CA on appeal from the High Court, Ch.D. (Mr Justice Carnwath) before Ward LJ, Waller LJ, Lady Justice Hale. 27 May 2004

JUDGMENT : Lord Justice Ward :

Introduction

1. This is the judgment of the court to which each of us has contributed.

2. Mrs Alice Adam died on 10th October 1991 at the age of 91. This is a dispute about her last Will and Testament. The tale to be told is, at every twist and turn of it, an unusual one, the stuff of drama. The events which bring it to us betray the emotions in the case which have become melodramatic, though we fear there will be no happy ending.

3. On 31st July 1998 by order of Carnwath J. (as he then was) the court pronounced for the force and validity of the last Will and Testament of the deceased dated 24th October 1990. The order also provided that the plaintiff pay the defendant her costs of the action, her costs to be taxed pursuant to the Legal Aid Act 1988. The validity of that Will is now again called in question.

The Story

4. Mrs Adam was born in Poland in August 1900 into a family of German origin. In 1947 the vicissitudes of war cast her on these shores. In 1953 she purchased a property in London N.W.6. with some financial help from her younger brother, Eugen, and there she lived for the rest of her life.

5. Eugen had two sons and a daughter, Barbara. Barbara married Mr Petrus (Piet) Couwenbergh and they made their home in the Netherlands. They and Eugen visited the deceased fairly regularly up to the 1970s. On 12th September 1978 the deceased made a Will appointing Petrus to be the executor of her Will and, after a small legacy to Eugen, she left the residue to her nephews, Barbara and Petrus in equal shares. Visits by the family were less frequent in the 1980s. The Couwenberghs separated in 1984 but Petrus continued to visit – indeed he was the most regular visitor from the family thereafter.

6. Meanwhile in 1979 the deceased met Dr. Bilyana Valkova, Bulgarian by origin, but working at the time as a research fellow at various hospitals in London. A friendship developed between the two ladies. In 1984 Dr. Valkova was working at the hospital in which the deceased was being treated for a hip fracture. A sitting tenant in the deceased's house had died and the deceased invited Dr. Valkova to live at her home. Dr. Valkova has been there ever since.

7. The house was in some disrepair and Dr. Valkova was closely involved in the dispute with the local authority which had served notice requiring the deceased to carry out the necessary repairs. In September 1986 the deceased signed a Power of Attorney in Dr. Valkova's favour and Dr. Valkova became increasingly influential and important in the life of the deceased. Her dependency on and her probable affection for Dr. Valkova grew.

8. On the other hand, time and distance would have diminished the strength of the familial affection. There was, moreover, a distressing breakdown of relations between the deceased and Barbara in August 1990 when Barbara and her father visited on the occasion of the deceased's 90th birthday. They were concerned about the deceased's state of mind and living arrangements and reported their anxieties to the Social Services Department. Barbara wished her aunt to be admitted to a home for the aged. This intrusion was resented by Dr. Valkova. There were ugly scenes in which the police and solicitors were involved. Barbara's hostility to Dr. Valkova was fully reciprocated.

9. Shortly before this visit and apparently in anticipation of it the deceased had signed a document in Dr. Valkova's handwriting declaring that she wanted: *"My friend and attorney Dr. B. Valkova to look after me as until now. I give all my property to Dr. B. Valkova absolutely and appoint her sole executrix".*

10. In September 1990 Dr. Valkova approached a firm of solicitors with a view to arranging for the transfer to herself of the deceased's property. This aroused the solicitor's suspicions and he wanted confirmation of the deceased's state of mind. Dr. Valkova then consulted a second firm of solicitors. This solicitor did attend the deceased on 30th October and his attendance note records:- *"Mrs Adam was adamant that she wanted to have nothing to do with her relatives. … It was quite clear that [Mrs Adam] regarded her [Dr. Valkova] as a close and trusted friend, in whom she had complete confidence."*

11. In fact a third firm of solicitors was also instructed in October and this firm drafted the Will in accordance with instructions given to them by Dr. Valkova which they sent to the deceased asking her to confirm her wishes in writing. On 5th October a letter was sent in Dr. Valkova's handwriting, signed by the deceased, expressing satisfaction with the Will. The solicitor sent the engrossment for execution on 17th October. It was executed on 19th October by the deceased and witnessed by neighbours, Mr and Mrs Doyle. Mr Doyle considered he had no room to sign on the page bearing the signatures of the deceased and his wife and so he signed on the next page. We can recite from paragraph 45 of Carnwath J.'s judgment:-

"On its return to him [the solicitor] was not completely happy with the attestation, and accordingly he sent a new engrossment which was executed on 24th October, this time attested by two gentlemen called Di Gregorio. (They have not played any further part in the story nor appeared as witnesses). [The solicitor] never met Mrs Adam. In his statement he accepts that it was very unusual to prepare a Will without seeing the client. He gives no explanation for this exceptional treatment, although one infers that costs may have something to do with it."

This is the Will which has been admitted to probate and is now questioned.

12. In August 1991 the deceased was again admitted to hospital having suffered a fall of which she had no recollection. Barbara attempted to visit her but was not allowed to do so. She died on 10th October 1991.

The Trial before Carnwath J.

13. Petrus Couwenbergh challenged the validity of the 1990 Wills and sought to establish the 1978 Will. The judge identified the issues as follows:- *"The issue in this case concerns the validity of the 1990 Will. The plaintiff now accepts that they were duly executed. The issues are whether Mrs Adam had testamentary capacity when she executed them, and whether she knew and approved their contents."*

The trial lasted from 6th July 1998 to 10th July 1998.

14. Dr. Valkova prepared a list of documents for the purposes of the trial. She included letters from Mr D. Lorenzo dated 16th January 1993 and Mr O. Di Gregorio dated 20th January 1993. They were typed letters, that of 16th January 1993 reading:-

"To whom it may concern.
On 24 October 1990 I Digregorio Lorenzo and Orazio Digregorio witnessed Mrs Adam's signature on her Will at 11 Dunster Gardens N.W.6. We stayed together with Mrs Adam. Mrs Adam signed first. We signed immediately after her. Mrs Adam appreciated and enjoyed our visit and we had a friendly conversation.
Yours faithfully," followed by a signature.

The second letter of 20th January 1993 from a different address stated to whom it might concern:- "*I am writing to confirm that on 24 October 1990 I Orazio Digregorio was one of the witnesses to Mrs Adam's signature of her Will. Mrs Adam signed in the presence of both of us and we signed immediately after her. Mrs Adam was cheerful and we had an enjoyable conversation."* Again a signature followed.

15. At the trial Dr. Valkova gave evidence of the execution of that Will as follows:-

"Q. Then can we look at the other Will …? Do you remember it came back again from the solicitors. They were not happy that it had a signature on the wrong piece of paper. Can you explain to his Lordship how this one was signed by Mrs Adam and the two witnesses?

A. Yes. She has been even waiting for a short while. They came with a small delay and again she signed when they have come in their presence and after her they have signed."

16. The judge's conclusions were:-

"59. As things stood at the beginning of 1990, Mrs Adam's life was reasonably settled and happy, taking into account her age and physical infirmity. This is clear from the neighbours' evidence and is consistent with that of Piet Couwenbergh and [one of Eugen's sons]. This state of affairs was in part attributable to the friendship and support of Dr. Valkova. There is no reason to see anything sinister in her actions up to that time, for example in the Power of Attorney which she obtained from Mrs Adam in 1986. …

60. Appraisal of events of August 1990 is made more difficult by the unreliability of the evidence of the two main participants, Mrs Couwenbergh and Dr. Valkova, caused partly by the implacable hostility which they developed towards each other at that time. On any view Mrs Couwenbergh seems to have over-reacted to her concerns about her aunt's living arrangements. …

61. … It is not surprising that Dr. Valkova reacted strongly to what was seen as interference with the settled life which had become established….

62. On the other hand Dr. Valkova's own actions in the period immediately before the visit, and thereafter, were calculated to raise the suspicions of the family. … Following the visit, Dr. Valkova gave the appearance of moving very quickly to give legal effect to the transfer of property and the new Will. Again, given her special position in relation to Mrs Adam's affairs, it is difficult to believe that she was not partly instrumental in initiating this action.

63. I return to the two questions raised by this case: first did Mrs Adam have testamentary capacity in October 1990; secondly, did she know and approve the contents of the Will? I conclude that both questions should be answered in the affirmative. As to her testamentary capacity, I find no compelling evidence to contradict the conclusions of [the consultant physician and geriatrician at Charing Cross Hospital who had visited Mrs Adam on 24th January 1991 and who found that she was then capable of understanding her own affairs]. …

64. Similarly there is no reason to doubt that the 1990 Will was understood by her and gave effect to her wishes. She was well aware that her only significant property was her house. She was well aware that Dr. Valkova was the friend who was sharing her home, that it was her brother and his family who were seeking to remove her from it. That was not a delusion of the mind. It was a very real and justified fear. Her hostility to them may have been fuelled to some extent by Dr. Valkova and [her sister], but it was nonetheless genuine. Even accepting, as I do, that Mrs Couwenbergh wished the best for her aunt, there was nothing irrational in Mrs Adam's regarding her as a threat to what was most important to her at the end of her life. In some cases, no doubt, the exclusion of the testator's immediate family from a Will may be evidence of an unsound mind, or of lack of understanding or approval. However, in this case, there was no reason why she should have felt any particular moral obligation towards her relatives. Apart from the contribution made to the house by her brother in the late 1950s, and some help to her during her illnesses in the 1970s, there is little evidence of their giving her any practical support. Nor is there evidence that they were in particular need. Conversely, Dr. Valkova was the person who had provided support and friendship for the last six years, and had shared her home. It was not irrational to want to leave it to her."

The First Appeal

17. The plaintiff immediately sought permission to appeal challenging the judge's conclusions on both issues. That application was dismissed with costs by Peter Gibson and Hale L.JJ. on 29th March 1999. One might have expected that that was the end of the drama, but it is not.

Act II, Scene (i)

18. The various costs orders against Mr Couwenbergh were eventually assessed and totalled about £107,000. These costs were to be paid to the Legal Aid Board now the Legal Services Commission. The Legal Services Commission pursued their costs with great vigour. By the summer of 2001 they had obtained attachment or freezing orders in the Netherlands over Mr Couwenbergh's bank accounts and his residence. This has given rise to obvious difficulties for him.

Scene (ii)

19. Early in 2000 the Edmonton police, and subsequently the Serious Crime Squad in Barking commenced enquiries into the death of Mrs Adam and conducted an investigation of allegations that Dr. Valkova had in some way unlawfully contributed to that death. We have assumed that those complaints were laid by Barbara, but we may be wrong about that. These enquiries continued throughout 2001.

20. As a result, Mr Couwenbergh sought and obtained from Deputy Master Reid in the Supreme Court Costs Office stays of execution of the costs orders and stays of execution of the Dutch freezing orders pending the outcome of the ongoing police investigation. A hearing was fixed for 14th November 2002 for the Deputy Master to give further consideration to those orders.

21. Shortly before that hearing the police informed Mr Couwenbergh's solicitor that the forensic report into the death of the deceased had proved to be inconclusive and as a result the Crown Prosecution Service had decided not to prosecute Dr. Valkova in relation to the death. An indication was, however, also given by the police that the Will may not have been properly witnessed. At the hearing Detective Inspector Tipping produced statements from Lorenzo Di Gregorio and Orazio Di Gregorio. Without condescending to a detailed analysis of those statements and of the subsequent witness statements that they made for the purposes of this application, the effect of their evidence seems to be:-

i. Neither witnessed the deceased signing the Will;
ii. They signed a document not knowing what it was. They did not recall Mrs Adam's signature being on the document when they signed it.
iii. Mrs Adam was certainly not present when they signed.
iv. In late 1992 and early 1993 (when proceedings were being contemplated) both were contacted by Dr. Valkova asking them to confirm that they had witnessed the deceased's signature to a Will. Both refused.
v. Neither wrote nor signed the letters of 16th and 20th January 1993 purporting to confirm their attestation of the deceased's signature to the Will. It is said their signatures on those letters were forged. In January 1993 neither was residing at the address given on the letters.
vi. Orazio's signature as a witness to the enduring power of attorney dated 8th August 1990 granted by the deceased in favour of Dr. Valkova was disputed by him.

22. On hearing evidence to that effect Deputy Master Reid extended the stay of execution of the costs orders indefinitely pending this application and if successful the appeal to this court.

The Application to this Court

23. Having learnt of those allegations, Mr Couwenbergh applied to this court to renew his application for permission to appeal. Peter Gibson L.J. directed that it be heard on notice to the respondent, Dr. Valkova, and that is the application to be determined by us.

24. Being a second application, the applicant must satisfy the high hurdle established by ***Taylor v. Lawrence*** [2002] EWCA Civ. 90, [2003] Q.B. 528. The full court laid down this guidance:-

"54. … The residual jurisdiction which we are satisfied is vested in a Court of Appeal to avoid real injustice in exceptional circumstances is linked to a discretion which enables the court to confine the use of their jurisdiction to the cases in which it is appropriate for it to be exercised. There is a tension between a court having a residual jurisdiction of the type to which we are here referring and the need to have finality in litigation. The ability to re-open proceedings after the ordinary appeal process has been concluded can also create injustice.

55. … What will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred and that there is no alternative effective remedy. The effect of re-opening the appeal on others and the extent to which the complaining party is the author of his own misfortune will also be an important consideration."

The first Taylor v Lawrence question: significant injustice?

25. If the fresh evidence which the applicant seeks to introduce is established, then the injustice can be said to consist in (a) an invalid Will being admitted to probate and (b) an order for costs is made in favour of a party to the litigation who has perpetrated a fraud on the court. The assertion is, however, dependent on four sub-issues:-

i. Should the evidence be admitted?
ii. Is it true?
iii. Which testamentary disposition should have been admitted to probate, and
iv. What order for costs should have been made?

26. A preliminary question then arises. What standard of proof or level of confidence must the court have in the answers to those four sub-issues bearing in mind that at this stage of the enquiry we are simply considering whether to grant a second application for permission to appeal. It seems to me that the answer has to be that we apply the test appropriate for permission to appeal, namely, is there a real prospect of success? That allows us to sift out applications which are hopeless and where the prospects of success are simply fanciful but it seems to me that no injustice will be done if we accept any case where there is a real argument in its favour. We turn to those four sub-issues.

The application to admit the fresh evidence

27. The applicant seeks to admit the fresh evidence of the Italian brothers. The starting point is the application of the well known principles established by ***Ladd v. Marshall*** [1954] 1 W.L.R. 1489, 1491, namely:- *"First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."*

28. It does not end there. As the court observed in paragraph 11 of ***Hamilton v. Al Fayed*** [2001] EMLR 15*:- "That question must be considered in the light of the overriding objective of the new CPR. The old cases will, nonetheless, remain powerful persuasive authority, for they illustrate the attempts of the courts to strike a fair balance between the need for concluded litigation to be determinative of the disputes and the desirability that the judicial process should achieve the right result. That task is one which accords with the overriding objective."*

The search is, as always, for justice.

29. Mr Blackett-Ord mounts a powerful attack on the applicant's assertion that the ***Ladd v. Marshall*** tests are satisfied. He complains that there was abundant opportunity to obtain the evidence of the Di Gregorio brothers before trial and that there is no evidence to explain why it was not done. That is true so far as it goes. There is, however, a sensible explanation already obvious on the papers. One starts with a presumption of regular execution. That was reinforced by the two letters disclosed in Dr. Valkova's list of documents confirming the regularity of the execution of this Will. Then there were letters, apparently in the trial bundle, indicating Dr. Valkova's inability to trace the witnesses. The view could reasonably be taken that it would have been an excessive waste of costs to engage inquiry agents to trace the brothers and take witness statements from them. In our judgment the applicant has a real prospect of succeeding in establishing this criterion.

30. Next the evidence should be such that it would have had an important influence on the result of the case. If the evidence does stand up, then it establishes that the Will was not properly executed because the testatrix and the witnesses did not sign in each other's presence. That Will ought not then to have been admitted to probate. If the added fact is established that the signatures on the letters were forged then it does call Dr. Valkova's credibility hugely into question and, in the words of Lord Buckmaster in ***Hip Foong Hong v. H. Neotia & Co***. [1918] A.C. 888, 893*:- "A judgment that is tainted and affected by fraudulent conduct is tainted throughout, and the whole must fail."*

However, even if the Will of 24 October was not properly executed, the result might well have been that the Will of 19 October took its place. This is considered further below. It would be for the Court hearing any appeal to consider what weight to give that factor at this stage. Without it, it seems to us to be a strong case that this criterion will be established.

31. Finally the evidence must be apparently credible, though it need not be incontrovertible. Lorenzo confirms his evidence in a witness statement dated 17th February 2003 exhibiting three witness statements made to the police. Orazio has also signed a witness statement confirming the statement he gave to the police. The witnesses say they are speaking the truth. There is nothing inherently improbable in what they say. There is the briefest evidence from Dr. Valkova given at the trial to the contrary. We are very mindful of the criticisms Mr Blackett-Ord makes in his skeleton argument. A careful analysis of the statements and a comparison of the brothers' accounts certainly does raise a number of questions which when answered may reflect adversely on their credibility. To deal with the most obvious, there are some self-contradictions in Lorenzo's statements as to whether he signed whilst the testatrix was sitting in the sitting room or whether he signed before going in to meet her. This statement is not entirely consistent with Orazio's because he speaks of signing when they arrived and then meeting the old lady sitting up in bed propped up by pillows. To these criticisms we would add the vagueness of some of the assertions of the brothers who frequently acknowledge they do not accurately remember the events they are describing which is hardly surprising given the years that have passed by since 1990. It might also be relevant that the initial statements were taken in the course of a police inquiry into Mrs Adams' death, where there was every incentive to distance themselves as far as possible from her testamentary behaviour.

32. Whilst, therefore, the evidence may not be incontrovertible, it does seem to us that there is a real prospect that the court may conclude that it is sufficiently credible to justify admitting it in evidence.

33. That is enough for conventional ***Ladd v. Marshall*** tests. Whether or not they are satisfied, there remains the crucial over-arching consideration of fairness and justice. We are very strongly of the view that if there is a risk that a fraud has been perpetrated on the court, then the court should whenever possible allow the truth to come out.

34. Our conclusion is that there is a real prospect that the fresh evidence will be admitted.

Is it true?

35. Self-evidently, no fraud has been committed and no injustice suffered unless the evidence of the Di Gregorio brothers is true. The main issue for any court hearing an appeal would be how that matter was to be determined. As this overlaps with the issue of whether there is another effective remedy, it is more convenient to discuss it there.

Which is the valid Will?

36. Whatever the prospects of success in setting aside the declaration propounding the 2nd October Will purportedly witnessed by the Italian brothers in the presence of the testatrix and each other, the Italian Will, the matter does not end there. Mr Blackett-Ord is clearly right in submitting there is almost an inevitability that the Doyle Will should be admitted to probate. We appreciate the argument advanced on the applicant's behalf that if it is shown that Dr. Valkova was capable of deceit, then it shows her in a malign light which may cast doubt on Carnwath J.'s findings on knowledge and approval. In view of the fact that the judge's conclusions rested more on his assessment of the opinions of the professional witnesses than on Dr. Valkova's views, we incline to think at present that this argument on the applicant's behalf is tenuous. We also appreciate that there is an argument about the want of due execution of the Will where Mr Doyle signed on a separate page but taking a view of the arguments at this preliminary stage and on the information presently available to us, we remain of the opinion that the Italian Will would fail but that the Doyle Will would survive. Since the Wills are in identical terms, justice does not demand that the applicant have a second hearing simply to achieve a wholly Pyrrhic victory. Yet there is more to it than that.

Costs

37. £100,000 is a lot of money whether measured in sterling or Euros. Any litigant, whether a national or foreign citizen seeking justice in our courts has a legitimate complaint if ordered to pay the costs, certainly *all* of the costs, if the other party in whose favour they are ordered has perverted the course of justice. This is the aspect of the case which most concerns us. This is one of the main reasons for our urging the parties to consider a compromise in which the Legal Services Commission would have had a vital part to play. We shall say more about this later.

Conclusions on substantial injustice

38. Since there is in our view a real prospect that the order for costs may turn out to be unfair, we are satisfied that it is arguable that a substantial injustice has occurred.

The second Taylor v Lawrence question: is there an alternative effective remedy?

39. There is an alternative remedy. As Lord Phillips MR said in *Hamilton v Al Fayed, at para 8: "A party who seeks to set aside a judgment or verdict by adducing fresh evidence to show that the court was fraudulently deceived can adopt one of two alternative procedures. He can appeal to the Court of Appeal and seek, on appeal, to adduce the fresh evidence, or he can bring a fresh action in which the relief sought is the setting aside of the judgment fraudulently obtained. Where the fresh evidence, or its effect is hotly contested, the latter procedure may prove to be the more satisfactory . ."*

Lord Phillips referred to the comments of Lord Buckmaster in **Jonesco v Beard** [1930] AC 298, at p 300: *"It has long been the settled practice of the Court that the proper method of impeaching a completed judgment on the ground of fraud is by action in which, as in any other action based on fraud, the particulars of the fraud must be given and that allegation established by the strict proof such a charge requires. In **Flower v Lloyd** (1877) 6 Ch D 297, at p 302, . . . James LJ states that "you cannot go to your adversary and say, 'You obtained the judgment by fraud and I will have a rehearing, of the whole case' until that fraud is established."*

40. However, it is also possible to seek to establish that fraud by adducing fresh evidence on an appeal. The effect of recent authorities was summarised by Sir Martin Nourse in ***Sohal v Sohal*** [2002] EWCA Civ 1297, at para 25, as follows: *"There is no jurisdictional bar to this court admitting the fresh evidence and dealing with the allegation by way of an appeal. But it should only do so if, in the words of Lord Woolf [in Wood v Gahlings, unreported, 29 November 1996, at p 3] , the allegation of fraud 'can be clearly established' or if, in the words of Lord Phillips (which come to the same thing) the fresh evidence or its effect is not 'hotly contested'. In any other case, the party who complains about the judgment should be left to bring a fresh action to set it aside."*

41. Sir Martin went on to consider a further passage from ***Hamilton v Al Fayed*** where the court stated in para 21: *"Because the Court of Appeal alone has power to order a new trial on the ground of fresh evidence, it has been the rule*

rather than the exception that parties seeking to overturn a judgment on the grounds that it was obtained by fraud have appealed to the Court of Appeal. Lord Buckmaster's strictures have been generally disregarded. We are inclined to think that because the Court of Appeal has much wider powers to do justice in such a situation, including the power to order issues of fact to be tried, the prevalent practice is one attuned to the overriding objective."

Sir Martin commented, at para 29: *"I do not think that [those observations] can have been intended to depart from what was said in paragraphs 8 and 14. Whether that be right or wrong, it is clear that each case must be judged on its own merits. If this court takes the view that the fraud has not been clearly established, or that it is or certainly will be hotly contested on the evidence, then it must be open to it to say that the question will not be dealt with by way of appeal, but must be dealt with as the subject of a fresh action."*

42. ***Hamilton v Al Fayed*** was not, in the view of the Court of Appeal, a case where the verdict had been obtained by fraud. ***Sohal v Sohal*** was a case very similar to this, in which it was alleged that a verdict upholding a will had been obtained by fraud. There is little doubt that the Di Gregorio brothers' evidence will be hotly contested. A court hearing an appeal might well consider that a fresh action was not only an effective but also the more appropriate remedy in this case. Where the fresh evidence is hotly contested, it could be most unjust to order a retrial without having heard and formed a view on that evidence. Yet the Court of Appeal rarely hears oral evidence (although it did so in ***Hamilton v Al Fayed***) and to do so could be highly prejudicial to any retrial.

43. On the other hand, a retrial of the action would bring benefits to both parties which would be unobtainable in a fresh action. It may be able to deal with the costs order which so offends Mr Couwenbergh. As we understand the position, if he were successful in setting aside the declaration in favour of the Italian Will, the costs order consequent upon it would inevitably fall with it. The judgment including the order for costs is either set aside or it is not. One cannot tinker with the order that was made in the first trial. One cannot set aside the declaration and substitute no order for costs or order the payment of a percentage of the costs.

44. That could produce an unfairness to one or other or even both of the parties. If a fraud had been perpetrated on the court, the whole of the costs arguably should not fall on Mr Couwenbergh; on the other hand some or all of the costs relating to the two disputed issues may properly be ordered against him. The alternative remedy does not seem effectively deal with a fair allocation of costs

45. There are other reasons why a retrial could be said to be preferable. The first is that a rehearing is likely to be less costly. The pleadings may suffice as they stand or only small amendments will be necessary for the issues to be clearly joined. Much of the evidence stands. On the other hand, a fresh action would need fresh pleadings, fresh discovery, fresh witness statements and so forth. Secondly, a fresh action is likely to take longer to get to trial than the refixing of a rehearing. Thirdly, and to our minds most importantly, a rehearing gives the trial judge the greatest flexibility to do justice between these parties. As we have indicated, the real question may turn out to be what should happen with regard to the order for the costs of the first trial. On a rehearing the judge will have full power to make such order for those costs as is just. He may discharge the order altogether, or he may order Mr Couwenbergh to pay part of the costs. The trial judge in a fresh action will have no such broad discretion.

46. Our conclusion is, therefore, that there is a real prospect, that is to say that the prospect is not fanciful, that the Court hearing any appeal would consider that a fresh action was not an effective remedy in this case.

Conclusions on the Taylor v Lawrence question

47. One hopes that cases where perverting the course of justice is alleged are exceptional. If ever there is a reason for the Court of Appeal to reconsider the correctness of a decision of the court below, then it is when a deceit has been practised on that court.

48. On the other hand, the finality of judgments is a cardinal principle of justice. The longer the delay in attacking the judgment, the more important it becomes to strive to uphold it. Here there is delay between the judgment and the second application to set it aside. The new facts emerged at the hearing before the Master in November 2002 and this application does not appear to have been launched until May 2003. Mr Couwenbergh could have acted more speedily in bringing the matter to court. On the other one has to have regard to the difficulties under which he laboured as a litigant from a foreign jurisdiction without ready access to English lawyers. The court is grateful to the Dutch lawyers through their English qualified member

who has acted pro bono and we are grateful to Mr Knox for his assistance on this application. The delay will not, however, have any serious impact on the fairness of the rehearing if that is to be ordered.

49. Mr Blackett-Ord reminds us of Lord Wilberforce's observations in ***The Ampthill Peerage*** [1977] A.C. 547, 569:- *"The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interests of peace, certainty and security it prevents further enquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth … and these are cases where the law insists on finality."*

50. It is however important to read on:- *"For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals: so the law, exceptionally, allows appeals out of time, so the law still more exceptionally allows judgments to be attacked on the ground of fraud …"*

51. Here allegations of fraud in the broad sense have been raised. For the reasons given earlier, there is a sufficiently real prospect that an appeal would succeed in meeting the ***Taylor v Lawrence*** criteria and that an appeal would succeed. Consequently we grant this second application for permission to appeal. The costs of this application will, as usual, be costs in the appeal.

What next?

52. The appeal will be listed for a hearing and the full court will again traverse much of the ground covered in this judgment, especially on the admissibility of the fresh evidence. It is, perhaps, unfortunate that the matter was listed for the grant of permission only and that we were not able to deal with the appeal itself if that permission were granted. But there is nothing we can do to change that now. The parties had it, and still have it, in their power to alter the destiny of this appeal and this sad case. We urged them, and continue to urge them, to do so through mediation. It is a case crying out for alternative dispute resolution. Dr Valkova may feel she is on strong ground in attacking the credibility and/or reliability of the Di Gregorio brothers. But she must also take a view as to whether or not she can persuade the full court to give directions for oral evidence to be taken and possibly for a handwriting expert's or experts' evidence to be adduced and subjected to cross-examination in the Court of Appeal. If the matter were remitted for rehearing the questions arising out of the new evidence may be capable of being decided as preliminary issues. If the appeal were to be allowed and a retrial ordered by consent, we would imagine that the costs of the appeal would be reserved to the trial judge who would also have the court's full discretion flexibly to deal with the costs of the first trial and the retrial. The costs of coming back to the Court of Appeal would be saved, perhaps without there being much if any prejudice to Dr Valkova. It is entirely a matter for her.

53. If the matter does go back for a rehearing then Mr Couwenbergh will have to take a view about his chances of establishing the 1978 Will and defeating the Doyle Will, even assuming for this purpose that he will establish the fraud. He has difficult decisions to take.

54. As we keep harping on, this may eventually be an argument about costs. The beneficiary of the present costs order is the Legal Services Commission. They seemed to us to have a critical role to play in the mediation. If there is a retrial they may have to fund the litigation again. They may or may not recover all their costs from Mr Couwenbergh. So they too have choices to make. Their representative was in court and knew exactly why we wanted their involvement. Yet they declined to participate. They appear to have obstructed the mediation, knowing we wished them to be involved. We cannot contain our criticism of the authorities for such an intransigent view. We have received no explanation why they have been so uncooperative. We direct that a copy of this judgment be sent to the Chief Executive of the Commission and we expect the courtesy of a full explanation from her.

55. When costs do finally have to be allocated, we hope these observations will be borne in mind when the court comes to apply the guidelines in ***Halsey v. Milton Keynes General N.H.S. Trust*** EWCA [2004] Civ. 576 on how to deal with failures to mediate despite the encouragement to do so.

Henry Knox (instructed by Messrs Cooke Matheson on behalf of De Braw Blackstone Westbroek) for the Appellant

Mark Blackett-Ord (instructed by Messrs Sebastians) for the Respondent :