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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (Ch)
ON APPEAL (from Order of Master Teverson, 15 July 2020)
NEUTRAL CITATION NUMBER [2021] EWHC 368 (Ch)

No. CH-2020-000193

Rolls Building
Fetter Lane
London, EC4A 1NL

Thursday, 28 January 2021

IN THE ESTATE OF DEAN ASHLEY JAMES BRUNT DECEASED (PROBATE)

Before:

MR JUSTICE MICHAEL GREEN

B E T W E E N :

WINSTON NEVILLE WRANGLE — Claimant / Respondent

- and -

(1) MARLENE ALICIA BRUNT
(2) DALE COLIN CHARLES BRUNT — Defendants / Appellants

MR D. MacPHERSON (instructed by Sillett Webb Solicitors) appeared on behalf of the Claimant/Respondent.

MS S. ROGERS (instructed by Birkett Long Solicitors LLP) appeared on behalf of the Defendants/Appellants.

J U D G M E N T

(Via Microsoft Teams)

MR JUSTICE MICHAEL GREEN:

Introduction

1 This is an appeal from the order of Master Teverson dated 15 July 2020. In fact, by the order of Mann J dated 2 November 2020, the Appellants' application for permission to appeal Master Teverson's order and the appeal itself were directed to be heard together in a rolled-up hearing. I heard this on Tuesday, and this is my oral judgment in relation to both aspects.

2 There are also applications before me for a stay of the order, for permission to amend the Appellants' Notice and Grounds of Appeal to include an appeal on the Master's Costs Order, and for permission to rely on fresh evidence pursuant to the test laid down in *Ladd v Marshall* [1954] EWCA Civ. 1.

3 This is an appeal largely on the facts on the basis that the learned Master approached the assessment of the evidence in the wrong way and that led to a number of incorrect findings of fact which determined the outcome of the case in favour of the Claimant, the Respondent to this appeal. Of course, it is trite that an appellate court will only rarely interfere with the findings of fact made by a trial judge who has had the benefit of actually seeing and hearing live witnesses, and Mr MacPherson, appearing for the Respondent on this appeal, took me to some of the well-known statements from the authorities that emphasised the restraint that must be exercised by an appellate court and the latitude given to the factual findings of the trial judge. It was also urged on me that a judge does not have to deal with every piece of evidence, submission, or argument and that first instance judges should be commended for producing short concise judgments. That has weighed heavily on my mind in my approach to this appeal.

4 However, in this case I believed that there was regrettably insufficient analysis of the evidence and it is not possible to understand why it was that the learned Master rejected certain evidence, including agreed expert evidence, and accepted other evidence.

5 At the end of the day, it really came down to the fact that the learned Master considered that the Respondent's witnesses were telling the truth and would not have engaged in the forging of the Will that is at the heart of this case, whereas the Appellants were, to use the Master's words, "*unimpressive witnesses*" and that overrode everything else including the expert evidence and the fact that the figure at the centre of this dispute, who signed the Will in question on behalf of the testator and who only allegedly discovered the Will ten years after the death, was a convicted fraudster who had himself died before the matter could come to trial.

6 While the learned Master was obviously entitled to come to such a conclusion, he must explain why he did so and in my view there was, with respect, little, if any, analysis as to why he did. He did not have to deal with every nuance and twist and turn of the evidence, but it must be possible for the parties, an appellate judge, and anyone reading the judgment to discern the basis for his conclusion. Because of the structure of the judgment, which I will come on to explain, it is unclear how the Master assessed the evidence. For example, if he was relying on the demeanour of the live witnesses in concluding whether they were telling the truth or not, he did not say so.

7 I do not underestimate the scale of the task facing the learned Master which was heard just before the first lockdown in the Covid-19 pandemic, that is last March, but this was a reserved judgment and in my view it was incumbent on him to show at least some of his

working so that it is possible to respect the advantage that he had of seeing and hearing the live evidence.

8 I need to explain what the case is about, but at the outset the parties should be clear that I grant the Appellants permission to appeal and I am going to allow the appeal. Even though Ms Rogers, who appeared for the Appellants, suggested that I would be able to decide the case here and now in their favour because the evidential burden was on the Respondent and I could conclude that he had not discharged that burden, I do not consider that that would be a fair or reasonable course to take. It would involve me concluding that the Will at the centre of the case is forged and that the witnesses for and the Respondent himself who supported the validity of the Will had fraudulently concocted their evidence.

9 In my view, my only option in this matter is to order a re-trial which is, of course, highly regrettable. Because there will be a re-trial, it is inappropriate for me to set out in this judgment any more than is necessary to understand the issues and why it is that I think the Master failed to engage with the factual issues before him and did not explain so that the parties and I can understand how he arrived at the conclusion that the Will in question is valid.

Background

10 Turning to the background of this unusual case, the proceedings relate to the estate of Dean Ashley James Brunt (who I will call "the **Deceased**") who tragically died aged 35 on 8 December 2007. He was hit by a train and the inquest concluded that his death was accidental.

11 The First Defendant is the Deceased's mother, and the Second Defendant is the Deceased's elder brother. They are the Appellants, and I will adopt the Master's and counsel's approach of referring to the family members by their first names - no disrespect is intended, and it is just for ease of reference. The First Appellant is **Marlene**, and the Second Appellant is **Dale**.

12 On 25 June 2008, Marlene obtained letters of administration in relation to the Deceased's estate on the basis that he died intestate.

13 Over ten years later, in November 2018, the Claimant/Respondent, who is the Deceased's uncle by marriage and is called **Bob**, started these proceedings based on a purported Will dated 2 March 1999 that had recently been discovered. In these proceedings, Bob sought to propound the Will and to revoke the letters of administration issued to Marlene and remove her as the personal representative of the estate. Marlene and Dale have defended and counter-claimed for declarations as to the invalidity of the Will and that the Deceased died intestate. They alleged that the Will was a forgery, in that it has been created after the Deceased's death. They also said that it was invalid by reason of lack of due execution and want of knowledge and approval. This was, therefore, essentially a fraud trial with very few undisputed contemporaneous documents and which would depend heavily on the credibility of the factual witnesses, the relevant circumstantial evidence, and the expert handwriting evidence.

14 The circumstances around the production of the Will so long after the Deceased's death (together with a second duplicate original of the Will that was only discovered by accident in February 2020 by the Claimant's solicitor), and the evidence of those said to have been involved in the making and witnessing of the Will, are crucial elements for the fact-finding judge, and in particular the fact that the Will was not even signed by the Deceased but by a

Mr Howard Day on his behalf. Mr Day is the convicted fraudster at the heart of the case that I have referred to, and he is someone who has advised the family over the years and was acting for the Claimant at the start of these proceedings. Not only did Mr Day sign the will but also two of his associates witnessed it, and then he was the one who "discovered" a copy of it in 2018, all of which needed comprehensive analysis, in my view, by the Master.

15 Mr Day was admittedly a man of bad character having been convicted of fraud and sent to prison in the early 2000s. There was also evidence of his propensity to produce doctored documents and one of the pieces of new evidence that the Appellants seek to rely on is further evidence of that. Mr Day, having conducted the proceedings at the beginning for the Claimant, died on 1 September 2019 so he could not be cross-examined at the trial. Furthermore, one of the witnesses to the purported Will was Mr John Thorpe, an employee of Mr Day, and he too had died by the time of the trial, (he died in November 2018), and so he could not be cross-examined either.

16 There are further relevant contextual factual matters.

(1) The Deceased had a sister called Venetia. She has sided with Bob in this claim and gave evidence on his behalf.

(2) Bob's wife was called Valerie. For a time, Venetia lived with her uncle and aunt and has always been very close to them. She lived with them because of her difficult relationship with her mother, Marlene, from whom she has always been estranged. Valerie died in December 2010.

(3) The Deceased also was very attached to his uncle and aunt and from time to time he stayed at their house. According to the judgment, there was no maternal warmth or tenderness emanating from Marlene towards her children. Bob and Valerie had no children of their own. The Deceased was starved of oxygen at birth and had learning

difficulties and mental health issues throughout his life. He had no relationship with his father who was a successful jockey.

(4) An important aspect of the background is that the Deceased's maternal grandfather, Arthur (Marlene's father), died on 1 February 1990. There followed a continuing dispute within the family over his estate, and the Master deals with this in his judgment. One asset was the property known as Ettridge Farm which Arthur left to his second wife. He had married his second wife, Mary, shortly before his death. He left this to Mary for life, thereafter to his son, Barry (one of Marlene's brothers), and each of his grandchildren being the Deceased, Dale and Venetia. Therefore, the farm was held for the four of them in equal shares, a quarter each. This is an important factor as the terms of the Will are inconsistent with that. In the disputes that followed in relation to Arthur's estate, Mr Day, who's firm was called ASA & Co., describing themselves as private and corporate advisers, were advising the Deceased, Dale and Venetia.

(5) Towards the end of 1998, the Deceased got into trouble with the police and was charged with assaulting four police officers. He appointed Mr Day as his attorney, and Mr Day assisted him in dealing with the prosecution. In November 1999, the Deceased pleaded guilty, but he managed to avoid going to prison.

(6) In 2004, so after the Will had purportedly been made, an agreement was reached between Mary, Barry and the three grandchildren in relation to Ettridge Farm. Mary released her life interest and Barry sold his interest to the three grandchildren. Thereafter, the farm was held by the three grandchildren in equal one-third shares.

(7) After obtaining the letters of administration and because the Deceased was said to have died intestate, Marlene transferred the Deceased's third share in the farm to Dale. Therefore, the farm would be held as to two-thirds for Dale and one-third for Venetia. Venetia was not notified of this at the time. Indeed, one of the main reasons for the Master's finding against Marlene and Dale was that Venetia and Bob were never told

that the estate was administered on the basis of intestacy by Marlene and that she had transferred the Deceased's interest to Dale.

(8) From around September 2015, there were various family disputes continuing, particularly around Ettridge Farm and a partnership business that had been operated from there. The partnership was between the three siblings and was called Dalevedean. Relations between Dale and Venetia had completely broken down. There was also a dispute about whether Bob should be allowed to stay living in what was called the Old Barn on the Ettridge Farm estate. Bob was claiming some form of proprietary estoppel in relation to the Old Barn. Bob was also claiming back certain monies that he and Valerie had lent the grandchildren.

(9) These disputes pitched Bob and Venetia on one side, and Marlene and Dale on the other. Bob and Venetia had Mr Day acting for them. It was during one discussion between Venetia and Dale that Venetia says she first found out that she only had a third share in Ettridge Farm and the partnership whereas she had assumed that she and Dale would have succeeded to the Deceased's interest equally, i.e. giving her a half share.

(10) Even though Mr Day had been acting for them for a while, it was only eight days before a mediation on the partnership dispute due to take place on 12 June 2018 that the purported Will was circulated. The Will left £20,000 to Marlene, and £20,000 to Valerie and Bob. It also gave the Deceased's one-third share in the freehold of Ettridge Farm to, "*...my brother, Dale, and sister, Venetia*", and it left a one-third share in the Old Barn to Bob and Valerie. It is the Appellants' case that the Deceased did not have a one-third share in those properties at the time of the purported Will. He only had a quarter share. Furthermore, they say that the Old Barn was not called that in 1999. Both factors, they say, are signifiers of forgery.

(11) The alleged witnesses to the Will were Mr Thorpe, an employee of Mr Day's, and Mr Michael Keeble, a long-time client and friend of Mr Day. As I have said, the Will is

unusually not signed by the Deceased. It was signed by Mr Day as his attorney, according to the attestation clause. Signing pursuant to a power of attorney is not possible for a valid Will. It has to be signed by the testator or at the testator's direction according to s.9 of the Wills Act 1837. Normally, a Will is only signed by someone other than a testator when that person is incapable of signing. There was no evidence as to the Deceased's inability to sign the will.

(12) As I have said above, the proceedings were begun and conducted by Mr Day until his death. As Mr Day is not a solicitor, I understand that Mr MacPherson was acting on a direct access basis with Mr Day acting as some form of agent or intermediary. The Claimant's current solicitors, Sillett Webb, took over after Mr Day's death. On 2 February 2020, days before the pre-trial review and long after the disclosure deadline in this case, a further original duplicate of the Will was found in lever arch files that had been sent from Mr Day's offices and passed to Sillett Webb. The papers had been provided to Sillett Webb in October 2019 and the duplicate copy of the Will was found by accident by Ms Katherine Sillett when, I think, her cat knocked over a pile of papers. The two copies of the Will have been referred to as "the **First Will**" and "the **Second Will**", and I will do likewise. They are in exactly the same form, save for the following: (a) Mr Day's signature is different in form; and (b) the second page of the First Will appears to have been printed separately. There were at the trial differing theories as to whether the existence of the Second Will was a signifier of fraud or whether it actually signified authenticity. In any event, Ms Rogers and Mr MacPherson were agreed that it is unusual to have signed two separate Wills at the same time.

(13) The proceedings, including the pleadings and witness statements that had then been filed, were on the basis that there was only one Will. The discovery of the Second Will led to amendments to the pleadings. It was also sent to the handwriting experts to analyse.

(14) The Master records at para.[72] of his judgment that the experts were agreed that the two Wills were separately executed duplicates, that is they were executed at the same time. The Master also referred in para.[135] of the judgment that both experts agreed that looking at the First Will alone there is: "*...strong evidence to support the proposition that Howard Day did not sign this will in 1999 as purported but at a later date when his writing deteriorated*." Having concluded that both were done at the same time, the experts' joint report then goes on to say at para.[137]: "*It is more likely than not that both of these signatures were written at a later point in time*." In other words, they were jointly of the view that the wills were not signed in March 1999.

(15) However, the Master appears to have rejected that expert evidence and decided that the Will, or the Wills, was indeed executed on 2 March 1999. One would have expected to find in the judgment a clear explanation as to why that joint expert opinion was being rejected by the Master, but I did not find such an analysis. All he says is that he was not persuaded by the expert opinion: "*...that I should alter my conclusions on the factual evidence or conclude that the wills are forgeries in the sense of being created after Dean's death.*" (Para.[142]). This may indicate that the Master may not have approached the analysis of the evidence in the right way. I will come on to consider this under the Grounds of Appeal in a moment.

17 The trial was originally listed for eight days starting on 16 March 2020, however it was becoming apparent that the coronavirus pandemic was taking hold and that there was likely to be a lockdown, which there was shortly thereafter. There were two elderly witnesses involved, Marlene and Bob, and both parties were agreed that they did not want the trial adjourned. It was, therefore, agreed that the trial should be limited to three days of cross-examination of the main witnesses, and this took place between 17 and 19 March 2020. It was also agreed that there was no need for the handwriting experts to be cross-examined.

That meant, as recorded by the Master in para.[6], that there were a number of witness statements that would go in and be considered but would not have been subject to cross-examination. The Master rightly said that he would:

> "...take care to read all the statements and when reading the statements to take into account that their evidence had not been tested by cross-examination."

18 In the circumstances, I would have expected the Master to make reference to those witness statements and explain what reliance he did place on them, and whether he accepted or rejected that evidence, and if so why. Instead, there is no such analysis, and the structure of the judgment makes it difficult to discern the extent to which some witness statements were considered or not. Two witness statements filed on behalf of the Appellants were not referred to at all in the judgment and this forms the subject matter of Ground 2 in the Grounds of Appeal.

19 Full written submissions were filed with the Master on 25 March 2020 and he handed down his reserved judgment on 6 July 2020, finding in favour of the Claimant. Pursuant to his order dated 15 July 2020, the Master:

(1) Pronounced for the force and validity of the last Will and Testament of Dean Ashley James Brunt (Deceased) in the form of duplicate Wills dated 2 March 1999.

(2) Revoked the letters of administration granted to Marlene dated 25 July 2008.

(3) Removed Marlene from the office of personal representative.

(4) Appointed Mr Timothy Christopher James Adams as substitute personal representative to the Deceased's estate.

(5) Made certain consequential directions.

20 The Master also handed down judgment on 10 August 2020 dealing with the costs of the proceedings. He decided that both sides' costs should be paid out of the estate, largely because he blamed Mr Day for causing the expense of the trial to be incurred by both parties. Mr Day should have insisted, according to the Master, that the Deceased personally signed his Will. He also thought that the Appellants, even though they had lost, "*genuinely believed that Dean died intestate*" which is perhaps an odd conclusion given that he found that Marlene had seen a copy of the Will.

Grounds of Appeal

Ground 1

21 With that background, I turn to the specific grounds of appeal, the first of which is a general overarching Ground as to the Master's approach to the evidence. Mr MacPherson says that this Ground effectively seeks to put the challenge to the Master's factual findings on a legal footing so as to give the appeal more chance of being considered. I think, however, that the Master did adopt a flawed approach to his consideration and analysis of the evidence, and it may have been because he relied too heavily on the approach adopted by His Honour Judge Simon Barker QC in the case of *Re Parsonage (Deceased)* [2019] EWHC 2362 ("***Re Parsonage***"). Ground 1 is in the following terms:

> "The learned master erred in law by applying the wrong approach to assessing evidence and making findings of fact. He applied the approach formulated by His Honour Judge Simon Barker QC in *Re Parsonage* at para.38 of that judgment. The Master should have

> applied the approach outlined by the Court of Appeal and the leading authority on the issue, *Kogan v Martin* [2019] EWCA Civ. 1645. The learned Master's error of law in this respect led to a series of errors in the assessment of evidence and findings of fact outlined in these grounds of appeal."

22 I have been shown the various authorities referred to. I have, on occasion, myself referred to Leggatt J's (as he then was) discussion of the unreliability of memory in *Gestmin SGPS SA v Credit Suisse* [2013] EWHC 3560 ("***Gestmin***") and I think it is an invaluable caution for judges insofar as they are dealing with commercial cases in which there is plenty of contemporaneous documentary evidence which is not disputed. I do not think Leggatt J was prescribing how oral evidence should be dealt with and assessed for every type of case. Rather, he was saying that where there are undisputed contemporaneous documents, they are going to provide a better guide to the truth than oral testimony, which is inherently unreliable, particularly where witnesses claim to be able to recall events or conversations many years back and where their recollection of events is necessarily overlain with the events that have happened since and the willingness to support one side or the other.

23 I do not believe that the *Gestmin* case can really be criticised so long as it is properly understood. The Master relied, as I have said, on *Re Parsonage*, the decision of His Honour Judge Simon Baker QC (sitting as a High Court Judge). That also was a will case but there were not allegations of fraud and forgery. The issues were testamentary capacity and knowledge and approval. After reviewing a number of the well-known authorities including that of Robert Goff LJ (as he then was) in *The Ocean Frost* [1985] 1 Lloyds Rep 1 ("***The Ocean Frost***") and Lord Bingham (as Bingham J) in his 1985 well-known article, "*The Judge as Juror*", His Honour Judge Barker then concluded at para.38 with this:

> "This selection from the authorities seems to me to demonstrate an established approach to fact finding. The court takes as a platform for fact finding reliable contemporaneous documentary evidence. It adds

> to that known, established or agreed facts, probable facts (both inherently probable and by inferences properly drawn from known, established or agreed facts), and then builds further with witness evidence which is consistent or compatible with that underlying body of reliable documentary evidence and is not tainted or flawed by other indicators of unreliability."

24 That quote from para.38 of *Re Parsonage* was directly quoted by the Master in para.[80] of his judgment. He then said: "*I respectfully agree with that approach to fact finding*." The Master went on to make his findings and appears to have followed a structure in his judgment that mirrored directly the approach as set out by His Honour Judge Barker. While I do not think that there is anything particularly wrong with what His Honour Judge Barker said, I do not think that it is a prescription for fact-finding in all cases, in particular where he referred to "*reliable contemporaneous documentary evidence*" as being the platform for the assessment of evidence.

25 In this case, there were no reliable contemporaneous documents. All were under challenge as forgeries. It is not as though witness testimony could be tested against undisputed documents or agreed facts. The only agreed facts in this case were essentially the time and place of discovery of the two copies of the Wills, the fact that they had been signed by Mr Day on behalf of the Deceased, the fact that Mr Day had been to prison for fraud, and the agreed expert evidence. In other words, the only undisputed facts gave rise to a high degree of suspicion.

26 In a case of fraud where the credibility of witnesses is critical, I prefer to rely on what was said by Robert Goff LJ in *The Ocean Frost* which was quoted in *Re Parsonage* at para.34. Paragraph 34 of *Re Parsonage* says as follows:

> "In *The Ocean Frost*... Robert Goff LJ stressed the importance of having regard to the documentary evidence, objective facts,

> witnesses' motives and overall (or inherent) probabilities when attempting to decide whether a and/or which witness is telling the truth..."

Then he quoted from *The Ocean Frost* in which Robert Goff LJ said:

> "Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, references to the witness' motives and to the overall probabilities can be of very great assistance to a Judge in ascertaining the truth."

27 In *Re Parsonage*, there was also, as I have said, reference to Bingham J's article in 1985, and what is said in para.35 of *Re Parsonage* is as follows:

> "Also in 1985, Bingham J, in his article The Judge as Juror: The Judicial Determination of Factual Issues, Current Legal Problems 38, drew attention to three matters he considered important to testing the reliability of a witness's evidence : (1) the consistency of the witness's evidence with what is agreed, or clearly shown by other evidence to have occurred; (2) the internal consistency of the witness's evidence; and, (3) consistency with what the witness has said or deposed on other occasions. Bingham J considered the credit of a witness in matters not germane to the litigation to be of less significance, and the demeanour of a witness to be an unreliable pointer to honesty."

28 I would have expected to see a section of the judgment dealing with his assessment of the witnesses by reference to the known facts, inconsistent or changing stories, the witnesses' possible motives for lying, and the overall probabilities. If relying on the demeanour of the witnesses as a reason for believing or disbelieving them, then I would have expected the Master to have said so. That would, in any event, be a weak ground for accepting a witness' evidence as per Lord Bingham. Instead, the Master merely declares towards the end of his

judgment that he was: "...*impressed by Venetia as a witness. I do not think she would for one moment associate herself with a fraudulent claim*." (Para.[103]) By contrast, in relation to Marlene, the Master merely said that, "...*she was a most unimpressive witness*" (para.[125]).

29 Ms Rogers says that the Master should have referred to the recent Court of Appeal decision in *Kogan v Martin* [2019] EWCA Civ. 1645 and he had been referred to this in the closing submissions. In that case, Floyd LJ referred to the *Gestmin* decision in para.88 of his judgment, and he said as follows:

> "We think that there is real substance in this ground of appeal. We start by recalling that the judge read Leggatt J's statements in *Gestmin*... as an 'admonition' against placing any reliance at all on the recollections of witnesses. We consider that to have been a serious error in the present case for a number of reasons. First, as has very recently been noted by HHJ Gore QC in *CBX v North West Anglia NHS Trust* [2019] 7 WLUK 57, *Gestmin* is not to be taken as laying down any general principle for the assessment of evidence. It is one of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed. Earlier statements of this kind are discussed by Lord Bingham in his well-known essay *The Judge as Juror: The Judicial Determination of Factual Issues*... But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon *all* of the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence."

30 I entirely agree that a judge has to make findings of fact based on all the evidence. Where evidence is inconsistent or contradictory or where it differs from agreed expert evidence, it has to be evaluated and assessments made as to whether the witness evidence is reliable in the face of agreed incontrovertible facts. This is not a *Gestmin*-type case where there are reliable documents, but there are known facts. There are the terms of the Will and there is

the expert evidence, much of which was agreed. All this has to be weighed and analysed, and while not everything has to be set down in writing in the judgment, it has to be clear from the judgment how the judge has come to the conclusion that one side's witnesses should be believed over the other's.

31 Ms Rogers says that the effect of the Master adopting the approach in *Re Parsonage* was that he prioritised considering the terms of the Wills and other documents before considering the witness evidence. He then considered that the witness evidence that accorded with his analysis of the disputed documents was correct and that which did not was not to be relied upon, including presumably the expert evidence, although he did not say so expressly. She says that that shows the dangers of slavishly following the *Gestmin* formula in a case where those documents are what the dispute is about and therefore cannot form the basis against which the witness evidence is to be tested. Furthermore, it led to the Master failing to take into account some of the Appellants' evidence and this approach gave rise to the specific errors that are relied upon in the other Grounds of Appeal.

32 Mr MacPherson for the Respondent said that the Master is not to be criticised for adopting the approach of His Honour Judge Barker in *Re Parsonage*. As an overall point, however, he says that an appellate court such as this should be very slow to interfere with a trial judge's factual findings particularly where they are based on an assessment of witnesses' oral testimony and balancing that against other facts and written evidence. I entirely agree. He says that the Appellants effectively accused the Claimant and all his witnesses of fraud, but the Master found that they were honest. Where a party has been acquitted of fraud, it should not be displaced except on the clearest grounds, and he referred to the comments to this effect by Stuart-Smith LJ in *The Ikarian Reefer* [1995] 1 Lloyd's Rep 455.

33 There is clear high authority that appellate courts should not interfere with findings of fact, particularly if they are based on the credibility of witnesses unless compelled to do so. In *Fage UK Ltd. & Anor. v Chobani UK Ltd. & Anor.* [2014] ETMR 26, Lewison LJ said as follows at para.114:

> "Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are... [he listed a number of authorities]... These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include:
>
> (i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
>
> (ii) The trial is not a dress rehearsal. It is the first and last night of the show.
>
> (iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court and will seldom lead to a different outcome in an individual case.
>
> (iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
>
> (v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
>
> (vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

34 Insofar as the judge failed to give adequate reasons for the findings he made, I also bear very much in mind that not all reasons or facts or pieces of evidence or arguments need be referred to. In *English v Emery Reimbold v Strick Ltd.* [2002] 1 WLR 2409, Lord Phillips MR (as he then as) said: "*... justice will not be done if it is not apparent to the parties why one has won and the other has lost*." He then went on to say that Griffiths LJ's

comments on the adequacy of reasons in *Eagil Trust Co. Ltd. v Pigott-Brown* [1985] 3 All ER 119 saying that these comments of Griffiths LJ applied to all judgments. Griffiths LJ said:

> "... a judge should give his reasons in sufficient detail to show the Court of Appeal the principles on which he has acted, and the reasons which led him to his decision. They need not be elaborate. I cannot stress too strongly that there is no duty on a judge in giving his reasons to deal with every argument presented by Counsel in support of his case. It is sufficient if what he says shows the parties, and if need be the Court of Appeal the basis on which he acted..."

35 As Lord Hoffmann famously said in *Piglowska v Piglowski* [1999] 1 WLR 1360 at p.1372:

> "...specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance... of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.
>
> ... The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed."

36 Of course that is right, but the appeal court must be able to see how the trial judge got to make the findings of fact that he did. The reasons why he acted as he did must appear from the judgment. I should add that Ms Rogers did actually seek some clarification on certain matters in the short time available between circulation of the draft and the handing down of the judgment, which was basically over a weekend, but the judgment was not substantially amended as a result.

37 Mr MacPherson also referred to the fact that there needs to be finality in litigation, and this is why the rules set out above are so rigidly applied. He said that if I ordered a re-trial it is unlikely to be heard this year and that that is another reason why in the court's discretion

permission to appeal should not be granted. Also, the costs of a re-trial would be disproportionate to the amount at stake, which is in the order of £1.2 million. I, again, have much sympathy with these arguments but if I consider that the Master has not provided any real explanation as to why he is rejecting agreed expert evidence and why the circumstances of the Will's discovery and the suspicious involvement of a convicted fraudster not only in discovering the Will ten years after the death but also the fact that he actually signed the will on behalf of the Deceased, why those circumstances do not weigh heavily in the balance against accepting the Claimant's witness evidence then, in my view, there is little option other than to order a re-trial.

38 Mr McPherson says that there is nothing wrong with the approach adopted by His Honour Judge Barker in *Re Parsonage*, but each case depends on the type of evidence available and the court must consider and balance all of the evidence testing known facts against the credibility of the witnesses' evidence.

39 In my view, the structure of the judgment indicates that the Master did do as he said and followed the suggestion of His Honour Judge Barker in *Re Parsonage*. I think that led his judgment into difficulties because that approach did not involve a proper assessment and balancing of all the evidence in the round.

40 Looking at the judgment a bit more closely, at para.[80] the Master referred to *Re Parsonage* and said he agreed to that approach. He had previously said in para.[73] that because of the circumstances of the Will's production, the evidential burden was on the Claimant and convincing evidence would be needed to defeat the allegation that the Will is a forgery.

41 So in accordance with the *Re Parsonage* approach, he started with the documentary evidence as the supposed platform. However, those documents were the Will itself and then some supposedly corroborating documents including two attendance notes by Mr Day of meetings with the Deceased and a diary entry from Mr Day that had added to the 2 March 1999 entry, *"& Signed Up Will*" which both experts agreed was added at some later time. That is highly suspicious, the fact that the diary entry was added later, but this does not seem to have weighed with the Master at all.

42 All these documents were under challenge. Indeed, they were what this case was about. Yet the Master appears to have used them as the basis, the platform, for considering the credibility of the witnesses, some of whom were allegedly engaged in their fraudulent concoction. The only platform that could reasonably have been used would be undisputed, reliable documentary evidence.

43 So in paras.[81]-[88] there is reference by the Master to the Will, and he points out some of the oddities. In para.[82] he says that these oddities do not go to the genuineness of the Will, only to the knowledge and approval question which, in my view, is not correct.

44 He then referred to the one-third share of Ettridge Farm that the Deceased purported to gift in the Will when he only actually had at that time a quarter share, and the reference to the Old Barn on which there was evidence from the Appellants that it was not called such at the time. Without seemingly resolving those issues, which are clearly potential signifiers of forgery, he concludes without analysis at para.[89]:

> "In my judgment, it is not possible to determine looking at the contents of the will alone whether or not it is a forgery."

45 At para.[132] he confirms that finding by saying that:

> "The contents of the will do not arise [although I think he means arouse] suspicion."

46 That is the only place in the judgment where he considers the contents of the Will and given that he appears to be following the *Re Parsonage* formula he is therefore using the Will, together with the other evidence, as the "*reliable contemporary documentary evidence*" against which he goes on to accept the witness evidence that is consistent with a conclusion that the Will is genuine.

47 In paras.[90]-[94] he refers to the other alleged contemporaneous evidence, namely Mr Day's diary and file notes on which, despite the suspicious late diary entry, he comes to no conclusion at para.[93], recording the Claimant's submission that the file notes appear authentic whereas if the Will is a forgery: "...*then these typed attendance notes are part of a criminal attempt to put forward a forgery*."

48 So no clear conclusion on the other documents, and in para.[94] there is reference to the purple folder where it was common ground that the Master was wrong that the writing on the purple folder was agreed by the experts to be in Valerie's handwriting. The Master concluded in para.[94] that that provided some evidence that Valerie at some point held the Will or a copy of the Will.

49 After dealing with the documents, the judgment moves to the witness evidence. At paras.[95]-[101] he records some of the evidence given by Bob, pointing out some inconsistencies in his evidence but concluding at para.101:

> "I found the Claimant to be a truthful witness. I can see no reason why he would be prepared to fabricate evidence relating to his knowledge of Dean's will if he did not genuinely believe it."

50 Venetia is dealt with in paras.[102]-[103]. Although she could not give much relevant evidence, the Master simply records at para.[103]:

> "I was impressed by Venetia as a witness. I do not think she would for one moment associate herself with a fraudulent claim."

51 Between paras.[104]-[123] the Master deals with the Claimant's other witnesses including Mr Keeble who allegedly witnessed the will, Mr Jonathan Day (Howard Day's son) who was allegedly involved on the day of the Will signing, and to some other witnesses, two of whom were not called, who gave evidence as to the Deceased referring to the fact that he had made a Will. At para.122 the Master concluded as follows:

> "I am satisfied that the Claimant was told in March 1999 by Valerie that Dean had made a will. I am satisfied that Howard Day's attendance notes are not part of an elaborate fraud. Howard Day was in 1999 assisting the Brunt Grandchildren with the support of the Claimant, Valerie and Marlene in relation to Arthur's estate. I am satisfied that Mr Keeble and Mr Jonathan Day gave truthful evidence setting out their recollection of when the will was signed."

52 Almost in passing, he then turns to Marlene's evidence. At para.[125], without any real analysis, the Master just says, "*She was a most unimpressive witness*". I have no idea why he concluded that. It cannot just have been on the basis that she had denied seeing the Will or that she thought it was Howard Day's will rather than the Deceased's (perhaps not an unreasonable assumption as Mr Day had actually signed it).

53 Mr MacPherson directed me to the transcript of some of the cross-examination and said that there were a number of times where Marlene fell into his traps and the Master appreciated this. He said that if I had been there and heard this evidence that I would have been bound

to conclude that Marlene was being untruthful. That may be so, but the fact that he had to revert to the transcript rather proved the Appellants' point that there is no adequate analysis in the judgment as to how the Master came to the conclusion that Marlene was an unimpressive witness.

54 Further, there seems to me to be a *non-sequitur* in para.[126] and a confusion as to whether the Master is talking about when Marlene saw the Will in the witness box or at the time of the Deceased's death.

55 At para.[129], Dale's evidence is dismissed as mere argument but again the Master does not explain why he preferred the Claimant's evidence over his. Then paras.[131]-[132] are his summary. Paragraph [131] says that the Master took account of Mr Day's bad character. It is to be noted that he did not refer to the similar fact evidence. But what does "*taking account of*" actually mean? Then in para.[132] he says having weighed all the evidence, the contents of the will do not arouse suspicion and:

> "There is no obvious reason why Howard Day, Michael Keeble or Jonathan Day or the late John Thorpe want to participate in a serious fraud. Nor is there any reason to believe that the Claimant and Mr McCutcheon would be willing to perjure themselves."

56 There is no consideration of all those persons' motives for doing so. The Master seems to have based his conclusion around the fact that he did not find the contents of the Will to be suspicious and the fact that he did not think the Claimant's side would be engaged in such a fraud. There is no apparent consideration of the highly suspicious circumstances under which the Wills were discovered so long after the event, or why Mr Day, for example, did not mention the Will until shortly before a mediation at which the contents of the Will were material and beneficial to Bob and Venetia.

57 The judgment goes on to consider the expert evidence, the subject matter of a particular Ground of Appeal, but in para.[142] the Master concluded that he was not persuaded to change his mind on the factual evidence as a result of the agreed expert evidence.

58 As Mr MacPherson put it, essentially the Master found the Claimant's witnesses to be truthful and the Appellants' witnesses not to be truthful, and he was perfectly entitled to come to that conclusion having seen and heard the witnesses give evidence. He is entitled to come to that conclusion, but the question is whether he adopted a flawed approach to assessing that evidence and whether it is clear from his judgment as to how he got to that conclusion.

59 With respect, I believe that he was wrong to come to a conclusion on the disputed documents first, as he did apparently in para.[89], and then go on to see if the witness evidence was consistent with such a finding. That wrong approach stemmed from a rigid adherence to the *Re Parsonage* formula and meant that he did not perform - at least it does not appear from his judgment that he performed - a proper assessment of the overall evidence tested against known and undisputed facts and documents. I think it is only by looking at the particular examples as set out in the following Grounds of Appeal that one can see how the Master failed to properly assess and analyse the evidence before him.

60 I should emphasise that I am not deciding that the Claimant and his witnesses are guilty of fraudulently concocting a case in putting forward the validity of the Will. That would necessarily be for another judge to decide. All I am deciding is whether the Master approached the assessment of the evidence in a coherent and reasoned way and whether it is possible to discern how he concluded what he did from the evidence that was before him. It may be that another judge will come to the same conclusion, but hopefully that would be

after explaining why the expert and other evidence was rejected and why the witnesses who were believed should be believed by reference to more than merely an overall impression of impressiveness.

Ground 2

61 Turning to the specific grounds, Ground 2 concerned witness statements of Sally Newton and William Diss, both of whom gave evidence for the Appellants but were not cross-examined. Their witness statements are not referred to anywhere in the judgment. The Master did refer to witness statements on behalf of the Claimant that were not cross-examined (see paras.[115]-[116]). It is certainly unfortunate that the Master did not expressly refer to this evidence. He did say, as I said above, that he would be taking all witness statements into account.

62 Mr MacPherson says that I should take the Master at his word - which I certainly do - and accept that he did take that evidence into account. However, Mr MacPherson went too far, in my view, in saying that there was no need for the Master to cover all the witnesses in his judgment. At the very least, in order to show to the losing party that all their evidence has been carefully considered, they should have been referred to. The fact that it was not, may not be in itself a major flaw in the judgment but it may indicate that the Master did not go about the assessment of the evidence in the right way.

63 Sally Newton's evidence concerned Howard Day's character and also referred to Michael Keeble, one of the witnesses to the will. In relation to Mr Day, she said in her witness statement that there was another example of Mr Day producing a document after a person's death, in that case Ms Newton's mother-in-law, in which that document was not found to be genuine. This was similar fact evidence that would be highly material to the

central credibility of Mr Day as the maker, signer, and discoverer and propounder of the Will. The Master only referred to Mr Day's conviction for fraud. In relation to the same events upon which he was convicted, Mr Day was also pursued in the civil courts for knowing receipt and dishonest assistance. But the Master's conclusion in relation to this was that it: "*...requires the court to evaluate documents and evidence coming from Howard Day with caution*." (Para.[79]) However, that was it. Yet it is the central documents in this case (the will, Mr Day's purported attendance notes and his diary) that all came from Mr Day and were belatedly discovered by him. His propensity to produce false documents has another example in Ms Newton's evidence but this was not referred to in the judgment. (In the further evidence that the Appellants wish to rely on, there is more similar fact evidence in relation to Mr Day's willingness to doctor documents. I will come on to deal with that later.)

64 Mr MacPherson said that the Master would have taken account of that evidence in making his conclusions about the character of Mr Day, as set out in paras.[76]-[79]. However, it is not apparent that he did. As to the similar fact evidence, Mr MacPherson says that this should not be admissible on the tests as set out in *O'Brien v Chief Constable of South Wales Police* [2005] UKHL 26. However, there was no objection at the trial to the Master considering this similar fact evidence and in my view it would clearly have been relevant to the central issue in the case, namely whether Mr Day prepared a forged Will of the Deceased. I consider that this evidence was potentially significant and should have been mentioned.

65 The Master's findings as to Mr Day were limited to his bad character based on his conviction and the High Court judgment in the *Fayers* case. There was no reference in the judgment to the Court of Appeal judgment in that case, but the Master did conclude in

para.[78] that someone who has participated in a dishonest scheme may act dishonestly again. He did not, however, refer to Ms Newton's similar fact evidence which made it even more likely that he would do the same again. Mr Day had been found to have been prepared to act dishonestly in assisting clients for financial benefit. It is insufficient, in my view, merely to conclude that the Master would treat anything coming from Mr Day with caution. He was the central character in the case, and he could not be cross-examined. The extraneous evidence as to his character and *modus operandi* were critical.

66 Ms Newton also explained the close relationship between Mr Day and Michael Keeble. As to Mr William Diss, he gave evidence as to the Deceased's mental capabilities and how he tended to defer to people around him to help with reading documents, etc. It goes to whether the Deceased would have understood what was going on, in particular whether he would have been able to concentrate through an allegedly five-hour meeting with Mr Day after which the Will was purportedly signed. This is not as important as Sally Newton's evidence, in my view, but it is unfortunate again that it was not mentioned. It would have only taken a sentence or two.

Ground 3

67 Ground 3 is in the following terms:

> "The master erred in law and fact by failing to take into consideration and give due weight to the evidence of motive of the persons involved in producing and propounding the wills including Howard Day, Michael Keeble, John Thorpe, Jonathan Day, Venetia Murray and the respondent. Such evidence pointed inextricably to the conclusion that such persons had motive to participate in the forgery and/or falsely participate in propounding the invalid wills. The master was accordingly wrong to find that such persons had no motive."

68 I quoted from *The Ocean Frost* above where Robert Goff LJ said that in a fraud case he always pays special attention to a witness' motive and the overall probabilities. Ms Rogers

says that the Master ignored the evidence and submissions she made as to the motives of the Claimant and his witnesses. Mr MacPherson said that the Master clearly took everything into account whether it was mentioned or not and that a judge is not expected to set out every piece of evidence or submission in the judgment. That is obviously correct, but where the credibility of witnesses is at the heart of the case it is important to be clear why the alleged bad motive does not impact on the credibility of the evidence. So, for example, both Bob and Venetia would benefit financially if the Will was proved. At the time it was produced, the Will would also have materially improved their position in relation to the ongoing family disputes in that it bolstered Bob's proprietary estoppel claim in relation to the Old Barn and Venetia's partnership claims.

69 Michael Keeble was being assisted by Mr Day until his death with litigation in respect of his late partner's estate and Mr Day was doing so for free. He also considered that Marlene and Dale owed him some £52,000. It made me wonder why Mr Keeble would give false evidence after Mr Day had died but by then he had already claimed to be a witness to the Will so was effectively committed to continuing with his evidence.

70 Mr Thorpe, who died by the time of the trial, had given evidence for Mr Day at the fraud trial in the late 1990s and was a long-time associate and friend of Mr Day. Jonathan Day is Mr Day's son and would be keen to avoid a further finding of fraud against his father and the company, ASA. The Master accepted all of their evidence despite finding certain inconsistencies and items that should have been mentioned, such as the fact that two duplicate Wills were signed. The Master did refer to the fact that Mr Keeble was not an independent witness. He would obviously have known also that the Claimant and Venetia stood to gain from the will. Indeed, he said this at para.132 but then he concluded boldly that:

> "There is no obvious reason why Mr Day, Michael Keeble or Jonathan Day or the late John Thorpe would want to participate in a serious fraud."

71 I assume that the Master did take account of motive but again it would have been better if he had expressly explained why their apparent motives did not suggest that they would act fraudulently. Again, in itself, I do not consider that this would constitute a major flaw in the judgment justifying interference by an appellate court. It would have been preferable if the Master had expressly put motive into the mix on his assessment of the Claimant's witnesses. His failure to do so adds to the overall unease about the judgment.

Ground 4

72 The fourth ground concerns the contents of the Will itself and includes examples of signifiers that the Master allegedly did not take account of, including:

(a) The Deceased did not sign the will himself.

(b) The date is typed on the first page of the Wills rather than handwritten, as is usual.

(c) The Deceased's middle name was incorrect on the front of the Wills.

(d) The spelling of his mother's farm was incorrect on the second page of the Wills.

(e) There was an irregular attestation clause used stating that the Wills were signed by Howard Day as attorney, given attorneys do not have such a power.

(f) The contents of the Wills benefited the respondent and Venetia Murray in respects relevant to their ongoing complex disputes with the Appellants outside of these proceedings which form the context in which the Wills came to light.

(g) The expert witnesses' evidence that the second page of one of the Wills was printed on a different printer and on different paper to the rest of the document, contrary to the Respondent's pleaded case in his response to a request for information on the printing of the Will having been done on one printer in Howard Day's office, and Michael Keeble's evidence of the amendment and execution of the Wills occurring in his presence.

73 The Master referred to some of these peculiarities in his judgment, in particular in para.82, but he said that these are not matters that go to whether the document is genuine but as to whether it was read and understood by the Deceased. The Master then went on to deal with the one-third point and the reference to the Old Barn as signifiers of forgery. These are the subject matter of the fifth Ground and so I do not deal with them here.

74 In themselves, the factors in Ground 4 are not particularly significant in terms of forgery except perhaps the first one that the Deceased did not himself sign the Will. As to that, the Master did say that he had taken into account the potential for forgery arising from the signing of the will by Mr Day on behalf of the Deceased (para.131). However, it is unclear to what extent it was taken into account but then clearly rejected as a reason for not accepting the validity of the will.

75 Furthermore, there was no finding as to why the Deceased did not sign the Will himself. An obvious explanation is that it is harder to fake someone else's signature, but this too was not considered. All in all, while I consider that the Master was wrong to rule out these factors as being relevant to forgery as well as knowledge and approval, I do not think that in themselves they are significant enough to undermine the judgment as a whole.

Ground 5

76 Ground 5 however is, in my view, significant. This Ground of Appeal concerns the Master's failure to make any findings in relation to the reference to "the one-third share" in the farm when the Deceased had a one-quarter share at the time of the Will and the reference to the Old Barn which was not called that at the time because it was a derelict shed then. Ms Rogers showed me an admitted picture of a dilapidated shed as it was in the 2000s before it had been converted into Bob's house, the Old Barn.

77 In para.[86], the Master said that the Claimant's evidence that the Deceased considered that he held a one-third share of the Brunt grandchildren's share from Arthur was a "*plausible*" explanation. Ms Rogers complained that the Master had to make a finding of fact on a balance of probabilities as to this and it is insufficient to refer to a merely "*plausible*" explanation. Mr MacPherson said that the Master was clearly deciding that that was the reason and, even if it was infelicitously worded, there is no basis for challenging the Master's finding in this respect.

78 As to the Old Barn, or cart shed as Ms Rogers referred to it, Ms Rogers said that the Master referred to Dale's evidence on this but did not come to a conclusion. This is in paras.[88]-[89]. Instead, the Master said that the Claimant had said that there was an agreement or understanding in 1999 that the property would be given to him and Valerie, but this does not seem to me to answer the point as to what it was called at the time. There is, in my view, a *non-sequitur* in para.[89] when the Master simply says:

> "In my judgment, it is not possible to determine looking at the contents of the will alone whether or not it is a forgery."

79 If the Will had been drawn up well after the Deceased's death, it is perfectly possible that the forger would have forgotten that the Deceased only got his third share in 2004 and that in 1999 it was only a quarter share. Similarly, it could have been forgotten that in 1999 the Old Barn was not called that because it had not been built.

80 The complaint in this respect is that the Master should not have looked at the contents of the Will in isolation. The signifiers of forgery such as the reference to one-third and the Old Barn needed to be assessed alongside the other signifiers of forgery and weighed against any other factors pointing to the genuineness of the Will. Not only did the Master fail to find the necessary facts, he also failed properly to weigh that evidence against the rest of the evidence indicating forgery. Mr MacPherson says that the Master accepted the Claimant's evidence on this and rejected Dale's. Unfortunately, he did not actually say this, and I think this was important evidence that required more analysis.

Ground 6

81 Ground 6 concerns the other documents that were used to corroborate the validity of the Will. These were Mr Day's diary entry for 2 March 1999 which had added to it, as I have said, the words, *"& Signed Up Will*", and the experts were agreed that this had been added later. A list of meetings and typed file notes which were also not contemporaneous were produced. There was no contemporaneous Will file kept by Mr Day, as would have been expected. All these documents were produced by Mr Day in 2018.

82 The addition to the diary entry is a strong indicator that documents have been doctored or fabricated in order to support the validity of the Will. Ms Rogers showed me the expert evidence on this, and the writing had clearly been added later and it was in ink that was not used throughout the rest of the diary and was obviously added for a purpose. The Master

made no findings as to this and did not evaluate that evidence. Mr MacPherson said that this was considered as part of the Master's overall conclusion as to the preparation of the Will. At para.[122], he concluded that Mr Day's attendance notes were not part of an elaborate fraud, however he does not explain why the words were added to the diary and/or why that is not a signifier of fraud.

Ground 7

83 There was also an issue concerning the purple folder that I have referred to that was found among Valerie's files and it had written on the outside "*Dean Will*". The file was empty when it was found by the Claimant and Venetia. The Master said that the experts were agreed that the words were written by Valerie. That was wrong. The Appellants' expert regarded the evidence as inconclusive as to whether this was written in its entirety by Valerie. Mr MacPherson agreed that the Master had got that wrong but said that this was only a minor error by the Master and did not undermine the judgment as a whole.

84 Ms Rogers also says that the Master's conclusion that Valerie had at one time a copy of the Will in the folder is unsupported by any credible evidence. It cannot fit with the known fact that the two copies of the Will that we have were both found amongst Mr Day's papers. By contrast, Mr MacPherson pointed to significant evidence that the Deceased had taken a copy of the Will with him and could well have left it with Valerie who he went to immediately after the Will was executed. It was also corroborated by Bob's evidence that he had been told about the Will.

85 Ms Rogers says that if those words, "*Dean Will*" did appear on the file, there was clear evidence from Dale that Valerie may have used those words to signify that it was a file dealing with the administration of the estate and Valerie had assisted Marlene at the

beginning with the administration of the estate. The Master does not appear to have recorded or evaluated this evidence. Mr MacPherson accepts that this was not dealt with, although he says it is clear that the Master had rejected Dale's explanation as he had rejected all of his evidence. Again, in my view, it was important for the Master to have been clear about these matters and not to leave readers of his judgment wondering what his conclusions were on that.

Ground 8

86 This concerns the expert evidence and in my view is significant as the Master basically rejected the surprisingly strong conclusions of both experts that the Wills were signed after 1999. At para.[135], he recorded the experts' joint conclusion that the First Will:

> "...as a stand-alone document, there is strong evidence to support the proposition that Howard Day did not sign this will in 1999 as purported, but at a later date, when his writing had deteriorated."

87 Then in para.[137], the Master set out the experts' joint conclusion:

> "...we agree that it is more likely than not that both of these signatures were written at a later point in time and the signature on the Second Will was appended with better pen control and fluency."

88 The Master latched on to the next paragraph of the joint experts' report which said:

> "We consider that it would be quite a coincidence for Mr Day to have written the signature on the First Will in 1999 in an unusual style relative to his writing at that time and in a manner which is not found until later dated signatures."

The Master interpreted coincidence as meaning that it could have happened, but I do not think the strength of their joint opinion can be dismissed so lightly. What both experts were

basically saying was that: “we do not think that is a likely explanation at all”. There was no cross-examination of the experts, but I would regard that as particularly strong evidence from both experts that the Wills were not signed in 1999. However, because it did not fit with the Master’s conclusion on the facts, it was rejected.

89 I was told that the Master was following established practice in probate cases of considering the factual evidence first and then reconsidering his conclusions in the light of the expert evidence. So firm was the Master in his conclusion on the factual witnesses that he was prepared to accept the small possibility that Mr Day had signed the First Will in that fashion in 1999. The Master did not, however, refer to the expert evidence of Ellen Radley on behalf of the Appellants that the likely explanation for the fluent signature on the Second Will was that Mr Day had warmed up by then. She had pointed to an exact example of this in 2016 in which Mr Day had signed a document twice, one after the other, in which the signatures had similar differences in fluency.

90 Mr MacPherson said that the Master faced a conundrum. If he accepted the expert evidence, it meant that he had wrongly assessed the factual evidence. He had found the Claimant’s witnesses to be truthful, so he could not change his mind on that. To a certain extent, that renders the expert evidence redundant. I also think that it shows the dangers of coming to a definitive conclusion on the facts purely by reference to the credibility of the witnesses without testing that credibility against the totality of the evidence. If the Master was going to reject the expert evidence, he had to explain why. I think it would be preferrable if the expert evidence were considered alongside the factual evidence so as to determine where the truth on a balance of probabilities lies.

91 I am not going to criticise the Master for following the usual course in these cases, but this was powerful evidence, it seems to me, coming from both sides' experts and it was dismissed by the Master on the basis that he preferred the factual evidence adduced by the Claimant and the expert evidence did not alter his conclusion that the Will was not a forgery. I believe this is a serious flaw in the Master's assessment of the evidence and more weight should have been afforded to the expert evidence. It should not have been considered only after the Master had already decided on the facts that the Will was not a forgery. It was part and parcel of the evidence as to whether it was a forgery and should have been part of a balancing of all the evidence, not merely as to whether it affected the Master's reliance on the Claimant's factual witnesses.

Ground 9

92 Ground 9 is a wrap-up of the previous Grounds, saying that the evidence points inextricably towards the conclusion that the Will was forged. However, I cannot determine that, as I have said above. What I can say is that I consider that the Master did not adequately explain or deal with some of the evidence. He did not properly evaluate and weigh the expert evidence and he does not appear to have assessed the witness evidence against the known facts around a highly suspicious discovery of the two Wills, the involvement of a convicted fraudster, Mr Day, with form in this regard and the lack of signature by the Deceased on his own will. No real reason was given for accepting the Claimant's evidence in support of the Will, save that he did not believe that the Claimant and his witnesses would engage in such a fraud, even if they were quite happy to continue to deal with a convicted fraudster and allow him to act for them.

93 I am not saying that another judge will not come to the same conclusion, but I am not satisfied that there has been a proper evaluation of the evidence in this case and I am not

able to tell how the Master has concluded what he has. It is highly regrettable that we are in this position, but it is clear to me that the judgment cannot stand and there will have to be a re-trial.

94 I know the circumstances under which this trial was heard placed great strain on the parties and the court, and the pandemic is of course continuing, but I do consider that the Appellants have a genuine sense of grievance as to how the evidence was evaluated in this case and the only course, therefore, open to me is to direct a re-trial.

95 I understand that it is a relatively new thing for Masters to be trying these sorts of matters, and by that I mean effectively a fraud case in which the assessment of witnesses is crucial, and I know that this Master has great experience in probate matters and will have heard many forged will cases. I understand the parties had agreed for this matter to be tried by the Master and that was particularly because it would be heard much sooner, and indeed it was able to be heard despite the advent of the pandemic. Now that I have decided that there needs to be a re-trial, I think it would be preferrable if the case is heard at High Court Judge level and it would be suitable for a deputy, and that is what I propose to direct.

Permission to adduce further evidence

96 I have not yet dealt with the application to adduce further evidence. I have decided the matter without reference to that new evidence. As the matter is going for a re-trial, I do not think that this is or can be really opposed. It would essentially be a case management decision for the new trial judge.

97 Insofar as the *Ladd v Marshall* grounds are relevant therefore, Mr MacPherson had accepted that two of the three elements of *Ladd v Marshall* are satisfied, namely that the evidence

could not have, with reasonable diligence, been obtained for the trial and that it is apparently credible. He does not, however, accept that the evidence would have had an important influence on the result of the case. The evidence is contained in three witness statements from Mr Daniel Howe, Mr Anthony Lloyd-Bainbridge, and from his mother, Maureen Lloyd-Bainbridge.

98 The Appellants were unaware of these individuals or that they might be able to give relevant evidence. It was only after there was publicity in relation to the outcome of the trial in the tabloid press that the three came forward with their evidence that would support the Appellants' case. All three witnesses give evidence about conversations they had had with the Deceased to the effect that he had not made a will and would not make one because of his experience of dealing with his grandfather's estate. Ms Rogers says that this evidence is significant because the Master relied quite heavily on the Claimant's evidence that the Deceased had told friends that he had made a Will (see para.[121] of the judgment). The new evidence obviously, if true, would undermine that evidence and one of the planks of the Claimant's case would potentially be lost and the burden being on the Claimant.

99 By contrast to the Claimant's evidence, the new witnesses give specific dates and occasions when they spoke to the Deceased. In addition to that evidence, Maureen Lloyd Banbridge, who is a licenced conveyancer and has worked in various firms of solicitors, also gives evidence as to the relationship between Mr Keeble and Mr Day and as to the involvement of Anthony White Solicitors, for whom she worked for many years, and as to similar fact evidence of Mr Day forging a document. She says that Mr Day used the headed note paper of her firm in Wales to correspond with Barclays Bank, but he allegedly doctored the notepaper to refer to his address rather than the firm's.

100 In relation to Anthony White, to whom the Claimant's witnesses said the Deceased was taken on 2 March 1999 so that he could look over and advise the Deceased as to whether he should execute the Will, Mrs Lloyd-Bainbrindge's evidence is that this would never have happened and certainly not for free. There has been no evidence from Anthony White himself, who was unwilling to give evidence at the trial, nor were there any file notes or other documents evidencing his alleged advice.

101 I believe that this is potentially highly material evidence, and it is a further reason why a re-trial is essential where this evidence can be tested and compared to the Claimant's evidence which it contradicts. I would have been prepared to admit it on *Ladd v Marshall* grounds but in any event I give permission to the Appellants to rely on this evidence at the re-trial.

102 The stay application I think falls away as I am setting aside the Master's order.

103 That only leaves costs. I think it is accepted that the costs of the trial should be decided by the new trial judge after the re-trial. The Appellants' Grounds of Appeal have been amended and insofar as it is necessary I give permission to amend to include a new Ground 11 in relation to costs as there was a separate order and judgment on costs. The Master ordered both sides' costs to come out of the estate. It must follow that if I am setting aside the substantive order, that I must also set aside the Costs Order, and leave it to the trial judge to decide who should pay the costs of the first trial.

104 That leaves open the costs of this appeal upon which I am willing to hear the parties. My provisional view is that it is neither sides' fault that there has to be a re-trial and although the Appellants have won their appeal, it might be unfair to visit the costs of this appeal on the Claimant. It may be that the Master's conclusions will be upheld at the re-trial, in which

case it would be unfair that the Claimant has had to pay the costs of an appeal not brought about by his own fault and where he wins at the end of the day.

105 If I had overturned the Master and decided to make the declarations sought by the Appellants then obviously the Appellants would have had their costs, but the possibility that the Claimant has been right all along does give me cause for doubt as to whether he should be ordered to pay the costs of this appeal. Anyway, I am willing to be persuaded if Ms Rogers wishes to do so.

106 I do reiterate my sincere regret that I have had to order a re-trial with all the costs, time and effort that will have to be expended on that at this very difficult time, but I do think there has potentially been a serious injustice here and in the circumstances I have no option but to order that re-trial.

107 I am prepared to consider making an order for expedition, but I should say that I think it will be important that this is an in-person trial and so should take place when that can safely take place after we are through the worst of the pandemic and hopefully everyone is vaccinated. That is my judgment.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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** This transcript has been approved by the Judge **