwen had capacity after that phone call to make a note like that.

I see. Even though you have never met her?-- Ceinwen was extremely upset, as I was, in that call. I remember Eddie, the discussion on that.

So you do remember saying that now about Eddie?-- I remember some discussion on Eddie. I don't recall what was said. I remember her being extremely upset, as was I.

40

Do you remember telling Ceinwen Mahlo that after Karen had tried to kill herself on April 11 that Karen was mad with you for saving her life and she said next time she would get it right; do you remember telling Ceinwen Mahlo that?-- No, I don't, but I certainly felt that way, but it's not to say I didn't tell her that, but-----

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You might well have?-- -----I don't recall.

You might well have told her that?-- May well have. I certainly felt that way. Karen told enough people that.

You rang Beverley Mahlo the day before the funeral to ask to have coffee with her and Jenny Ruhno; do you remember that?-- I do remember ringing Bev. Honestly I believed that was all

my family there.

1

And whilst you were speaking to Beverley Mahlo, you had a conversation where Beverley said she couldn't come and meet you, she just simply had too much to do?-- I don't remember the exact content, but Bev didn't - didn't - yes, was unable to meet.

Okay. She said, "I'm sorry, John, I can't make it today as I have too much to organise.", something to that effect?-- Yes.

10

Okay. She said that - she told you she thought Karen's depression had been exacerbated by worry over her financial position; do you remember Bev saying something to that effect?-- No, I don't, but she may have.

Okay. And you said words to the effect, "Well, that's not so. Karen had no worries about her financial position."?-- I don't know whether I said that or not. I can't recall, but it's possible that I could have easily said that.

20

Okay. She said to you, "I don't know how you can say that", because Karen had discussed it with her and many other members of the family; do you remember that?-- I don't recall.

Okay. She said, "In her latest Will Karen has bequeathed me a large sum of money but at 74 I have no need of this but I would invest it so it would be safe for her children when John and I die."; do you remember something to that effect?-- No.

30

To which you said to her, "Yes, I know she has increased the amount from 150,000 to \$300,000." Did you say that to Mrs Mahlo?-- I don't recall.

You don't dispute it, you simply don't know?-- No, because Karen had told me originally that she was increasing her - the amount that she was wanting to gift to her mum.

And had she mentioned-----?-- She'd told me that and I'd created a position in Excel spreadsheet for that.

40

And had she told you the amount that she was increasing it to, or discussed the amount that she was considering increasing it to?-- I have a feeling she said she was going to double it. I can't give you an accurate answer to that though. I knew she was increasing it. Hence being in the Excel spreadsheet.

Excuse me, your Honour. Excuse me, your Honour. No, your Honour, thank you, that's the cross-examination.

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HIS HONOUR: Re-examination?

RE-EXAMINATION:

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MR NEVISON: Mr Hehir, you were asked some questions about the FAA file notes of 7 May and 23 May 2008; do you recall?-- Yes.

And the data that was shown on those printed file notes?-- I still have it in front of me.

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Yes. Would you explain to the Court the circumstances by which you came to print the file note of the 7th of May 2008, it bearing a date printed, as I understood your evidence, on the 19th of July 2011?-- I had previously sent this to Kristy, I forget her surname, who was a - Asquith, who was a solicitor looking after me at Greenhalgh Pickard. I had a discussion with Robert on that particular day.

Robert is who?-- Robert Gaddes, who is now the solicitor at Greenhalgh Pickard who is looking after this matter.

20

On which day?-- I would assume on the 19th of July. I had a discussion with him and I said there was a second one, and I referred that I'd already sent it to Kristy, and he said, "Could you send it again?", and I did.

Yes. Do you recall printing the two file notes that day?-- No, I don't, but maybe I did.

30

Yes. Would you have a look at these two documents, please? Just look at them and tell the Court what they depict to you.

MS TRESTON: If this purports to be further late disclosure at 10 to 11 on the last day of this trial, I object.

HIS HONOUR: Have these been disclosed?

MR NEVISON: The document of the 7th of May as printed on the 19th of July 2011 I understand was lately disclosed last week and hence the reference to it not being disclosed in the FAA documents, your Honour. The document of the 23rd of May I understand was disclosed and in fact form part of the FAA disclosure. However, this is the document of the 23rd of May coincidentally printed on the 19th of July or 9th of July, whatever the date is - 19th of July. So-----

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HIS HONOUR: Mr Nevison, the 23rd of May document-----

MR NEVISON: Yes.

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HIS HONOUR: -----which is printed on the 19th of July-----

MR NEVISON: Yes.

HIS HONOUR: -----has that been disclosed?

MR NEVISON: That document, to my knowledge, has not been

disclosed, your Honour, no.

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HIS HONOUR: Well, now, therefore you would require leave to tender it.

MR NEVISON: Yes, yes.

HIS HONOUR: Now, is that what you were proposing to do, to tender it?

10

MR NEVISON: I was, your Honour, to clarify this issue. That was the document I showed my learned friend during the course of cross-examination, because obviously it is a duplicate copy of the earlier one that was printed, but obviously they were both printed on the same day, but given that one had originally been disclosed it's obviously not occurred - I'd need to take express instructions - it's not occurred that a further copy of the same document, albeit printed on a different date, would have to be provided. But nonetheless, it exists, so, yes, I am seeking leave to clarify the issue.

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HIS HONOUR: Right. Now, Ms Treston.

MR NEVISON: I'm embarrassed, your Honour.

HIS HONOUR: What do you say about the application for leave to tender it notwithstanding its nondisclosure?

MS TRESTON: I say it should be denied, your Honour. It's late, it's something, as my learned friend rightly says, was just shown to me at the Bar table during the course of my cross-examination, I haven't had the opportunity to consider the effect of it, to cross-examine Mr Hehir about it, or indeed to ask the police officer if I thought it was relevant, anything about it.

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HIS HONOUR: Well, you were shown it very late, of course, during the cross-examination, but you finished your cross-examination nevertheless.

40

MS TRESTON: Yes, your Honour, because as far as I'm aware-----

HIS HONOUR: Because you were confident you'd be able to object to it.

MS TRESTON: I didn't even know what course my learned friend proposed to take. I wasn't told that it was going to be put to Mr Hehir.

50

HIS HONOUR: All right.

MS TRESTON: I was simply shown it.

HIS HONOUR: Well, I would be disposed to allow you to tender it, but only upon condition that Ms Treston be permitted to cross-examine further.

MR NEVISON: Indeed, your Honour. I accept that condition.
May I say, it goes to the limited issue of just showing that
the data retention details are different in a later print.
That's the essence of what it shows.

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HIS HONOUR: Well, it's probably preferable that you don't say
that.

MR NEVISON: Yes.

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HIS HONOUR: Now, the two documents that have been put in
front of the witness I think ought to be presently marked for
identification.

MR NEVISON: Yes.

HIS HONOUR: They will be MFI4 and 5, 4 being that which is a
copy of the 7 May document, and 5 being that which is a copy
of the 23 May document. May we have those, Mr Bailiff? We
will have them marked. Thank you. After they're marked, they
will be given to Ms Treston and she can further cross-examine.

20

MR NEVISON: Thank you, your Honour.

HIS HONOUR: So just take a seat, thanks, Mr Nevison.

MR NEVISON: Thank you, your Honour.

MS TRESTON: Does my learned friend propose to lead any
evidence in relation to it before-----

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HIS HONOUR: Well, what you're now getting is disclosure of
these documents.

MS TRESTON: Yes, your Honour, I understand.

HIS HONOUR: It's a matter for you what course you take-----

MS TRESTON: Thank you, your Honour.

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HIS HONOUR: -----with those documents. And in the
circumstances, Ms Treston, you'd be permitted to further
cross-examine at large.

MS TRESTON: Thank you, your Honour.

HIS HONOUR: If you're not ready to do this immediately, I'd
understand.

MS TRESTON: No, no, your Honour.

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HIS HONOUR: All right.

MS TRESTON: Perhaps does your Honour propose to take a short
adjournment before-----

HIS HONOUR: It's convenient-----

MS TRESTON: Might I raise one other matter with your Honour?

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HIS HONOUR: Yes.

MS TRESTON: My learned friend and I had hoped that we would be able to conclude Mr Hehir roughly around 11, 11.15. We seem to be working broadly to that timeframe, not to cut my learned friend short. With your Honour's leave, we thought we then might duck back to our Chambers, pick up our submissions and the cases, just settle our thoughts, and come back around midday with the hope of finishing around 1 o'clock. Does that sound like something your Honour had in mind for today or-----

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HIS HONOUR: That's fine. Don't feel that you have to finish by 1, but I am perfectly happy for things to proceed that way, but I'll come back in 10 minutes.

MS TRESTON: Thank you, your Honour.

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THE COURT ADJOURNED AT 10.58 A.M.

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THE COURT RESUMED AT 11.07 A.M.

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JOHN MICHAEL HEHIR, CONTINUING:

FURTHER CROSS-EXAMINATION:

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MS TRESTON: Mr Hehir, you recall before we adjourned, there was produced to you the documents which are MFI 4 and 5 for identification. I will just pass them to you. They are the file notes of the 7th of May 2008 and 23 May 2008, both of which are printed down the bottom left-hand corner on the 19th of July 2011?-- Correct, yes.

Nothing in the alteration to the printing dates as demonstrated on 19 July 2011 explains why the 7th of May 2008 file note wasn't produced to the police in response to the search warrant, does it?-- I believe it would be produced to the police. It's just the police have not recalled it.

20

Mr Hehir?-- You asked what I believe, and that's what I believe.

Mr Hehir, nothing in the printing dates on the 19th of July 2011 explains why the 7th of May 2008 file note was not produced to the police in response to the search warrant, does it?

30

HIS HONOUR: It's really an argument, isn't it? I don't think it's a matter for his evidence; it's an argument.

MS TRESTON: As your Honour pleases. I have nothing more, thank you.

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FURTHER RE-EXAMINATION:

MR NEVISON: Mr Hehir, just going back to the documents in front of you, in particular the file note of 23 May 2008, that one, do you have the FAA documents with you?-- No.

May the witness see the FAA Exhibit, please.

50

HIS HONOUR: Yes.

MR NEVISON: Mr Hehir, would you turn, please, to page 547 in the FAA bundle of documents, please. You have before you the file note dated 23 May 2008?-- Yes.

Is that the document?-- Yes.

What was the print date of that document?-- The 14th of August 2009.

Yes. Would you quickly compare that document with the document dated 23 May 2008 which is the separate sheet document marked for identification as document 5?-- Yes.

Compare the two. What notable differences are there between the two documents?-- The difference - the notable differences are in the data at the top.

10

HIS HONOUR: You could tender it.

MR NEVISON: We can all read, yes, your Honour, thank you. I tender the two documents marked for identification numbers 4 and 5.

HIS HONOUR: May I see the documents. Now, the one of the 7th of May which is MFI4, is that not identical to Exhibit 15?

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MR NEVISON: It is, yes, yes, so strictly it's not required to be further in evidence. Your Honour, it's -----

HIS HONOUR: Yes.

MR NEVISON: -----just the circumstances under which this came about, that they were printed on the same day.

HIS HONOUR: Thank you. The tender should be of MFI5.

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MR NEVISON: Yes.

HIS HONOUR: That will become Exhibit 40.

ADMITTED AND MARKED "EXHIBIT 40"

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MR NEVISON: In the circumstances, may I ask for the return of 4 then, your Honour, so that-----

HIS HONOUR: Well, I think it ought to remain on the Court file as marked for identification in case there is some question about this -----

MR NEVISON: Yes.

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HIS HONOUR: -----as they say, in another place.

MR NEVISON: Indeed, thank you. I missed the Exhibit number we were up to.

HIS HONOUR: 40.

MR NEVISON: Thank you. A final matter, Mr Hehir, you were

asked by my learned friend questions this relation to who had access to the computer of the deceased at the house?-- Yes.

1

Do you recall those questions?-- Yes.

Yes. Could you tell the Court, to your knowledge, who used that computer on a regular basis up until the deceased passed away.

MS TRESTON: Well, I object in the sense that he can only talk about the periods that he was actually there, who regularly used the computer.

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HIS HONOUR: As far as he observed.

MS TRESTON: To the periods that he observed.

MR NEVISON: I'd accept that valid criticism. Who did you observe use the deceased's computer up until the date of her death?-- I observed that Karen used it a lot. I used it a lot. Anna used it occasionally. Anna used to come around and she was doing some job seeking at the time.

20

This was after she moved out?-- Yes. She didn't have a computer at her house so she was coming around using that one looking for jobs.

Thank you. Nothing further, thank you, your Honour.

HIS HONOUR: Thanks. You're excused, Mr Hehir.

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WITNESS EXCUSED

HIS HONOUR: So that's your case, Mr Nevison.

MR NEVISON: It is the case. With respect to the expert evidence, your Honour, we resolved between ourselves that we don't propose to call the experts for a joint session of anything of that nature, so I now close the case for the first defendant.

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HIS HONOUR: Now, I should ask each of the second and third defendants, Mr Sasonow and Miss Sasonow, whether you wish - firstly, Mr Sasonow, do you wish to call any evidence?

SECOND DEFENDANT: No, your Honour.

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HIS HONOUR: Thank you. Miss Sasonow?

THIRD DEFENDANT: No, your Honour.

HIS HONOUR: Thank you. So then you would like me to come back at midday for addresses?

MS TRESTON: If that's convenient to your Honour.

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MR NEVISON: Thank you, your Honour.

HIS HONOUR: Adjourn until midday.

THE COURT ADJOURNED AT 11.14 A.M. TILL 12.00 P.M.

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THE COURT RESUMED AT 12.01 P.M.

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HIS HONOUR: Yes, Mr Nevison.

MR NEVISON ADDRESSED HIS HONOUR: Of course, I can go on and on in these matters and take more time. I trust that what we put before you on behalf of the first defendant by way of closing submissions will assist your Honour in the endeavour.

10

That said, I open by saying that I don't pretend for a moment to have all of the evidence readily captured or relevantly cross-referenced to the exhibit but nonetheless, as I say, we can continue to spend time and time.

This matter today and in the last two days in trial sees the coming before the Court for the first time the dispute by people associated with the late Karen Lee Mahlo. It is unfortunate, of course, that these matters must come before the Court ultimately to be resolved but inevitably, sometimes people cannot resolve these matters by agreement between themselves, notwithstanding that the parties attempted mediation.

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Your Honour, it really was the chant of the Chancery Bar as recorded by Chancellor Salt QC in the decision of Minchells World Trust in 1964 2 Old England Reports 47 at 48, where he said, "Here's to the man who makes his own Will."

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I make not light of this situation. This is a terribly sad and diabolical situation for all involved, but taking that cliché into account in the resolution of this matter, it might well in the modern context and especially in light of the amendments to the Queensland Succession Act since 2006 be more readily reframed as, "Here's to the man or woman who tries to make their Will."

40

It often ends up in the most unfortunate circumstances of litigation between the parties.

Notwithstanding the wish upon wish upon wish of a party that things might be different, nonetheless, there is still a developed framework of law within which this matter must be resolved, and it is in that context that I propose to address your Honour by way of closing submissions.

Due to the limited time, your Honour, I've not been able to favour my learned friend with a written copy of our closing submissions, and taking away nothing more in return, but might I hand up to your Honour two copies of written closing submissions on behalf of the first defendant.

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HIS HONOUR: Thank you. One will be placed on the file.

MR NEVISON: Thank you. Without reference to them necessarily

perhaps at this stage, your Honour, but I will summarise them for you shortly, may I simply go immediately to the documentary evidence in this matter as we consider relevantly and importantly must be reflected upon.

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In the case of the first defendant, your Honour, there is, of course, the independent forensic computer experts that have each delivered reports, and in respect of which you will have regard.

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We say at the end of the day your Honour will be inclined to the view that they are essentially in agreement about all matters. That the document which we are concerned with here was, in fact, a document that was located in the file, pleaded by the plaintiff in his case on a computer that was known as the deceased's computer, so those reports clearly identify that that was so.

What the reports clearly also identify, your Honour, though, is that it could not be determined one way or another whether the file was actually printed at any time or not.

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Very usefully, your Honour, the reports detail when the file was received, the relevant Will file was received, when it was created on the relevant computer, and when it was last modified, and essentially none of that is in dispute in this matter.

We say, your Honour, that you will be assisted by looking at the annexures that have largely been printed off as attachments to Mr Gallo's report and you have, of course, Mr Gallo's affidavit and his report in electronic form if you wish to troll through any of the material there but in our submission it's not necessary because you may simply refer to the hard copy, Exhibit 39, which is the bundle of documents tendered this morning.

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May I take your Honour firstly to that bundle, and in particular to the document at page 286. Your Honour, that purports to be the suicide note that was left for Anna and Ben, the son and daughter of the deceased.

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Your Honour, the evidence is that Detective Allen, Jodie Allen found this note on the printer at the deceased's home on the morning that emergency services attended on the 28th of May.

It's a record of the deceased's thought, in our submission, and guidance she was providing then to her son and daughter.

There was a second message, though, and that's at page 292 in the bundle, your Honour, as extracted from the computer. That's the message that was left for John, and we say that was John Hehir, the first defendant.

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Your Honour, you may be inclined to the view with respect to that message when you read it that it's a message of mixed emotion by a lady who was deeply troubled, but on balance it probably more weighs in favour of a conclusion that the

deceased did have still very strong feelings for John Hehir.

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It says, "John, I do care for you so much. I'm so mixed up. I don't even know if I do still love you. I have hurt you so much and can't do that any more. Please look after the kids when they need you and don't try to control them."

There is no doubt that John Hehir's control had been an issue for the deceased and obviously for her daughter but I ask your Honour to seize upon the words, "Please look after the kids when they need you." They are not the words, if my respectful submission, of a lady who no longer wanted the person associated with her affairs. They are words, in my submission, consistent with a person who was appointed as executor of her estate.

10

HIS HONOUR: You probably just told me this, I'm sorry, if you have, when were these notes created?

MR NEVISON: Yes, thank you, your Honour. That appears in Mr Gallo's second report, and if I might just take you to that. I'm actually coming across to that. We might go there now because I've finished with that note.

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Your Honour, at page 401 is the second of Mr Gallo's reports and in particular, if we go, your Honour, to page 410 of the bundle, page 10 of the report, at paragraph 5.3. There is firstly an analysis of the file "Anna and Ben from Mum.docx" and on the next page analysis of file "Suicide John.docx".

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Your Honour, the experts have determined that the "Anna and Ben from Mum.doc" was created on the 28th of May 2008 at 2.47 hours, and further that the other document was created at the same time 28 May 2008 at 2.48 hours. There is a divergence between the two matters, your Honour, in that the report indicates that the "Anna and Ben from Mum.doc" was then saved in a folder named "Anna" on 28 May 2008 at 13.22 hours, whereas the other document was saved as "Suicide John.doc" in a folder named "files" on 28 May 2008 at 1320 hours.

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The other divergence, your Honour, is about the printing in the Anna and Ben document in the next paragraph down, the last sentence. It says, "The metadata also in the case file was printed on 28 May 2008 at 13.21 hours." However, it is accepted and is common ground that that would be the last print date or time that was probably recorded.

There is no dispute that both were printed probably at the time of - at or about the time they were created and saved by the deceased at 2.48 a.m.

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HIS HONOUR: Yes.

MR NEVISON: Conversely, the suicide John note was printed, according to this report, at 2.49 hours, so it's accepted, your Honour, that they were the suicide notes that were left by the deceased and they are significant.

One issue arises, your Honour in respect of these, and that is whether Mr Hehir re-entered the dwelling-house after he was returned by the police officer, Detective Jodie Allen.

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Detective Allen gave evidence in this trial and her statements were tendered. The statements reveal, according to her version, that she redelivered Mr Hehir to the premises at or about 11.30 a.m. on the morning of the 28th of May.

There appears to be some suggestion that he may have re-entered the house for some purposes and, in fact, you may be asked to infer that he has interfered with some documents. His evidence, of course, was to the effect that he went to the door. He opened the door, and he may have taken a step inside but that he did not then re-enter the house.

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In our submission, your Honour, it's more consistent, in fact, with this, that at or about 1.22 hours, the document was saved by Anna, the daughter of the deceased. That is so because the document was actually saved in the file of Anna, and one would think that that is probably her file on the computer, but it's nothing more than mere speculation, your Honour.

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Your Honour, there is a telling table in Mr Gallo's report, and that's at page 412 of the bundle, page 12 of his report. It relates to a deleted file on the 1st of May. This is page 412, your Honour. It relates to some deleted files on the 1st of May 2008, and they are Karen's Will files.

Given that she hadn't even received a pro forma document, the subject of these proceedings until the 8th of May, one may reasonably infer that those files relate to a former Will or a former document.

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There is no further evidence about them, your Honour, but I mention this, that, of course, the defendant doesn't bear any onus in this matter. The plaintiff has been concerned about the whereabouts of documents et cetera, et cetera. This document has been available to them. No further expert has looked at the matter from their side.

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Your Honour, I can hypothesise, based on that information, that, in fact, the deceased probably hit the delete button in respect of those four files. Against me, that could be said that she was getting rid of her copies of any earlier Will. Of course, that wouldn't be sufficient to renounce the Will because the Will itself could still exist and, in fact, the evidence is to the effect that the 14 February 2008 Will did exist in original form, fully executed, and was held at the office of FAA and then delivered up to the solicitors the morning the deceased was found.

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It's equally consistent, your Honour, in my submission, that the deceased being a bit cranky about things and throwing something out, but then requesting a further copy of her Will, even with a view to thinking about what she might do and she was provided then subsequently with a copy on the 8th of May.

Your Honour, you will find all of the emails have been tracked by the expert, Mr Gallo, and the copies consistent with, for example, the FAA disclosure material, the relevant emails that sent the material to the deceased from Mr Hehir are all found on the hard drive of the deceased's computer.

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So there is no contest about any of those things but, your Honour, in a modern context, it is telling what comes out in the evidence and in terms of the documentary evidence, might I take your Honour to page 442, please, of that bundle, and these are attachments to Mr Gallo's affidavit, and these purport to be in the appendix E which is a spreadsheet named "IE history for Internet Explorer history" containing a list of Internet activity references.

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Your Honour, if you go to the landscape view of it and page 442, may I direct your Honour's attention to the entry at - third entry on the page 16 May 2008, 10.36.50, Karen, the user, and there's a web address of Google.com.au and you see the search criteria extend to a Stirling engine. I will come to it short, but your Honour will recall, of course, reference by Mr John Mahlo, the father of the deceased to his daughter searing information for him about Stirling engines and, in fact, hot air engines and, in fact, submarines.

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As you go down the page, your Honour, interestingly, for a large part of the day, from 10.36.50 a.m. on that day, you can track, sometimes by two or four minutes apart, sometimes a little longer, a continued search by the deceased.

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Very tellingly, your Honour, you will recall Mr John Mahlo's evidence that the viewing of the document which I gather he would hope to support as being a copy of the last Will of the deceased, was shown to him two or three days after he was told of information on the computer.

Well, according to this, that must have been the 18th or 19th. He left on the 19th of May, your Honour. There's an unreliability, I'm suggesting, in terms of his evidence about those matters.

40

HIS HONOUR: Why is that? You've just said he, consistently with his evidence, he may have been shown this paper document on Sunday the 18th.

MR NEVISON: Well, no, his evidence was that he was shown it on the 15th, your Honour. That was-----

HIS HONOUR: Witnesses notoriously get dates wrong.

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MR NEVISON: Yes, yes.

HIS HONOUR: And with respect to him, people giving evidence much younger than Mr Mahlo very frequently have difficulty remembering dates. Witnesses remember the sequence of things-----

MR NEVISON: Yes.

HIS HONOUR: -----more often than they remember precise dates.

MR NEVISON: Yes.

HIS HONOUR: It's often therefore the technique of the cross-examiner, at least in jury trials, to try to confuse them and stump them with dates.

MR NEVISON: Yes.

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HIS HONOUR: Anyway.

MR NEVISON: Yes, thank you, your Honour. There are other issues relating to Mr John Mahlo's evidence that I will touch on that would cause you to be concerned, in my submission, but tellingly, your Honour, in terms of the record that is made by electronic imprint, your Honour, I take you to page 455 and the 28th of May 2008 and what's reported there at 2 - this is - the ninth entry down on that page, at 2.49.18, the file that is accessed is File G notes.docx, and that is consistent, your Honour, with or about the time that the deceased was creating the suicide notes.

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Then you go to the next reference, your Honour, is at 2.52.23 and it would seem that the deceased looked at a document relating to Anna, her daughter, and perhaps what ultimately did tip the scales against her was the next document which was the Queensland Health matter, correspondence with Terry Meahan which was the letter of suspension, I would ask you to infer that she referred to. Your Honour, there would appear to be no further accesses.

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HIS HONOUR: According to the evidence, about when was it that she was suspended from her position at Nambour?

MR NEVISON: I don't think it's in the evidence, your Honour, at all.

HIS HONOUR: Is there any evidence as to whether after that suspension she went back to work? I thought she was something about her working at Redcliffe?

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MR NEVISON: There was a suspension time when she returned to work and my understanding but I can have it clarified, my understanding is that she was then further suspended again.

HIS HONOUR: I'm only asking about the evidence but I was going to ask you this also about the February Will. I thought there was evidence that that was - or perhaps I have simply read the file. I read the file on the weekend.

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MR NEVISON: Yes.

HIS HONOUR: And I saw there some affidavit evidence from people who had worked at the Redcliffe Hospital-----

MR NEVISON: Yes.

HIS HONOUR: -----who witnessed the Redcliffe Will.

MR NEVISON: She was working there at the time.

HIS HONOUR: I don't know whether those affidavits have found their way into the record.

MR NEVISON: They haven't, no. They are not read in this trial, no.

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HIS HONOUR: Anyway, I can accept that she was working at Redcliffe Hospital at least at the time of the February Will.

MR NEVISON: Indeed.

HIS HONOUR: And I'd infer that she hadn't been working after the episode that led to her admission to RBH and then New Farm.

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MR NEVISON: There is no direct evidence of all of that, but, yes, that is certainly our understanding, your Honour.

Your Honour, might I then just take you further down the page we're on at 455 to an entry, the first entry of 30 May 2008, 9.54.39 a.m. and there as an access to the inheritance estimate document, you will see. This is after the deceased has obviously passed away, it's the following or two days later.

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Then there is an access to the message John wrote and the next one is an access to the Will and testament of the deceased and the next one is to the messages that Anna and Ben wrote.

I bring those matters to your attention, your Honour, because you recall the evidence from Dr Rhuno was that she and Anna were there and accessed documents at that time and they attached them to an email to Mr Wade Mahlo, the brother of the deceased, and that also formed part of the documents that were found.

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Your Honour, I must say I put it on the record that there are some very curious entries on the follow page, page 456 from the 31st of May 2008 at 16.33.03 and continuing, especially one at 16.24.35 when the evidence would suggest that family of the deceased -----

HIS HONOUR: What's the relevance of reading that?

MR NEVISON: It's amazing what the Internet records, your Honour, and my client was not in any way in possession of the premises or in occupation or in attendance. I place that firmly on the record, your Honour, and the evidence doesn't suggest that he had any access to the computer at that time.

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Your Honour, I'm mindful of the time, and being fair to my-----

HIS HONOUR: Mr Nevison, there is a bit to cover-----

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MR NEVISON: Yes.

HIS HONOUR: -----for each of you, so don't feel that you have to finish - you both have to finish by 1 o'clock.

MS TRESTON: No, absolutely, your Honour. I don't want any suggestion that he has been cut off, at all. Take as long as you want.

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MR NEVISON: Thank you.

HIS HONOUR: I wouldn't say that.

MS TRESTON: Subject to his Honour's-----

HIS HONOUR: Go on, Mr Nevison.

MR NEVISON: Your Honour, might I address very quickly the situation with the FAA disclosure documents and the documents which were last tendered or the document last tendered as Exhibit 40, the final print of the file note on the 23rd of April 2008.

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Your Honour, in our respectful submission, those documents each speak for themselves. The first defendant who essentially created those documents has given his version and explanation of them.

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It is consistent certainly with the position that the deceased was wishing to review her financial affairs and the manner in which she disposed of her estate.

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HIS HONOUR: What, if anything, do you say assists your case in the note of the 7th of May?

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MR NEVISON: Thank you, your Honour. Your Honour, that's the note about adjusting inheritance values and looking at them.

HIS HONOUR: Yes.

MR NEVISON: It's consistent with the request of the deceased to Mr Hehir that he provide the inheritance calculator so that the deceased could look at the value the children would get at various ages. In the February 14 Will, of course, it was cast at 35 years that they would take their benefit, but the deceased obviously wanted to look at the value of that inheritance at different times, and the likely investment earning on her investments, and so that note is simply consistent with him providing, as he did, the inheritance calculator to look at that.

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HIS HONOUR: But is that all that you seek to make of it?

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MR NEVISON: That's all, yes. That's all, your Honour. But in terms of the e-mail of the 8th of May, we do ask your Honour to consider very carefully the second paragraph, and in particular the third sentence, where Mr Hehir said, "Please send me a copy of your Will...before resigning it." Now, much can be made of the fact that he is not a solicitor and that's work in the nature of solicitors' work and it was dangerous territory and he shouldn't have been there and he shouldn't have done it. He has given his explanation of it, your Honour, honestly and openly, in my submission. The fact of the matter is and what I ask your Honour to look carefully at is his request that it be sent back to him to review, and it wasn't, of course. Now, one explanation, of course, is that if the deceased - if the plaintiff's version of events is to be accepted, then it could be said that the deceased wouldn't want him to see it. But the evidence bears out, your Honour, that the deceased was a fairly strong willed person who continued to have contact with Mr Hehir about her affairs right up until the time of her death. One would think, your Honour, that in fact she would have sent him a copy of what she intended to be her Will if that in fact was her intention. There's no reason, in my submission, for that not to have occurred.

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Your Honour, there's one further thing in that e-mail I wish to bring your attention to, and it is in the, in effect, third last paragraph where it says, "Monday night was really good with a nice dinner and then I left you a nice note for you next morning." I just bring that to your attention, your Honour, because in the evidence of Mr Hehir under cross-examination there was some contest to him about when he stayed at the premises on the 5th of May, the 6th of May, the 7th of May, 8th of May, and 9th of May. I simply remind you of the evidence, your Honour, that he said that Anna and Karen had returned from the weekend at Orange, on the 5th of May he had a lovely dinner, he stayed there that night, he probably didn't stay on the 6th, or the 7th, or perhaps the 8th, but

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certainly the 9th he recalls staying there. Your Honour, that is completely consistent with all of the e-mail traffic that occurred. He gave very honest and forthright answers about why there was no replies to the e-mail, because on his evidence there was a lot of text communication and phone communication between the parties.

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Those documents, your Honour, are, of course, not consistent with the deceased having finalised her testamentary intention or proposed Will. They are tools, at best, for her to embark on a course where she might, and beyond that I essentially don't take the documents any further, only to pass very quickly in commenting to your Honour about the 23 April matter and the contest, and I appreciate that it was very late disclosure of the 23 April note printed in July 2011, but it clearly explodes the fact that there's been any tampering with that document. It clearly demonstrates that there's just a different printing regime, and that's now in evidence.

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Your Honour, briefly may I turn to the oral evidence?

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Firstly, the evidence of Mr John Mahlo. I've already asked your Honour to reflect on the dates on which the engines were searched for him and his evidence about that, but going further into his evidence, at transcript day 1, page 33, at or about line 55, I asked him, "Do you recall her being on the computer and looking up information for you?" "Correct." "And was that at or about the time you say that you had the conversation about her estate or Wills?" "The day before." "The day before?" "A number of days before." "That she looked up about the Stirling engines?" Your Honour, through page 34 I simply bring to your attention that that's the evidence which I say supports the conclusion that he is just not reliable at all about when or where he saw anything at all, and it certainly wasn't him at the computer. He admits that at or around line 35.

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If I might go then further on, your Honour. At transcript day 1, page 36, at or about line 21, I said to him - I asked him, "Did you discuss anything with Beverley about Karen's Will or mention that to her?" "No. No." Your Honour, you might think that here is a father who has been dispatched to assist his daughter, according to Mrs Mahlo, in dire circumstances. If you accept that Mr Mahlo - there was discussions about a Will, very important things, he goes home, and in fact his evidence and his affidavit supports that he thought everything was rosy and fine, and there was no problem at all. He didn't - he didn't even say to his wife, "Oh, she's made a new Will." No sharing at all. That's not consistent necessarily with-----

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HIS HONOUR: But on his version he wasn't told by Dr Mahlo that this was a new Will, was he?

MR NEVISON: His version in his affidavit was, "This is my Will."

HIS HONOUR: Yes.

MR NEVISON: Yes, not a new Will.

HIS HONOUR: But you said that Mr Mahlo went home to Orange but he didn't say to his wife, "She's made a new Will."

MR NEVISON: No. No.

HIS HONOUR: So the - that may be explicable on the basis that consistently with Mr Mahlo's evidence he wasn't told that this was a new Will.

MR NEVISON: No.

HIS HONOUR: He was told that this was her Will.

MR NEVISON: Yes, and I will actually also submit to your Honour that it's consistent with him having seen the 14 February 2008 Will as well.

HIS HONOUR: Well, I wondered about that. I saw you've referred to that in your written argument.

MR NEVISON: Yes.

HIS HONOUR: Was his evidence not that the document he saw had Dr Mahlo's signature on it but no-one else's?

MR NEVISON: He actually didn't say nobody else, he just said he saw her scribble, and it was large, but there was no evidence about any witnesses. There was no evidence about that. But what he did say was that he saw the names of his son, Brett Mahlo, and of Anna and Ben. Well, no surprising fact, your Honour, that they're also mentioned in the February 14 Will, because Brett Mahlo is an alternate director in the February 14 Will.

HIS HONOUR: The so-called template that your client sent to Dr Mahlo in May-----

MR NEVISON: Yes.

HIS HONOUR: -----I was just looking for that again. Is that-----

MR NEVISON: In the FAA document, your Honour?

HIS HONOUR: Yes.

MR NEVISON: Yes.

HIS HONOUR: At page - here it is at page 367.

MR NEVISON: Yes. It's also to be found at page 544 in the FAA documents, your Honour, that were produced. If I might just go on very quickly with the oral evidence.

HIS HONOUR: Yes.

MR NEVISON: Further at day 1, page 39, at or about line 26, I asked him, "It wasn't simply a matter of convenience, because that's what the document which is sought to be proved as the last Will bore?" "I don't - I don't know anything about that at all." "You've never seen that document?" "No." "I see. In terms of this conversation that you say happened either on the 16th of May or around that time with Karen about her Will, what time of day would that have happened?" "Mid afternoon." "So are we to believe that it happened on the 15th of May? Is that your evidence?" And he says, "I wasn't sure of the day." "Do you recall your daughter, Karen" - sorry, at line 48 - "being on her computer every day that you were with her?" "No. I didn't make that statement, no." "You didn't see her on the computer every day?" "Not every day, no." The record probably indicates that she was. And then it goes on about - I'm back on this three odd so days after she researched the Stirling engine business, your Honour.

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Further - sorry, at page 40 on day 1, at or about line 8, I said - I asked him, "In your affidavit you refer to your daughter, Karen, handing you a piece of paper when she said, 'This is my Will.'?" "That was after I came inside." "Do you recall what time of day that was?" "I came in well after dark." And there's discussion about the TV.

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And then, your Honour, relevantly on that page from about line 29, he deals with - in his evidence about the nature of the page and a piece of paper, and how it was given to him on the desk or by hand. The upshot of it all was, your Honour, he just couldn't be sure what was handed to him, and he said this: "She handed me a piece of paper" - sorry, I put to him that he'd said, "She handed me a piece of paper saying words to this effect, 'This is my Will.'" I took the piece of paper in my hand and looked at the page." "You are now not sure whether it was one page or more?" "I only looked at the page that was on the front. That's all I can recall looking at."

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Further down on page 41, at line 11, in answer to my question, he said, "The thing that caught my eyes was that my son's name was listed there in heavy print, Brett Mahlo.", and he looked down at his grandson's name. So that's the evidence relating to those matters, your Honour.

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My instructing solicitor is well in tune with the affidavit material, your Honour, and he reminds me that in fact the affidavit of Mr John Mahlo said this of the conversation, at paragraph 14 of his affidavit, when he was in the hammock, out in the garden, and he says the deceased Karen said to him, "I am making a new Will.", and I am indebted for that reminder. But at the time she came out and handed the document, she certainly didn't say, "This is my new Will.", but it obviously follows. "I am making a new Will and I have got something to do."

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And, your Honour, at day 1, page 42, at line 39, I said to him, and asked him, "You cannot positively swear, can you, to the fact that that was a copy of the document you say you

saw?" And his answer was, "All I can say is it looked very similar in the outlay to what the one I seen before." So, you know, that is equally consistent, in my submission, with him seeing the 14 February Will. They're in a similar format, they sort of look the same, the setup, they weren't produced by different law firms or anything of that nature.

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Your Honour, in terms of Mrs Beverley Mahlo, she acknowledged under cross-examination the nature of her daughter's intelligence and demeanour, where at page 49 on day 1, line 12, she said - I asked her this: "It's perhaps easy for you to agree with me about this: undoubtedly your daughter, Karen, was a very, very smart person intellectually?" "She was intellectually. She - yes - she learnt management. I mean, she was very good at university and management, at university. You know, at learning things like that.", also consistent with Mr Hehir's evidence that she was a senior manager in hospitals and administration, not necessarily on the clinical side, she was very advanced in her administration skills. Another factor, your Honour, in terms of her perfecting her testamentary intention.

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Relevantly, your Honour, Mrs Mahlo at page 58 on day 1, in response to my question as follows, "And was there any discussion between you and John on his return?" "No. No." So she confirmed that fact. And then further down the page at or about line 45, there's a discussion in the evidence about her conversing with the deceased on the night before she died, and how she was looking forward, still making plans. That wasn't necessarily the end of it all.

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Your Honour, at page 60, in Mrs Mahlo's cross-examination, I said to her, "Well, I'm just trying to get it straight in my head. You say, 'It was during a conversation with Anna and Jenny in Karen's house that I found out that Karen had made a Will when John Hehir first moved in with her.'" Further on, "I didn't see that Will at all. It was just told to me." Now, the relevance of that, your Honour, is when you go back and you reflect on the actual statement in Mrs - Mrs Mahlo's affidavit in these proceedings, it is not - it is not consistent at all with what appears to have transpired there. The conversation is quite at odds, as she records in her affidavit, with what factually is now believed to have occurred, because factually the evidence supports a conclusion that Jenny Ruhno or Anna on the morning of the 30th of May e-mailed documents to Wade. You may accept that they printed it. You heard Jenny Ruhno say that she can't remember now but she may have printed it from the e-mail transmission that was done. That may be an explanation on the joint experts' report for why there was no print log as well of that document on the day.

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So, your Honour, the - the simple fact of the matter is, in my submission, you need to treat very cautiously the evidence of Mrs Mahlo about what occurred on the 30th of May, to the extent that it's relevant. I need not trouble you any further about that.

Your Honour, I don't propose to traverse the evidence of the other witnesses other than to comment on the evidence specifically of Ceinwen Mahlo, the wife of the applicant. It's a hollow excuse, in my respectful submission, your Honour, that you're overseas when such an important matter is before the Court. There are other ways of giving evidence if Mr Brett Mahlo had some relevant evidence to give. We can only conclude that he did not. Very, very relevantly to that, he was apparently the executor to be appointed by this new document, and yet he obviously never knew that that was so.

HIS HONOUR: That happens, of course, doesn't it?

MR NEVISON: Indeed, indeed.

HIS HONOUR: But, therefore, you'd ask me to infer that he hadn't been told of the Will, and that that indicates that there wasn't a Will, that is, that Dr Mahlo did not intend this document to be a Will.

MR NEVISON: That's right, and I ask you to infer that. Whilst it is usual - or perhaps not usual - it does happen that executors are not told that they're appointed as executors, you may well think in the context of this family he would have been. He would have been. If it is as the plaintiff would have you accept that there'd been a breakdown of the relationship, that there was a changing of the guard, you may well be inclined to the view that she would have broadcast that especially to the person she was trusting to go forward.

HIS HONOUR: Now, the conversation between your client and Ceinwen-----

MR NEVISON: Yes.

HIS HONOUR: -----Mahlo, that happened, did it, because your client was trying to ring her husband or-----

MR NEVISON: I was going to deal with the conversation. There is no evidence as to why it happened at all.

HIS HONOUR: But it happened by telephone call made by your client; is that right?

MR NEVISON: Yes, indeed.

HIS HONOUR: So I would infer that that - that is that he rang a home telephone number.

MR NEVISON: Yes.

MS TRESTON: No, the evidence was that he rang Brett Mahlo's mobile phone.

HIS HONOUR: I see.

MS TRESTON: And that Ceinwen answered the phone.

HIS HONOUR: Right. Now-----

MR NEVISON: I accept that, yes, your Honour.

HIS HONOUR: Now, if I put that evidence-----

MR NEVISON: Yes.

HIS HONOUR: -----with the note made by Ceinwen Mahlo-----

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MR NEVISON: Yes.

HIS HONOUR: -----and I accept that the note is authentic-----

MR NEVISON: Yes.

HIS HONOUR: -----and is substantially accurate as a recollection of that conversation, well, then her evidence, through that note, is that your client provided the information that there may be a second Will-----

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MR NEVISON: Yes.

HIS HONOUR: -----appointing her husband as an executor.

MR NEVISON: Yes.

HIS HONOUR: Now, from that I'd infer that your client had been told that by Dr Mahlo.

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MR NEVISON: Yes. An inference that may be open to your Honour - may I tell you why you would infer differently?

HIS HONOUR: Yes.

MR NEVISON: It is this. There are two parts to it. Firstly, the telephone conversation or the telephone call that was made, there's no evidence as to why it was made, however, on balance you might infer that Brett Mahlo was - I'll give him the label - a responsible member of the family, that he was somebody that Mr Hehir could ring on that side of the family. There was an upset between Mr Hehir and the mother of the deceased arising out of the belated 50th birthday. There was an upset between the - between Mr Hehir and the mother of the deceased about the hospitalisation of the deceased, and the failure to discuss that and disclose that, right or wrong. There were very valid reasons for Mr Hehir not to ring the mother and the father of the deceased, which sometimes you might think would be a logical starting point. Who is next in the calling list? Well, it could be a brother. Mr Wade Mahlo was here for the duration of the trial. He didn't give any evidence of any relevance, your Honour. Mr Brett Mahlo may simply have been - it's mere conjecture, but-----

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HIS HONOUR: Yes, that's a possibility. That's a possibility.

MR NEVISON: Yes. It's-----

HIS HONOUR: And probably the fact that he - your client rang his mobile number would of itself be of no significance except that I do have the evidence in the form of the diary note of Ceinwen.

MR NEVISON: Yes, and I'm coming-----

HIS HONOUR: And what do you say about that? Do you say that I shouldn't accept it as authentic or-----

MR NEVISON: Well, your Honour, I am stuck with the evidence as it is about these matters. The lady comes here, ostensibly no real axe to grind, but she is on one side of the ledger. You've heard the evidence of Mr Hehir in response to it, that he was very emotional. Conversely, Mrs Mahlo accepted that it was a very, very emotional conversation. You've heard that - Mr Hehir say that he can't specifically recall aspects precisely of the conversation, if at all, whereas, you know, there there is a departure on the part of Mrs Ceinwen Mahlo, she seems to have - she seemed to have a very perfect composure to make a note immediately after. Your Honour, it's a very detailed note, for somebody just out of the blue to make in a very distressed set of circumstances.

HIS HONOUR: She said she made it a few hours later.

MR NEVISON: Yes, that's right, but, nonetheless, it's still a very strange thing for people to do. Nonetheless, she tried to explain it away that it was an unusual conversation, and that's-----

HIS HONOUR: Well, it was an unusual and obviously tragic circumstance.

MR NEVISON: Yes.

HIS HONOUR: So that - and the police were involved.

MR NEVISON: Yes. But you might - you might think it all falls apart for a couple of reasons, and they are these: her evidence was that in fact Nadine, her sister, was present at the time. You look to her statement or her sworn affidavit, there is no reference there to Nadine at all. There's nothing about it. There's certainly no corroboration, there need not be, but there's no reference even to Nadine. There is a reference to Brett Mahlo being there, but he doesn't come and give any evidence that there was a call at that time that immediately put him on alert that he was responsible for the due administration of this estate. Against that, though, your Honour, is Mr Hehir's evidence that he immediately instructed solicitors and put it in their hands. There was no document in his possession at that time, and his evidence in fact was that it wasn't until - I think it is Exhibit 2 - Exhibit 2 to his affidavit - the 24th of June 2008 when he became possessed of a copy of the document. He may have heard about it through his solicitors was his evidence before that. So his actions are completely consistent with a person who didn't know of the

document.

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HIS HONOUR: But they're not inconsistent with the actions of a person who had been told of the possibility of the document but who was making inquiries.

MR NEVISON: Yes.

HIS HONOUR: Now-----

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MR NEVISON: But can I throw that back, your Honour, in this way, and say are the actions - matter for me to answer the questions at this stage, I appreciate, but I will promulgate the question and answer it. Are the actions of-----

HIS HONOUR: You could have been Prime Minister.

MR NEVISON: Yes, thank you. I'd be nursing babies of other Ministers. Are the actions of Mr Brett Mahlo - are the actions of Mr Brett Mahlo consistent with a person who had been told that he was executor of the estate or potentially a person who was charged with being executor of the estate? There is not - not one affidavit about his role in putting that - in going forward as a consequence of something he was told on the 28th of May.

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HIS HONOUR: But it all happened pretty quickly and no doubt everyone, including your client, was in shock.

MR NEVISON: Yes.

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HIS HONOUR: By the 30th, as you've discussed, the electronic document is discovered and it's printed. So the fact that Brett Mahlo did nothing between the 28th and the discovery of that, according to what the evidence reveals anyway, I don't think is remarkable. After all, he was in Orange.

MR NEVISON: Yes.

HIS HONOUR: Others were coming up here and did immediately-----

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MR NEVISON: This though your Honour is not-----

HIS HONOUR: -----to investigate and attend to things.

MR NEVISON: This though is not a fight just about a regularly executed Will. The applicant seeks very much the indulgence of the Court in unusual circumstances, and one would expect him to be right on the front foot as the applicant in terms of swearing as to his involvement. It was his wife who purportedly got the phone call that exposed this revelation that he was a person - I can't really put it higher than that. I find it exceptional. If your Honour finds it unremarkable, I certainly find it exceptional.

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HIS HONOUR: Well, it is difficult to say that anything in this case is unremarkable.

MR NEVISON: Yes.

HIS HONOUR: But going back to the note made by Mrs Mahlo, the first question is whether it's authentic. It does seem to me that although she is - she can be seen to be not completely independent, because naturally she is aligned with the plaintiff's side of the case and would be sympathetic to those who stand to benefit from the plaintiff's success. If she was the sort of person who fabricated such a document, and then perjured herself in an endeavour to prove it, I can't help thinking that she would have done better than that.

MR NEVISON: Yes.

HIS HONOUR: And it would have been much easier for her, for example, to have said or to have claimed that she had had a conversation with her late sister-in-law in which she had been told that the Will was on the computer.

MR NEVISON: Yes. Can I stand on my head and address that scenario then, your Honour?

HIS HONOUR: Mmm.

MR NEVISON: And I do so in this way: if you accept what Ceinwen Mahlo has recorded in her note, and her affidavit, there was a discussion by Mr Hehir to the effect that Anna had contacted the office that morning, asking for the Will, and arising out of that there was a conversation that there could be a second document. Even if you accept that that more probably than not occurred, that is not the end of the matter in terms of the document on the computer being the testamentary intention.

HIS HONOUR: Precisely.

MR NEVISON: Yes. I just wanted to make sure we are right about that, yes.

HIS HONOUR: Yes. No. Precisely. Because if I accept her evidence-----

MR NEVISON: Yes.

HIS HONOUR: -----and I accept the authenticity and substantial accuracy of that note-----

MR NEVISON: Yes.

HIS HONOUR: -----I think it follows that your client in his own mind thought that there was at least a real possibility that there was a Will which appointed Brett.

MR NEVISON: Yes.

HIS HONOUR: Now, that doesn't, of course, discharge the plaintiff's onus.

MR NEVISON: No.

HIS HONOUR: But it does indicate to me what - I will just say this before we adjourn - it indicates to me what I think is likely anyway, which is that your client and Dr Mahlo had remained on civil terms. You might want to address me after lunch, if you see fit to do so, as to whether they were in a de facto relationship, a matter about which I have great doubt, but, nevertheless, they remained on civil terms, and that's shown by your client sending what he sent on the 7th or 8th of May, and it's not unlikely in that circumstance that he was told something by the deceased about her intention, and in particular her intention to make a new Will appointing her brother as an executor, but that goes to what I think you describe as the second of the elements, it doesn't at all go to the proof of the third.

MR NEVISON: No. Yes.

HIS HONOUR: We will adjourn then till 2.30.

THE COURT ADJOURNED AT 1.04 P.M. TILL 2.30 P.M.

MR NEVISON

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ADDRESSES

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THE COURT RESUMED AT 2.33 P.M.

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HIS HONOUR: Yes, Mr Nevison.

MR NEVISON CONTINUED ADDRESSING HIS HONOUR: Thank you, your Honour. May I begin by addressing the two issues raised just prior to the luncheon adjournment. Firstly, dealing with the note produced by Ceinwen Mahlo.

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HIS HONOUR: Yes.

MR NEVISON; I'm the last person to want to complain about any late disclosure but I raise it for this reason. That document was provided, on my instructions, on Thursday the 4th of August 2011 to my solicitors last week, and perhaps it underscores the importance that was placed on it by the plaintiff, given the late disclosure.

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The other issue I wish to address your Honour, which you raised with me before lunch, was whether Mr Hehir was in a continuing de facto relationship. If one looks to the usual indicia under section 32DA of the Acts Interpretations Act, there's some departure from the usual indicia, but as your Honour will accept and is well recorded in cases dealing with de facto relationships, there is no script for these relationships. They are often different to a marital relationship and they can very much depend on their own specific circumstances.

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In the context of this matter, your Honour, it's my submission that the de facto relationship did continue until the actual death of the deceased, notwithstanding the fact that they were living separately to an extent, but there was a revisitation by Mr Hehir at the Moffat Beach premises right up to a date proximate to the death of the deceased.

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It's uncontroverted on the evidence that he was there on the 24th of May and the deceased died on the very early morning of the 28th of May. He had been there on and off through that period and that is consistent with the way the relationship had been bumping along, as it were.

HIS HONOUR: You said it was uncontroverted. Did you mean uncontradicted?

MR NEVISON: Uncontradicted, yes, indeed, that he was there on that date. In addition, your Honour, the evidence is that his unit at Cotton Tree was, I think I used the words no more than a camp. It had no electricity. It wasn't furnished properly. It had a blow-up mattress, hardly the premises of a person who had permanently vacated a residence and reestablished himself.

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HIS HONOUR: I have to say that I have difficulty in accepting that even if he only spent the amount of time at Cotton Tree

that he said he did, that he didn't have the power on.
Doesn't seem to have been a particularly - well, rather he
seemed to have worked late and would often no doubt have got
back to Cotton Tree well after dark.

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MR NEVISON: Yes.

HIS HONOUR: Anyway.

MR NEVISON: His evidence was he didn't put the power on, your
Honour.

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The other thing you might conclude in the curious nature of
the relationship between these two people is arguably the
deceased wanted to be saved. She really didn't want to die.
She made numerous various serious attempt on her life but each
time she reached out, she reached out to one person, Mr Hehir.

She phoned him on the occasion of the April event, and he
saved her. He went to her house. She was bordering on
unconscious. He called emergency services and they
resuscitated her and they saved her. She did it again on the
night she died. He went to save her.

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That may speak loudly of actions by a person who did place and
repose a great degree of faith and trust commensurate with a
marital type relationship and another, in my respectful
submission.

HIS HONOUR: Now, the missed call on his mobile phone -----

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MR NEVISON: Yes.

HIS HONOUR: -----is that proved by a phone record?

MR NEVISON: No, your Honour, it's not but it doesn't seem to
be in contest in any way, and it wasn't - it was accepted by
the police and ambulance officers who attended. They checked
his mobile phone, your Honour.

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HIS HONOUR: Well, is this in the evidence, Mr Nevison?

MR NEVISON: I would need to reflect on the statements of
Jodie Allen, the detective, to accurately inform your Honour
of that matter and I'll do so. I will ask my instructing
solicitor while I'm on my feet to do that.

HIS HONOUR: Well, if that can't be done before you sit down,
you can give me the reference to the evidence later in the
afternoon.

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MR NEVISON: I will certainly check it out, your Honour,
because those statements are clearly in evidence.

Finally, your Honour, I point again to the suicide note
directed to my client at page 292 in the trial bundle which
evidences the nature of somewhat of an ongoing relationship.

Might I cut to the chase, in my submissions, your Honour, and they are these: I relied, of course, completely on the written submission. I won't bore you with reading them. There are, in effect, three steps.

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Your Honour could conclude in this matter that the document was, in fact, created by somebody else. They had access - other people had access to the computer, and if you did so conclude that, that would be the end of the matter.

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There may, and I'm prepared to concede that there may be sufficient evidence for your Honour to conclude that the deceased, in fact, had an intervention in the document and thereto its creation on her computer.

Nonetheless, it is arguable that in the circumstances, as outlined in paragraphs 18 through 23 of the submissions that it doesn't truly form the testamentary intention of the deceased, but really where we hang our hat in this matter and ask for dismissal of the application is in respect of the third ground or leg, and that is even if you conclude that the document records a testamentary intention of the deceased, it was not, in fact, intended by her to be carried into effect as her Will.

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If you like, it might almost be seen in the nature of a draft. There is compelling evidence before your Honour as to why you should so characterise the document. In particular, I point again to the file note of 23 May 2008 in the FAA material which clearly demonstrates that there was an ongoing discussion about inheritance or the insurance and how that may be affected by the Will.

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I also rely heavily still on the words expressed by the deceased. They are her own words in the suicide note at page 292 of the trial bundle.

There are a range of reasons we rely on, your Honour, to say that the Court could just not develop the degree of comfort necessary to conclude that she did intend, unequivocally intend, for that document to be her Will.

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Especially in light of the fact that - and I've just seen since coming back from lunch my learned friend's written submissions which I thank her, her reference to the Briginshaw test and the reasonable satisfaction a Court must have in the nature of these matters, and I adopt and rely on that as well.

Yes, it's a matter of determining it on the balance of probabilities, but there needs to be great caution and the Court must be reasonably satisfied at the end of the day.

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In terms of the case law, your Honour, it's a growing area and the nature of circumstances which give rise to orders increases by the day, but suffice to say, the starting point from our perspective is the treatment given to the legislation by her Honour Justice Philippides in the decision of re Garris which has been extracted in the submissions 2008, 2 Queensland

Reports at page 59.

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I will hand to your Honour, a copy of all of these decisions anyway, save your associate having to find them, and her Honour sets out the historic framework and, in effect, identifies the three-stage test as it was identified in the New South Wales decisions of Masters, Hill and Plummer and Hatsatouris which are often referred to in this area.

Your Honour, in my submission, this matter is more akin to the nature of the decision ultimately in re Vogeles, a decision of his Honour Justice Douglas in this Court where he actually concluded against the applicant in that matter and, particularly, your Honour, may I direct your attention to paragraphs 20 and 22 of his Honour's decision there. He just, considering all the evidence could not get the degree of comfort required.

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It will obviously be brought to your Honour's attention that there is a case involving somewhat similar circumstances in re Trethewey 2002, 4 Victorian Reports 406, a decision of Justice Beech.

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Your Honour, that concerned orders that were sought for declarations in relation to a Will on a computer. That was not signed by the deceased, but in my respectful submission, the application was successful, but in my respectful submission it is a world of difference from the facts in this matter.

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In that case the deceased had broadcast for some time to people that he had made a Will on his personal computer and, in fact, he typed his name into it. There were deliberate efforts by him to make his intention well-known.

Tellingly, also in that matter, there was no contradicter to the application as well, so that decision should ultimately be distinguished from the present.

Your Honour, I may not need to rise due to the efforts of my instructing solicitor, your Honour, about the Jodie Allen issue-----

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HIS HONOUR: Yes.

MR NEVISON: -----and the missed call. My instructing solicitor has brought to my attention the statement of Jodie Allen. This the first statement. It is actually numbered page 471 through 473 in the trial bundle.

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HIS HONOUR: Yes.

MR NEVISON: Particularly at page 472 last line in the last sentence there, your Honour. It says, "Hehir stated that during the early hours of the morning he noticed he had a missed call on his mobile phone from Mahlo so he tried to ring her back...drove to Mahlo's residence."

HIS HONOUR: If you going to read it, would you mind slowing down. I do have it in front of me.

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MR NEVISON: Thank you, your Honour.

HIS HONOUR: I was really asking whether there was any documentary record of telephones that show a missed call.

MR NEVISON: Not in evidence in this proceeding, no, your Honour, no.

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HIS HONOUR: Thank you.

MR NEVISON: I would be surprised if that is contradicted in any way but there is no direct evidence of that, your Honour.

HIS HONOUR: I would be surprised if the fact is admitted. We are about to find out.

MR NEVISON: Indeed. Thank you, your Honour. I don't think I can take the matter any further.

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HIS HONOUR: No, thank you. Yes, Ms Treston.

MS TRESTON ADDRESSED HIS HONOUR: Sorry, did I hear your Honour to say you would be surprise if it was admitted, or you wouldn't be surprised if it was admitted? Perhaps it doesn't-----

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HIS HONOUR: I said I wouldn't be surprised - sorry, I would be surprised if you admitted that there was a missed call.

MS TRESTON: Your Honour apprehends the situation precisely. There is no evidence other than Mr Hehir's evidence that he had a missed call from the deceased at that time of the morning. There is simply no telephone records, and as Mr Hehir told us repeatedly throughout his evidence, those records are available and yet he didn't seek to produce them.

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MR NEVISON: Well, your Honour, I am loath to interrupt but on this point because it's a live issue right now and I stopped halfway through what I was reading, could I go to the last two sentences of the statement. There has been no evidence to challenge this. This was material put in on the plaintiff's case.

HIS HONOUR: I go back to-----

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MR NEVISON: Yes, 473, your Honour, please. Firstly at the start in 471, Detective Allen says that she remembers the morning of the 28th of May 2008. In the second paragraph, "Myself, Detective Andrew Bauer attended 23A Williams Street." Then over at 473 at the last two paragraphs of the first paragraph she reports this, "Hehir then showed Bauer" -her fellow detective - "and I his mobile phone and displayed all the call register section of the phone."

HIS HONOUR: I see.

MR NEVISON: "I then took note of the calls made from Hehir's phone during the night."

HIS HONOUR: Had that not been consistent with what your client had said to Ms Allen, her statement would be in different terms.

MR NEVISON: Yes, exactly, your Honour. It would have been tested.

HIS HONOUR: I think that's right.

MR NEVISON: Thank you, your Honour. I apologise.

HIS HONOUR: Yes, Ms Treston.

MS TRESTON: I won't take the point any further.

Your Honour, could I hand up my written outline. Would your Honour like two copies, a working copy and a copy for the file.

HIS HONOUR: Yes, please.

MS TRESTON: They are quite long. Would your Honour like an opportunity to have a look through them first?

HIS HONOUR: Just take a seat.

HIS HONOUR: Mr Nevison, did you say you had a bundle of cases?

MR NEVISON: I did, your Honour, if I might hand them up to you.

HIS HONOUR: Thank you.

Do you have a copy of your cases, Ms Treston?

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MS TRESTON: Yes, I do, your Honour.

HIS HONOUR: Thank you. Yes, I've read them, thank you.

MS TRESTON: Thank you, your Honour. Your Honour, could I go first to the issue relied upon by my learned friend in relation to the importance of the so-called suicide note to John which appears in the trial bundle at page 292-----

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HIS HONOUR: Yes.

MS TRESTON: -----and the importance that's placed on that in the context that the submission was made by my learned friends that the - that the wording, "Please look after the kids when they need you" suggests that they are words consistent with a person who was to be the executor of a Will for the children?

HIS HONOUR: Yes.

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MS TRESTON: Adult children. The first thing to say about that note is that it would be unusual, in my submission, to elevate to the standard of a reflection of what true testamentary intention was those half a dozen words about looking "after the kids when they need you" in contrast with all the other evidence of testamentary intention which exists, in my submission, that is directly relevant to the Will which we are seeking to propound. That phrase, "Please look after the kids when they need you" is capable of so many interpretations. It would truly be stretching the boundaries to suggest that that was plainly a reference to his role as an executor of a Will. In fact, one would have expected that were she - Karen Mahlo intending in fact to say to him, "Please exercise your good judgment when acting as the trustee of their estate", because under the 14 February Will it's on trust until they're aged 45, one would have thought she might have used rather more particular words about his looking after them. But the additional words of "and don't try to control them", in my submission, are in complete conflict with the terms of the Will of 14 February 2008. If ever he was going to have control of them, it's under the terms of that Will, and yet she is imploring him not to control them. She is now saying to him, "Don't interfere in their lives. Let them get on with things."

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So we can, all sitting here today, put as many interpretations on those three lines as there are different people in this courtroom, everyone would read them differently, but to suggest that they indicate that in fact she is referring to an earlier Will where she has made him the executor and placed him in the position as a trustee for the children until age 35 does stretch the boundaries, in my submission. That's the point about the suicide note.

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Can I take your Honour to the other point which I understood to be significantly relied upon by my learned friend, and that is that as at the 23rd of May she was still considering her

testamentary affairs, and in fact it's submitted at paragraph 28 of my learned friend's submissions that on the 23rd of May 2008 the deceased was continuing to discuss her testamentary affairs with the first defendant who continued to stay with her?

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Can I take your Honour to what the evidence is in relation to the 23rd of May 2008? First of all, there's the file note made by Mr Hehir that forms part of the FAA documents where he attributes to her that she had rung him to discuss estate planning issues. She talks about the inheritance calculator, about decreasing her MLC insurance policy. He implores her to consider her options carefully and suggests she can address issues of concern by use of her Will. Now, when he gave evidence before your Honour in his evidence-in-chief the limit of his evidence in relation to the conversation of 23 May 2008 is transcript page - day 2, page 38, lines 35 to line 4 on 2-39. That's the full limit of his evidence-in-chief in relation to that conversation. He had a conversation with her about reducing life insurance, he made a note about it, she didn't want Anna to have as much money if she was to die, and it finishes at line 5.

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Now, your Honour might remember that I asked him this morning if he had a recollection of that conversation with her, and whether he thought that the file note of the 23rd of May accurately reflected the contents of the conversation that he had with the deceased, and he said that it did. I think, to be fair to him, he said he wasn't able to say whether it did or it didn't, but he certainly didn't add anything to it this morning. I think that's probably a fairer summary of what he said. The record will reveal. But in that sense the evidence about what occurred on the 23rd of May is very thin. It certainly doesn't suggest that at that stage she was uncertain about the terms of what she had put in her Will on the 15th of May, or 16th of May, which I will come back to in a minute. It might be suggestive of the fact that she thinks perhaps she should reduce her insurance so there might not be quite so much in the estate if she should die in the next day or two, might be suggestive of that, at a push, but it doesn't actually reflect at all on the terms of a Will. Now, Mr Hehir calls it estate planning issues in the file note. Again, that's only his terminology. In my submission, there wouldn't be anything about the content of the file note of the 23rd of May which would lead your Honour to conclude that in any objective sense that was estate planning advice, and indeed Mr Hehir tried to disavow the suggestion that he was in the business of giving estate planning advice, he was more interested in giving financial planning advice, as one would hope of a financial planner.

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So the two points in time at which my learned friends say, well, your Honour has good evidence that you could not conclude that she had got to the point that she was carrying her testamentary intentions into effect, the evidence is very weak indeed on the defendant's side of the record.

In the context of the submission which I have made to your

Honour about the Briginshaw test, I make it in this context: it is very easy after someone dies to say that, "They told me certain things", and Mr Hehir's evidence was redolent with things that he said the deceased had told him, which, in my submission, are otherwise inconsistent with the other evidence before your Honour. Now, in that sense, recognising what Mr Hehir has to gain under the earlier Will, one would be very cautious indeed where his evidence conflicts with the evidence of less interested parties, or indeed, in some cases, disinterested parties, such as, who I would submit, Jenny Ruhno and, to a lesser extent, Ceinwen Mahlo.

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HIS HONOUR: So you're addressing the application of a Briginshaw standard to his evidence?

MS TRESTON: Yes.

HIS HONOUR: But on what issue does he bear the onus of proof?

MS TRESTON: Sorry, your Honour, I'm not suggesting that he bears the onus of proof. I am saying when your Honour looks at his evidence in terms of the - your Honour's ability to accept the - that which he says to you about other circumstances which would go against the finding of testamentary intention, I am not suggesting he bears an onus of proof, I am suggesting it's in the context - and that's why I tried to make the submission perhaps inelegantly in the written outline that in - it was - the burden of proof was discussed in Bauer v. Hussey or Hussey v. Bauer about the ease with which one can make assertions about things which a deceased person has told one. I accept that in Bauer v. Hussey it was talking about it in the context of the burden of proof. I am talking to your Honour now today about the ease with which Mr Hehir can now make-----

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HIS HONOUR: I understand that submission. I just don't see it as a Briginshaw question.

MS TRESTON: Well, perhaps-----

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HIS HONOUR: Because the Briginshaw test, I always thought, was something which until recently was thought to put a gloss upon the civil standard of proof.

MS TRESTON: Yes.

HIS HONOUR: But it was until recently perceived as some sort of intermediate standard between the civil and criminal standard-----

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MS TRESTON: Yes, your Honour.

HIS HONOUR: -----which had to be met in the discharge of-----

MS TRESTON: An onus.

HIS HONOUR: -----the burden of proof.

MS TRESTON: I beg your pardon, your Honour, your Honour is probably right, and perhaps I am mixing the concepts there, because my point to your Honour still remains the same, in terms of the acceptability of Mr Hehir's evidence, and perhaps I was wrong to cast it in that light. The point, nevertheless, in my submission, is well made, that your Honour must approach Mr Hehir's evidence with a significant degree of caution given the ease with which he was prepared to tell your Honour about other conversations he'd had with the deceased for which he has no other independent source of support, particularly when that evidence seems to be in conflict with either the evidence of other witnesses, for example, in relation to the breakdown of their relationship, or in conflict with the documentary trail, and your Honour will remember the lengthy e-mail exchange that I took him to going to the same point about the breakdown of the relationship.

HIS HONOUR: Yes.

MS TRESTON: It was in that context that I was making the submission about Mr Hehir.

HIS HONOUR: Yes, I understand.

MS TRESTON: Now, my learned friend submitted to your Honour this morning that Mr Hehir would have impressed your Honour with his honest and forthright answers. It's the case sometimes that, as we know, in criminal cases we say five people see the same event and they see it five different ways. Well, this is a very good example of the same sort of thing. I would describe Mr Hehir to your Honour as nonresponsive, unconvincing and at times evasive. He was a particularly unimpressive witness, in my submission, not prepared to concede even the smallest point, argumentative on occasions, but certainly quite nonresponsive to questions. He seemed to prefer to want to answer questions of his own choosing rather than the ones which were actually put to him, and his evidence was wholly, in my submission, unconvincing.

Whilst I am on that issue of credit, and inferences to be drawn, I have set out at some length in the written submissions the reasons why your Honour would not be persuaded to draw adverse inferences in respect of the plaintiff's failure to call Anna or Ben Sasonow in these proceedings. I don't propose to take your Honour to anything further than that which is said in the written outline, except for this: to the extent that there is anything in the pleaded case that might have given rise to the expectation that the plaintiff would call either the second or third defendant in its case, the evidence upon which it's pleaded that they might have given evidence is of very limited compass. Paragraph 10C, which was not admitted, was that the May Will was located by the second defendant on the 28th of May. There is no evidence as to who located the Will on the 28th of May. Someone did. My learned friend submits that it was Anna Sasonow. With respect, there's just simply no basis for that conclusion. A document, being the suicide note, on my friend's case, was saved to a file that bore her name on that day of the 28th of

May. Now, it is a bit rich, in my submission, for the defendant to say - first defendant to say, "Well, that must have been Anna who found the document because she saved it into her own file", and yet on the other hand say, "Oh, but by the way, all the entries on the deceased's computer, in the deceased's home, saved in the deceased's file, called the deceased's Will, they were probably made by somebody else." It must lie like ashes in the first defendant's mouth to make that submission, but, in any event, the evidence does establish that someone accessed that document on that day.

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Mr Hehir gave some evidence about whether he went back into the house on that day or not. Again, in my submission, it wasn't very convincing. He agreed that he had told the police that he was a bit fuzzy and he wasn't sure or not. He did say this morning that he thought that if he had gone in it might have been only to place his foot over the threshold. Whether anything turns on that or not can't be said. It certainly isn't the case that anyone altered the document on the 28th of May. So that might be the only point about which your Honour might have expected, to the extent you could expect, a plaintiff to call a defendant in its own case.

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HIS HONOUR: Well, the-----

MS TRESTON: In the circumstances.

HIS HONOUR: They are defendants, but of course they have a very direct interest in the outcome of the application.

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MS TRESTON: Yes. Of course.

HIS HONOUR: And I think that it can be fairly inferred that their evidence would not have assisted your case in that they would not have been able to give evidence that - or either of them - that their mother said words to the effect, "I've made a new Will and it's on the computer."

MS TRESTON: That's right.

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HIS HONOUR: But if she did not say that to them, that's not the end of the matter.

MS TRESTON: That's right, your Honour. And then in respect of the third defendant, Anna, the only pleaded aspect of the case which might have been relevant to her are those at paragraph 11D(i) to (iv). In relation to those, as the written submissions set out, paragraph 11(i), that the first defendant sent an e-mail template so that the deceased could prepare a new Will, is plainly already proved by Mr Hehir's evidence and by the documentary evidence. (ii), that she intended to prepare a new Will, again proved, in my submission, by Mr John Mahlo's evidence, also by Mrs Jenny Ruhno's evidence. She was no longer in a relationship with the first defendant. Again proved elsewhere. She was no longer in a relationship with the first defendant who was the beneficiary under the earlier Will. So I certainly didn't need to call Anna Sasonow to prove any of those matters at

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11D(i) or (ii). Now, the only things about which she might - your Honour might say, "I am prepared to draw an inference that she couldn't have assisted the plaintiff's case in relation to 11D(iii) and (iv)" - it of course isn't - your Honour must not draw an inference, your Honour only may draw an inference, and to the extent that you would draw an inference, it's limited only that she couldn't have helped my case in relation to those two points. So very little can be drawn, in my submission, from that failure.

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Can I ask your Honour to - take your Honour then to what's actually required of me in the proof of my case in relation to the section 18 declaration?

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HIS HONOUR: Yes.

MS TRESTON: It's important to look at the wording of section 18 to establish what I must prove, because it's in respect of the third criteria, if I can call it that, set out by the New South Wales Court of Appeal in Hatsatouris' case, with which my learned friend's submissions were concerned, and seems to be the potential strength on his side of the case in terms of how he perceived it to your Honour and how he related it to your Honour. The section, of course, only requires that it applies to a document that purports to state testamentary intentions of a deceased person and hasn't been executed under the Part. Now, just pausing there at 18(1), the document in this case, it's now uncontroversial that it's a document within the meaning of the section. On the face of the document it plainly purports to state the testamentary intentions. It's a Will in fact. In content it purports to state testamentary intentions, that is, it identifies the estate for distribution, it identifies the persons who might have a call on the deceased's bounty. In every respect it's testamentary in nature, and it is called a Will for that purpose, and plainly it is not executed under the Part.

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So your Honour then having been easily satisfied as to the matters at 18(1) turns to section 18(2) which requires the Court to be satisfied that the person intended the document to form part of the person's Will.

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HIS HONOUR: Or, in this case, to form the person's Will.

MS TRESTON: Or, sorry, to form the person's Will. I beg your pardon, your Honour. Now, that's not - that's not, as it were, a separate criteria to (1) and (2). It's having concluded that it was - to (1)(a) and (1)(b) - having concluded that it was a document that was testamentary in intention, did she so intend it, and that is the way that the New South Wales Court of Appeal has described the three stage test in Hatsatouris' case.

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Having said that, my learned friend refers to it in his submissions, and I think I have provided a copy to your Honour, of the Court's decision in New South Wales in the estate of Masters, Hill and Plumber, where the Court said that this legislation must be given beneficial application. It was

intended to remedy the evil, as it were, of elevating the formal requirements of execution that, as it were, under the old section 9 of the Act, to a status that where you couldn't tick all the boxes, couldn't show that the document had been signed at the foot of each page, the document was thrown out, notwithstanding that it plainly evinced testamentary intention, and that's what Garriss' case was about, Justice Philpides giving the decision there, that section 18 starts with the intention, doesn't start with the formal requirements of execution. Indeed I think, if your Honour thinks it might be of assistance, the learned Chief Justice of this Court gave the WA Lee Will lecture, I think, this year or last year - I've got a copy of his paper in my Chambers - where he also spoke about the very beneficial nature of this amendment in 2006 and described it as a very commonsensical approach to how one ought to receive documents evincing testamentary intentions, and that's demonstrated, of course, by the wide range of documents that have been admitted to probate throughout the country. We, I think, were the last State, however, to introduce these amendments in 2006. So, as my learned friend, Mr Nevison, says, it is a developing area and a lot of the case law is in other jurisdictions.

Can I take your Honour, though, to two cases where the Court cautioned against placing a gloss on the actual statutory language of the section to sort of effectively add a criteria that doesn't exist within the legislation, and those are the cases of Mitchell v. Mitchell and Riches v. Innes, which I have set out at paragraphs 13 and 14 of my submission? Perhaps I can save a little bit of time. The citations are referred to in my outline and the summary of it is already there. Justice Heenan in those cases did express the view that we must be cautious not to place a gloss on the language, we need to look carefully at the requirements of the section, in our case, section 18(2), and in Riches v. McInnes, which is a 2010 decision in WASC 298, his Honour said - emphasised that the alleged testamentary document won't take effect if it is in any way provisional, tentative, preliminary, or part of some proposals which the deceased was recording, but had not yet then adopted as actual present testamentary intention.

Now, I ask your Honour to bear that caution in mind because it would be wrong to elevate the three-stage test in Hatsatouris' case as if it was superseded over the top of what was actually in the legislation.

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All that Hatsatouris is attempting to tell us is look at the document, look at the true evidence of intention and satisfy yourself that the intention was that it be a Will and that it be intended to be a Will, is really all it is saying

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HIS HONOUR: But the - I don't see that the so-called three-stage test involves really anything but a convenient description of the effect of the section. That is to say, there is undoubtedly a question in this case, in this state arising under subsection 2 of section 18 about intention, and the intention must be one as to the effect of the document, and that intention must be held at the time of the creation of the document.

MS TRESTON: That's right.

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HIS HONOUR: So to say that, as many judges have said, that it must, without more - it must be intended without more to be a Will is just to say that it must be intended at the time the document is made, that the document we made did constitute the Will.

MS TRESTON: Thank you, your Honour.

HIS HONOUR: That's the section says.

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MS TRESTON: Thank you, your Honour.

HIS HONOUR: I've used the word "constitute" there. The section uses the word "form".

MS TRESTON: Yes, your Honour.

HIS HONOUR: You don't suggest there is any difference?

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MS TRESTON: I don't suggest there is a difference.

HIS HONOUR: I note that some of the judges here, Justice Philippides has used the term "constitute". The explanatory note is the word "constitute", as did the Law Reform Commission in its recommended provision which was in 2002, I think, or may be a bit earlier. It was a bit earlier.

MS TRESTON: I can't recall, your Honour.

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HIS HONOUR: Although, as you say - I can, because I was on it - sorry, that's really by the by but for some reason or other, the Queensland Parliament took about six years to enact it.

MS TRESTON: Yes, your Honour. Can I say that I was in Garris' case and I certainly used the words "constitute" to Justice Philippides in the context used in Hatsatouris's case.

HIS HONOUR: Yes.

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MS TRESTON: That is the terminology that is used there and, you know, one can only assume that perhaps "constitute" in the Law Reform Commission report, your Honour would know more about it probably than I do, had some regard to Hatsatouris because it would have been at that stage, probably, the leading decision on the section - equivalent section elsewhere.

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HIS HONOUR: I think "constitute" came from a draft or a bill that at the time of the Commission's report was before the Victorian Parliament. This was all part of the program to make uniform succession laws, so I think these minor differences between the states as to words aren't intended to have any significance.

MS TRESTON: Sadly, when I was on the Law Reform Commission as late as last year we were still working on the national succession reform of the law. Ten years later.

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HIS HONOUR: Yes.

MS TRESTON: Your Honour, I have neglected to include in my bundle the case of Cleland but I have set it out at some length there as one of the cases in Queensland to which your Honour might have some regard. Quite a different case but can I mention Cleland for this reason.

Your Honour will see I set out that the deceased had a lengthy and quite complex existing Will. She was very ill in hospital and had made some handwritten notes which had things like, "J" whatever the daughter's name was - "J to get shares?", and then the next reference had something else with a question mark next to it. Justice White, as she then was, received some evidence from the members of the family as to the fact that the testator wasn't undecided about what she was going to do. She simply wanted to discuss the legal ramifications of some of her decisions with her solicitor.

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That codicil was admitted to probate in that case. There was no contra dicta. The family all agreed with the interpretation. Indeed, even the deceased's husband who was to take a lesser benefit agreed. That shouldn't, of course, be decisive that they all agreed to it being that way. The Court still had to be satisfied that it still reflected her testamentary intentions but it's a case that is demonstrably weaker than the current case before your Honour in my submission, because the terminology used in the document was so much more equivocal than the terminology used here.

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The Court, in my submission, would have to go - exercise much more rigour as to the wording of the document to be satisfied that it actually was testamentary in intent, even having regard to the evidence of the family.

My learned friend refers to the decision of re Vogele of Justice Douglas'.

HIS HONOUR: These are facts case.

MS TRESTON: These are-----

HIS HONOUR: As is the present case.

MS TRESTON: They are facts cases. It was a Will kit. It was unsigned. It was incomplete. It was undated. It was completed in two different inks suggesting that it had been filled out at two different times. There was no evidence as to when, on either of those times, it actually was completed. No one else was present in distinction to our case where Mr Mahlo at least is in the house at the time. And there wasn't even any real good evidence of testamentary intention. Yes, it was dismissed in re Vogele but it was a vastly different case, in my submission.

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Can I go briefly to some of the issues in relation to the evidence. There is this issue about the February 2008 Will and who was responsible for its production. To the extent that that matters, it seems to go to the question of the draft document, if I can call it that, the template that was sent to Dr Mahlo by Mr Hehir on the 8th of May 2008.

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Mr Hehir says, "Well, FAA did not prepare that Will. Dr Mahlo prepared it herself." Your Honour need only to look at the terminology of the 14 February 2008 Will and compare it to the much more informal terminology in the May 2008 Will to the parts that appear to have been changed from the February '08 Will to see that it would be a difficult conclusion to reach that Dr Mahlo was responsible for the preparation of the February Will. It looks remarkably similar to the Brown Will. It uses very legalistic language. There is nothing in it at all that is suggestive of a lay person having drafted it, and it does not really seem to-----

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HIS HONOUR: Except that it seems to be drafted in ignorance of the rule in Saunders and-----

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MS TRESTON: There is that. There is that, which might also suggested it has been drafted by a financial planner.

HIS HONOUR: Yes.

MS TRESTON: But probably doesn't suggest it was drafted by a medical practitioner.

HIS HONOUR: Well, I think this all goes in the present proceedings, it all goes to just credit, doesn't it?

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MS TRESTON: In one sense it does. However, in my submission, it goes to a little bit more than that. It is said by Mr Hehir that this was needed to be done because Karen had said to him that she didn't have a copy of the February 2008 Will. Does your Honour remember that evidence?

HIS HONOUR: Yes.

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MS TRESTON: His evidence was that she had, after having had that document executed, given it to him and said, "Put this in my file.", and he said he took it away to work and put it in the file. Subsequently after her death, the original of that document was delivered to his solicitors Greenhalgh Pickard.

He goes further and then says when she contacted him on the 7th of May telling him that she was wanting to change her Will, she didn't have an electronic copy of it. So he made one for her.

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My learned friend took you this morning to the entry in the report of Mr Gallo's showing that some documents had been deleted off her file on the 1st of May 2008.

HIS HONOUR: Yes, I remember that.

MS TRESTON: They seem to be Will documents. It's perhaps making an assumption that is not available on the evidence which, in my submission, is pretty much the basis of the whole of the first defendant's case but the assumption seems to be that she has deleted perhaps that - an electronic version of that file on the 1st of May.

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If that is the case, it might be one further piece of evidence that suggests that she was truly intending to revoke that 14th of February document. She had an electronic copy on her file. On the 1st of May she deletes it. On the 3rd of May she tells Jenny Rhuno that she is making a Will, to leave a gift to her parent and the residue to the kids and appointing Brett as the executor.

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She gets back home on the 5th of May and realises she doesn't have an electronic version of the Will any more so she contacts Mr Hehir to get him to send her one.

Again, a whole other raft of assumptions. There is a whole lot of things that might have happened at that point but it is of some importance perhaps also in the context of Mr Hehir's repeated assertions to your Honour, or the evidence is there, or you should have the evidence there as to how the February '08 rule was created.

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HIS HONOUR: My question was simply as to Mr Hehir's evidence about the drafting of the February Will, and it seemed to me that the question of whether that evidence is accurate is only something that goes to credit.

MS TRESTON: That does go to his credit, that's true.

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HIS HONOUR: What do you say, speaking of the February Will, what do you say to the argument that Dr Mahlo, particularly as a person of her intelligence and education, would have known from her recent experience of executing a Will, duly executing a Will, that the way this was done was to sign in the presence of two witnesses as the document itself provided for?

MS TRESTON: It can be safely concluded that she did sign in the presence of two witnesses. It can't safely be concluded that she was advised that that was the only method for creating a validly executed Will. Mr Hehir gave no evidence about the advice that FAA had given her for execution. She might simply have produced the document and wandered off and had it signed. One doesn't know, but certainly it was signed in the presence of two witnesses.

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HIS HONOUR: And the document which you seek to prove is her Will does provide for not only her signature but for two witnesses.

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MS TRESTON: Yes, it does, your Honour. That doesn't mean, of course, that it wasn't the document that she intended to constitute her last Will. It simply means that she never had it executed in accordance with the part which of course is what section 18 is all about remedying, the failure to execute properly, and whether it's documents that are one witness Wills, as the Registry now calls the, which can go through to the probate officer, as I understand it, without demur, nor no witness Will or no signature Wills, of which there are many in different jurisdictions. The failure to have a signature is simply not fatal to my case -----

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HIS HONOUR: No.

MS TRESTON: -----at all. I don't suggest your Honour was telling me it was, but, yes, she probably did - she did, in fact, have her previous Will witnessed. Whether she knew that was a testamentary requirement, there is no evidence of that.

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HIS HONOUR: It's just a bit outside what is often the circumstance in these cases that somebody who goes along to a newsagents, if you can still buy these things at a newsagent and buys a form, goes home and has go at it because she had the recent experience in the February Will and, as I've said, there is her obvious intellect and education. But she wasn't a lawyer.

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MS TRESTON: No, she wasn't. In relation to that, can I mention one other issue that does arise out of my learned friend's submissions about the witnessing of it. On page 18 of his submissions, it is said that she had it witnessed independently by two staff at the Redcliffe Hospital.

HIS HONOUR: Yes.

MS TRESTON: In fact, on the face of the document, it only demonstrates that it was witnessed by two persons who described themselves as executive assistants, I think - executive officers.

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Certainly there is not any evidence from those persons and their affidavits are not in evidence in the proceedings. I know your Honour read it over the weekend but that is not in evidence in the proceeding.

HIS HONOUR: Yes.

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MS TRESTON: Mr Hehir said that that is where she said she had it witnessed but all I say to your Honour is it was witnessed by two people.

HIS HONOUR: Yes.

MS TRESTON: Your Honour could not elevate to Dr Mahlo some additional knowledge of the requirements of exclusion simply because she was a medical practitioner, in my submission.

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The evidence about the actual Will itself, in my submission, is set out, I hope, in the written submissions, but it is compelling that the deceased told Mr Hehir himself that she was intending to change her Will and, in fact, his evidence at the bottom of transcript day 2, page 55 through to page 56 line 10, that he was creating the Will and put in the month of May and I said to him, "And you did that" - that is you put in the date - "because you fully expected that she was going to amend her Will in May 2008?" And he said, "Yes, I did."

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So he sends her a document with the email saying, "I'm putting it in electronic format for you to amend it as you wish." So he knows that it is her intention to change it. He gives her advice about changing it in terms of the car, et cetera. He implores her to send it back to him to check. It's of no surprise, of course, that she doesn't do that. She is hardly going to involve him in her affairs when she is taking him out of her Will.

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He knows, in fact, that she was going to change the amount of the gift to her parents. In that regard your Honour will remember that that evidence came out quite late in his cross-examination. Yes, the email said, "I've changed up the inheritance calculator so that you can automate it and I have forgotten about the gift to your mother and father.", I think was the email early in the morning on the 8th of May.

He never said anywhere that she told him that she was going to change the gift to the mother and father until quite towards the end of his cross-examination at which point he conceded that she told him she intended to increase and he, in fact, thought he was going to be doubled, so she had been quite specific about what she discussed with him and yet that certainly hadn't come out in any pleaded case. There was certainly never any admission that she intended to change the document. The defence was on the basis that she did not intend this to be her testamentary instrument. A notice to admit the fact was given to him before the trial that, "You sent it to her for the purpose of changing her Will?", and that was not - and that was denied. When he comes along to Court - sorry, I should say then it's not in his affidavit at all.

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He comes along to Court and we realise that the case actually is, "Oh, no, she didn't intend to change her Will. She did intend to make some gift in relation to a motor vehicle. She

didn't intend to change the amount to her parents and in fact, I knew she was thinking about doubling it." She did want to consider her asset position for the purpose of the children's gifts.

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He, in fact, was possessed of quite a lot of evidence about her intentions, none of which saw the light of day in any pleading and none of which saw the light of day in the affidavit such that the parties come along thinking rightly that there was quite a different case to meet than that which ultimately transpired.

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At the same time, of course that she is obtaining this Will from Mr Hehir, she is also going away and seeking, it seems, her earlier Will from Greenhalgh Pickard. Your Honour will remember that exhibited to see Mr Gallo's Affidavit. Is Greenhalgh Pickard writing back to her, I think it is also on the 7th of May 2008 coincidentally sending her a copy of her September '06 Will.

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For all intents and purposes it looks like she is fishing around for her earlier Wills, see what she had done before for the purpose of making a decision as to precisely where she will go or perhaps searching for the terminology, knowing that she doesn't have an electronic version of her earlier Will, one or the other. But unequivocally she creates the document on the morning of the 7th of May. At the same time, your Honour will see that I have extracted various references to what else she is doing at the time or what someone is doing on her computer at 8.30 in the morning on the 8th of May, saving the document that Mr Hehir sent as a Will document, performing Google searches for revocations of Powers of Attorney, performing Google searches on the Public Trustee's website, performing Google searches in relation to changing registrations on a motorbike. They are all set out in the submissions.

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Certainly it has all the hallmarks of someone getting her affairs in order and setting things to right having regards to the changed circumstances with Mr Hehir.

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She is the only person living at the house at Moffat Beach on that occasion and there is no evidence to suggest otherwise.

Mr Mahlo then says, well, during the period that he was there, there was no one else living in the house, and he was only asked, your Honour will remember, "Did Ben Sasonow ever sleep over there?", to which he said no. He wasn't even asked if Anna Sasonow was there.

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HIS HONOUR: I thought he gave some evidence that she from time to time came around and used the computer because she was doing job searches.

MS TRESTON: Yes, but on the - but the critical point of the submission, your Honour, is on the 15th of May at 10.30 at night when the only modifications were ever made to this document and saved, the only questions that were asked were,

"Was anyone else living there?" "No." "Did Ben Sasonow sleep over?" "No."

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So it wasn't ever put to him that Anna had slept over or indeed that she slept over on that night. The only reasonable inference, yes, we could speculate the next door neighbour might have snuck in and open the door, but on the balance of probabilities, it was this deceased who amended that document on that night that Mr Mahlo was in the house and no one else was there.

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I accept that Mr Mahlo's evidence had some difficulties in terms of his recollection. It wasn't exactly the way I had hoped to start my case with Mr Mahlo not remembering his home address. Of course, that's a matter that is of concern on my side of the record and on the other side of the record-----

HIS HONOUR: There have been some famous footballers who haven't been able to remember-----

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MS TRESTON: Your Honour, I hate to think of the examples that spring to mind. As your Honour rightly noted, the similar sort of problem actually affected Mr Hehir in the course of his evidence, a much younger person.

HIS HONOUR: I must say that I was a bit worried with the way his evidence started but in the end his bad start didn't seem to me to reflect on the credibility or reliability of his evidence.

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MS TRESTON: Thank you, your Honour.

HIS HONOUR: I have to be very careful about it as I have to do about everyone else's evidence here. It can be fairly said if it is said by your opponent that he like others who gave evidence or some of them who gave evidence has a direct interest in the outcome as well as what I would describe as an emotional investment in the outcome.

MS TRESTON: Yes.

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HIS HONOUR: Again it might be said, as I think it could be said about Mr Hehir too, that if he wanted to fabricate a version, just make something up, he might have done a much better job than he did. For example, Mr - I better not discuss it too much.

MS TRESTON: Thank you, your Honour. In relation to Mr Mahlo as well, can I say the suggestion that is put that he doesn't really know what he was shown on - whether it was the 16th or May or the 15th of May or the 18th of May, he doesn't really know what document he was shown because he wasn't really able to identify it.

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What we do know is that the deceased didn't have in her house a signed copy of the 14 February 2008 Will. We know that because Mr Hehir had it at his office. So she wasn't showing him a signed copy of her February Will.

HIS HONOUR: She was obviously looking to change her Will from-----

MS TRESTON: Yes.

HIS HONOUR: -----the terms of the February Will. That is clear from the emails from the defendant, so there is no real possibility, it seems to me, that if she showed her father a Will or a form of Will that she showed him the one that was the February 2008 Will.

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MS TRESTON: No, there is no possibility, in my submission. The only likely explanation is that she showed him the document that she had just created and modified within a matter of days. That is, the 16 May document which was last modified on the 15th of May because to suggest that on the day she showed it to him, she would have printed up some other document when no other document was on her computer, no other document had been worked on by her, no other document was in the house.

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HIS HONOUR: Yes, I understand that, but if I accept his evidence, I'd accept also that it had her signature on it, the paper that he saw.

MS TRESTON: Yes.

HIS HONOUR: Why then if she had intended the electronic document to be her Will, would she have printed and signed this one?

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MS TRESTON: Because - in my submission, your Honour, because most lay people, indeed most lawyers, would consider that if you've got a document, you want to have a copy of it in front of you. You might put your signature on it. You don't necessarily have the level of confidence that we have in knowing, oh, the computer version of my document can be proved as my last will.

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In my submission, plainly it can because it embodies her testamentary intentions and it otherwise ticks the boxes at section 18, but as evidence of her testamentary intention she prints it off to show her Dad. There is nothing unusual about that conduct.

HIS HONOUR: But she also signs it.

MS TRESTON: Yes.

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HIS HONOUR: Why would you sign it? Just-----

MS TRESTON: As evidence of your testamentary intention.

HIS HONOUR: You are showing your document to your father and saying, "This is my Will." Why do you need to sign it?

MS TRESTON: One can only speculate as to why she thought she

needed to sign it before she -----

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HIS HONOUR: That is what we are doing, I suppose. We are speculating as to that.

MS TRESTON: We are speculating, and my speculation is that because she would have thought that that was a good way of showing her Dad that she was serious about what she had done. She signs it. There is a space for her to sign it. She signs it, and she takes it out and shows it to him.

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Your Honour, can I say the two other obvious pieces of evidence to which I should refer, of course, are the Beverly Mahlo/Mr Hehir conversation about the increase in the gift from 150,000 to \$300,000. It seems unlikely, notwithstanding Mrs Mahlo's - your Honour's term - emotional investment in the outcome that she would make that conversation up.

It rather seems more consistent with what came out belatedly from Mr Hehir that in fact he knew that that was precisely what the deceased was intending to do, to double the gift to her mother.

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Then, of course, we have got the Ceinwen Mahlo notes. In relation to the, I accept, fairly gently put challenge in submissions to their authenticity or voracity, it fairly and properly, if something was going to be said to Mrs Mahlo that, "Gee, Mrs Mahlo, what an unusual thing for you to do after getting off the phone."

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HIS HONOUR: Yes.

MS TRESTON: A challenge should have been made to her. There was not, with the greatest respect to my learned friend, there was not a scintilla of a challenge to her. The only thing that was put to her was perhaps, "Could it be that you said it to him rather than he said it to you?", and she said, "No."

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Now, Mr Hehir, of course, didn't give evidence that she had said it to him, so my learned friend quite properly wasn't putting it to her as that was his case, he was seeing if he could get a response from her. She rejected it, and that was the only thing that was said about those notes. Now, she didn't know of the existence of a second Will until she spoke to Mr Hehir. When one looks at the content of what else is in that note, she couldn't have known the things in that note if they didn't fall from Mr Hehir, the conversation with Jenny Ruhno at the police station, that she was looking for gory details, that - indeed, that Karen and Mr Hehir weren't living together anymore. On Mrs Mahlo's evidence, she had never spoken to Mr Hehir before.

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Now, this morning your Honour will remember that Mr Hehir told us he'd spoken to Mrs Ceinwen Mahlo two, three, four, five, maybe more than five times. Your Honour just couldn't accept that. No-----

HIS HONOUR: Well, that depends on the context. He may have spoken to her very briefly. She may not have remembered it. I am not trying to be offensive to him. It is just that he may have had a better recollection about earlier conversations which were completely inconsequential.

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MS TRESTON: Except that she said she had never met him, and he admitted he had never met her, so-----

HIS HONOUR: That may be accepted, but-----

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MS TRESTON: So one would think that if there were even inconsequential conversations that must have taken place over the telephone, he might have mentioned those to his solicitors before he came along to Court today, knowing what was in Mrs Mahlo's affidavit.

HIS HONOUR: Yes, perhaps.

MS TRESTON: Knowing that she would say all the things that were in her file note.

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HIS HONOUR: So then what impact does her evidence have on the case?

MS TRESTON: Well, her evidence, in my submission, is further evidence that Mr Hehir knew in fact that the deceased had made another Will.

HIS HONOUR: Well, what is the relevance of his understanding about that? You said knowledge, but that has the premise that it was the fact that Dr Mahlo had made another Will.

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MS TRESTON: Well, it's based on the position that she had, by one means or another, communicated to him that she had made another Will, and told him something about the contents of it, certainly so far as Mrs Mahlo was concerned, that her husband Brett was the executor.

HIS HONOUR: I just want to get the exhibit. This is the passage, isn't it: "Spoke about Will and thinks Karen" - "thinks Karen had a second one which he believes Brett was the executor"-----

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MS TRESTON: Yes.

HIS HONOUR: -----"although he'd never seen it."

MS TRESTON: Yes. So-----

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HIS HONOUR: So it's - he's saying, "Well, I think there's a second Will, although I don't know, and he would have thought there was a second Will.

MS TRESTON: Because he knew-----

HIS HONOUR: Or possibly a second Will.

MS TRESTON: Because he knew that she was intending to make another Will, he knew that she was intending to make it in May, he believed she was intending to make it in May, she had spoken to him about the contents of it, and, indeed, although it didn't come out in the evidence, she must have also spoken to him about the fact that there was a change to the executorship, otherwise how would Mrs Mahlo have got a hold of that piece of evidence? So whilst it might be accepted for the purpose of this trial that he had not seen the new Will, he knew of its existence, in my submission.

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HIS HONOUR: Well, he may have been - well, I don't know if this was put to him, but he may have been fishing for information.

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MS TRESTON: Well, he might have been fishing for information. I am not sure what would be behind that, but the terminology used by Mrs Mahlo, Ceinwen Mahlo, that he believes Brett was the executor suggests that he has some knowledge about something that some other members of the family did not. Jenny Ruhno had been told by the deceased that one of her brothers, Wade or Brett, she couldn't remember which, was to be the executor.

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HIS HONOUR: At the moment I think it's quite likely that given what I earlier referred to as the civil dealings between Dr Mahlo and Mr Hehir, exemplified by the fact that he was sending her information-----

MS TRESTON: Yes.

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HIS HONOUR: -----which would assist her to make a new Will-----

MS TRESTON: Yes.

HIS HONOUR: -----that she had said to him that the new Will she proposed to make would appoint her brother as the executor.

MS TRESTON: Yes.

HIS HONOUR: So-----

MS TRESTON: And certainly my line of questioning to him about the breakdown of the relationship was not for the purpose of demonstrating some deep-seated hatred on her side for him. It was nothing of that sort. It was plainly directed to the fact that their de facto relationship, if that's as he likes to categorise it, prior to the 2nd of April 2008 was over, and therefore the - in the context of the breakdown of that relationship, one might naturally actually expect that someone like Dr Mahlo would rewrite her Will to ensure that her valuable residential property just around the corner from where her own daughter lived might actually pass to her children, not to her partner of some, you know, less than 18 months standing.

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HIS HONOUR: Well, it seems to me that if I accept, as I have been minded to do, this note of Mrs Mahlo as authentic and sufficiently accurate, all that follows is that Mr Hehir on that afternoon had a supposition that there was another Will.

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MS TRESTON: It's just another thread in my case that I make out, but it also is telling in this sense: it is a matter that goes significantly to Mr Hehir's credit on other issues, because he was not willing to concede that he knew anything about it, and it goes to his credit in terms of his defence of these proceedings, being the bald denial that she intended to - sorry, I should - I will put it properly.

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HIS HONOUR: Well, he knows - he might know a lot more - he might know a lot more in defending the proceedings than he knew on the afternoon of the 28th of May. But it is just - on the face of it, it's a statement by him of his own supposition that there was a second Will.

MS TRESTON: Yes. Can I-----

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HIS HONOUR: It's not a statement that, "Karen told me she had made another Will."

MS TRESTON: No. No, it's not, although it might actually lead - that might be the true status of it, but that reflection in the file note is not that. Can I just take your Honour to the Notice to Admit? It's at page 481 of the trial bundle. It's - the paras that were not admitted from the Notice to Admit of 15 July 2011 - sorry, were not admitted - were disputed were paragraphs 6, 7 and 8, and we see that from the correspondence from Greenhalgh Pickard to Thynne & Macartney of 29 July. So - which is page number 482. So in July he's disputing that prior to sending the e-mail of 8th of May, he recreated the Will of 14 February into a Word format to allow her to amend the document as she wished. That's precisely what his evidence was, and indeed what the e-mail of 8th of May said. That he sent it - at paragraph 7, that he sent that e-mail in response to the deceased's advice that she

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wished to change her Will. That's-----

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HIS HONOUR: Well, when you say he is disputing it, he just didn't - well, what did he do by way of disputing it?

MS TRESTON: He sends correspondence to say that he disputes those facts.

HIS HONOUR: I see, yes. It's on the next page.

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MS TRESTON: So he actively puts those issues in dispute in this trial when in terms of paragraphs 6, 7 and 8 it was precisely what his evidence was. So-----

HIS HONOUR: But, anyway, ultimately - I see that is relevant to his credit.

MS TRESTON: It might also ultimately be relevant to costs, but it is certainly relevant to credit. I think I have otherwise addressed your Honour on the balance of that which is contained in the written submissions-----

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HIS HONOUR: Yes.

MS TRESTON: -----albeit in a slightly more haphazard manner, although your Honour might think the written submissions are haphazard. I'm not sure.

HIS HONOUR: No, not at all. They are very helpful, as are Mr Nevison's. Thank you.

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MS TRESTON: Can I - one other issue that I must raise with your Honour that arises out of my learned friend's submissions, at paragraph 22-----

HIS HONOUR: Of his?

MS TRESTON: -----that even though testamentary capacity isn't put in issue by the first defendant, the plaintiff seeks an indulgence having regard to the deceased's mental state, it was incumbent upon us to prove the plaintiff's capacity and we failed to adduce any evidence about that. Putting aside - sorry, I will start that again. Even assuming that that's a correct statement of principle, there is ample evidence about the deceased's capacity, sufficient to establish capacity for the purpose of admitting this Will to probate, and indeed my learned friend helped my case significantly in that regard by asking questions about - of Mr Mahlo, "Well, you thought she was good at the time that you were up there, between the 9th and the 18th of May?" "Yes." She was - seemed to be happy, she seemed to be going forward, she was making plans, she was talking to her father in the garden. Your Honour remembers the test for testamentary capacity being, first of all, that she knew and understood what a Will was, or she plainly understood what a Will was. She told her father she was making one. She discussed with him the appointment of an executor. She knew what a Will was. She actively pursued the preparation of the Will by contact with Mr Hehir, by contact

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with Greenhalgh Pickard. She plainly understood the nature and extent of her assets because Mr Hehir sent her the inheritance schedule on no less than three occasions. So she knew what her assets were and she could play with that document to her heart's content. She knew who the people were who had claims on her bounty. She had spoken to Jenny Ruhno about leaving money to her parents, to her children. She thought that they were old enough now to look after it themselves, was Mrs Ruhno's evidence. And the fourth criteria in the Goodfellow v. Banks test, that there was no delusion of her mind poisoning her affections. Well, we all know the fact that someone commits suicide doesn't demonstrate, on its face, there was a delusion of your mind that affected your capacity. Justice White gave proper consideration to what that meant in a matter about two years ago in the estates of Dana Shankari Clare, I can't remember the citation off-hand, but that was a case of a testatrix who was being visited by evil angels from out of space with whom she was having sexual relations and a flagrant history of mental illness and subject to an involuntary treatment order, et cetera, and her Honour looked at what is the delusion of the mind that affects your testamentary capacity, and to say that this is a far cry from that is to put it mildly. So the plaintiff has adduced ample evidence that this testator satisfied the Banks v. Goodfellow test for testamentary capacity.

HIS HONOUR: Well, so has the defendant, because on the defendant's case there isn't a suggestion of any incapacity.

MS TRESTON: No, absolutely not. I confess I was a bit surprised by the submission, but it's there, and I would be wrong to not address it, because it's put that if----

HIS HONOUR: Yes.

MS TRESTON: -----your Honour finds that, then my case must fail. There's ample evidence of her capacity. I don't have to call a psychiatrist to address that point. This isn't a solemn form proceeding. In fact, absence of capacity is expressly disavowed.

HIS HONOUR: I was just looking - I will look at it later, because I am going to reserve this - there was something that was said at the beginning of the trial, I thought, about capacity not being an issue.

MS TRESTON: And-----

HIS HONOUR: Anyway, I'll find it.

MS TRESTON: -----that's my recollection as well, and-----

HIS HONOUR: I'll find it.

MS TRESTON: And indeed the allegations about want of testamentary capacity, your Honour will remember, were expressly withdrawn from the Amended Defence. So it would be a surprising result for the plaintiff to lose on that ground,

in my submission.

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HIS HONOUR: Yes.

MS TRESTON: Does your Honour have anything further you would like me to address?

HIS HONOUR: No, thank you, Ms Treston.

MS TRESTON: Thank you, your Honour.

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HIS HONOUR: Yes, Mr Nevison.

MR NEVISON: Thank you, your Honour. I will be as brief as I can, but I may need to be indulged in respect of my submissions. On page 17 at subparagraph G, just so that I am not taken out of context in the last sentence of that paragraph, I say, "This would provide some comfort that the deceased did intend the document to be her Will." It should properly read, "If there was reliable evidence of this". "If there was reliable evidence of this, it would provide some comfort". In other words, I am saying that there is no reliable evidence in relation to that issue.

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Your Honour, I will just tick off the issues. The terminology "constitute" in the sense of it constituting the last Will of a deceased person is terminology which arises constantly in New South Wales decisions, not necessarily part of the terminology here. In my submission, your Honour has identified the proper test to be applied in Queensland with respect to the testamentary intention. The document must embody clearly the testamentary wishes of the deceased person and the testamentary intention is, in effect, an intention to carry that document into effect, and that's the nature of the test to be applied here under, in effect, what is the third limb. That's my submission as a matter of law in respect of that.

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Your Honour, in terms of the submission by my learned friend that it's beneficial legislation and that you should be encouraged to open the floodgates almost, of course the terminology "beneficial legislation" does not invite the throwing out of established juris prudential standards. There are still significant rights which attach in respect of these matters, and one needs to exercise the great degree of caution, notwithstanding that it is - recognises beneficial legislation. To that extent, I come back to the submissions with respect to the Briginshaw test and its application in these matters. Your Honour, littered in these cases, and as recently as the 2010 decision in Western Australia by Justice Heenan in *Riches v. McInnes*, one of the authorities relied on by my learned friend, there is still an ongoing reference to the Briginshaw standard and its application in these matters. I specifically didn't pick it up in my submissions. Appropriately the standard is the civil standard, on the balance of probabilities, but nonetheless great caution is required where an indulgence is sought in these matters for the evidence to be tested, and to the degree of satisfaction

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that the Court needs. It's certainly not - and your Honour will remember, of course, that the original standard in South Australia was beyond a reasonable doubt in these matters. That's certainly not the case now.

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Your Honour, I need to touch on the submissions made as a matter of law with respect to the potential revocation of the 14 February 2008 Will by its dumping in the delete box. Well, there's a signed copy. Nobody would be that dumb.

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In terms of the formal execution submissions, your Honour, there has been discussion about legal advice that was taken or not taken in respect to the 14 February 2008 Will. There was, however, a Will of 2006 made in the presence of a solicitor, and I ask you to bear that in mind.

In terms of determining and concluding as a matter of law the state of knowledge of the deceased with respect to the formal requirements, your Honour dealt with a supposition with respect to Mr Hehir's knowledge about the deceased's intention to make a new Will, and that he was told what might be comprised in it. Well, if that's the case, you might think there that the deceased would have had no objection in e-mailing a copy back if she wished to show an intention to be bound.

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The final thing I wish to address, your Honour, is the calling of the second and third defendants to give evidence in this matter. As a matter of law, the simple fact of the matter is in the plaintiff's case, your Honour, in the case of Anna particularly, and in the evidence of Mrs Beverley Mahlo, there was direct evidence from her in paragraph 48 of her affidavit about knowledge possessed by Anna in respect of an unsigned copy of the Will left on the ironing board. Anna should have been called. Anna should have given evidence. Rightly an inference should be drawn that she knew things which would have assisted the Court in a resolution of this matter, and she has failed to come forward and give that evidence.

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HIS HONOUR: No. Well, I think in terms of the rule it's that I'd more easily draw inferences - well, I'd draw the inference that her evidence would not have assisted in respect of matters in which she'd be expected to have knowledge, and I suppose you'd say that is one of them.

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MR NEVISON: Yes.

HIS HONOUR: But it doesn't mean that that helps the contrary to be proved.

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MR NEVISON: No, no. But relevant matters, in my submission, she could have certainly addressed.

Your Honour, finally, in terms of the Notice to Admit that you were taken to by my learned friend and the dispute as to the three facts in that notice of dispute, your Honour, again, as a matter of law, rule 189 of the Uniform Civil Procedure Rules uses the terminology "dispute". That's how you respond to a

Notice to Admit. The first defendant had an entitlement to put the plaintiff to proof.

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HIS HONOUR: I see.

MR NEVISON: Yes.

HIS HONOUR: Can I ask you about paragraph 22 of your written submissions? I should have asked you about this earlier.

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MR NEVISON: Indeed.

HIS HONOUR: Let me just find it.

MR NEVISON: Yes.

HIS HONOUR: Now, on its face it looks as if you're submitting that absent proof in the plaintiff's case of testamentary capacity as at 16 May 2008, this application would be dismissed.

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MR NEVISON: I made it clear, your Honour, and reflected in the amended defence, that the first defendant does not pursue the issue of testamentary capacity, but we're not seeking the Court's indulgence, your Honour. The plaintiff seeks the Court's indulgence in a significant way, and each of the defendants, all three defendants in this matter, lodged caveats against any Will being admitted to probate except in solemn form, that is, the two children of the deceased joined in that. It was incumbent, in my respectful submission, for the plaintiff to have led some evidence that-----

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HIS HONOUR: Are you able to help me with where you did make that statement about your pleading?

MR NEVISON: Day 1, certainly.

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Page 5, your Honour, line 15 and my learned friend Ms Treston says, "Now the allegation in relation to testamentary capacity are not pursued by the first defendant.", and there will ultimately be an issue about that in terms of cost. We can put that aside. "You accepted that, Mr Nevison?", you say to me, your Honour, at line 28, "Yes, your Honour."

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HIS HONOUR: My question then was, "If there is a declaration made under section 18, it followed that there would be a grant of probate."

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MR NEVISON: Yes.

HIS HONOUR: Well, that's the passage I was thinking of.

MR NEVISON: Yes.

HIS HONOUR: I have to say I understood that as a statement by you that there would be no argument about capacity and, in particular, no argument that the plaintiff would be required to prove capacity.

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MR NEVISON: Certainly I wasn't intending to lead a case for the first defendant arguing capacity.

HIS HONOUR: Well, the defendant never has to prove incapacity.

MR NEVISON: No. We had defended on that basis though, your Honour, up until the time of the amendment.

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HIS HONOUR: Let me look at the pre-amended pleadings.

MR NEVISON: I don't want to take at all cheap points, your Honour, I won't do that. Your Honour may decide capacity from other evidence, but my simple point was that the evidence of a psychiatrist or something would have been appropriate from the plaintiff's perspective.

HIS HONOUR: Let see, the defence of your client filed on the 4th of March 2009-----

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MR NEVISON: Yes.

HIS HONOUR: -----was the most recent one prior to the amendment during the trial.

MR NEVISON: Yes. And at page 173 in the trial bundle, paragraph 9A(iii), your Honour, on page 3 of the document.

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HIS HONOUR: Yes.

MR NEVISON: And that's deleted.

HIS HONOUR: So nevertheless, although you deleted that from your pleading-----

MR NEVISON: Yes.

HIS HONOUR: -----the plaintiff is on notice that he had to prove capacity.

MR NEVISON: No, the deletion was consistent with me not raising it as an issue in defence. It's a matter for the plaintiff what they decide they need to do to satisfy your Honour to get the relief they need.

HIS HONOUR: Your written submission is, "Absent capacity to make a Will, the Court could not" - not should not - "could not conclude that the May document purports to state" et cetera.

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MR NEVISON: Yes.

HIS HONOUR: That looks to me like a submission that the plaintiff will fail if he proves everything else, or the plaintiff cannot succeed if the plaintiff has not proved the testamentary capacity of Dr Mahlo. Is that not the submission?

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MR NEVISON: In view of the solemn form caveats, it still remained with the plaintiff, your Honour. It still remained with the plaintiff.

HIS HONOUR: I have to say, Mr Nevison, this is a very bizarre way in which you've pleaded and conducted the case then because you've made quite a business about deleting his specific allegation to incapacity from your pleading. You've answered my question as you did at the commencement of the trial but keeping in your back pocket the submission I now see in paragraph 22.

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MR NEVISON: I don't seek to conduct my case in a bizarre way, your Honour. I hear what your Honour says. I withdraw and ask for it to be struck, paragraph 22, of my closing submissions.

HIS HONOUR: I think that is very proper in the circumstances.

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MR NEVISON: Thank you, your Honour.

HIS HONOUR: Thank you. I will reserve the matter and the Court will adjourn.

THE COURT ADJOURNED AT 4.29 P.M.

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