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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)
[2021] EWHC 582 (Ch)

No. PT-2020-000190

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday, 19 February 2021

Before:

MR JUSTICE MORGAN

B E T W E E N :

NICHOLAS DAVID JEFFERY — Claimant/Respondent

- and -

ANDREW PAUL JEFFERY — Defendant/Applicant

MR P CURRIE (of Counsel) appeared on behalf of the Claimant.

THE DEFENDANT appeared In Person.

J U D G M E N T

(Via Microsoft Teams)

MR JUSTICE MORGAN

1 The applications by the Defendant, Andrew Jeffrey, which are before me today essentially seek an order setting aside an order for sale which was made by a deputy High Court judge, Mr Charles Morrison, at a hearing on 30 October 2020 and amended under the slip rule on 12 January 2021. It may be that an alternative to setting aside the order would be to place a stay on the operation of the order so that the order will remain but the court will prevent steps being taken under it pending further matters being resolved. That I think is the substance of what I am asked to do.

2 The claimant, who obtained the order for sale, is Nicholas Jeffery. He and Andrew Jeffery are brothers who have been locked in litigation for the last decade. The order for sale relates to a property known as Woodlands House, near Billingshurst, West Sussex. The title to that property is registered at the Land Registry and the current position is that Andrew Jeffery is the sole registered proprietor. From now on, for convenience, I will refer to the brothers as Nicholas and Andrew without intending any disrespect to either of them.

3 Andrew has indicated in the course of his submissions today that there are others apart from himself who might wish to participate in some way, either in this current application or in relation to further claims which are to be brought. I think his point is that, although he is the sole legal owner, he is not the sole beneficial owner and others might have interests or claims in the property. However, the order for sale was made against the sole registered proprietor alone. The application before me is to set aside or stay that order. No one else has applied to be joined in the current application. No one else has issued an application notice and served it on the claimant, whereby the court could determine whether to join those persons and what order to make. So I will proceed on the basis that, at this hearing, there is a single defendant and a single applicant, Andrew.

4 The order for sale was made by the deputy judge pursuant to two final charging orders made in the High Court. There is also a charging order made in the County Court but the order for sale was not made pursuant to that charging order and I need not therefore consider the County Court charging order. The High Court charging orders were made some time ago. The dates are 30 October 2018 and 18 November 2019 respectively. Indeed, in the usual way, there were previous interim charging orders and the dates of the interim charging orders were 4 September 2018 and 9 October 2019.

5 There has been no appeal against the High Court charging orders. There has, so far at any rate, been no application to the court to set aside the High Court charging orders. The High Court charging orders were made consequential upon, and pursuant to, orders for costs that had been made in favour of Nicholas and against Andrew. Taking the first High Court charging order, the charging order related to costs orders made on 10 July 2013 and 6 March 2018.

6 At this stage, I am going to refer briefly to the earlier litigation. The litigation which led to the costs order in 2013 was a dispute about the will of the mother of Nicholas and Andrew. The mother was Mrs Daphne Jeffery. She died, leaving a will. Under the will, Nicholas benefited but Andrew did not, although the will did make some provision for Andrew's children. However, the main point is that the mother treated the two sons differently in her will. The executors of the will, who were Nicholas and a Mr Eyre, who was the Chief Constable of the Nottinghamshire Constabulary, brought proceedings seeking a formal grant

of probate of the will. Those proceedings were defended by Andrew. I will refer later in this judgment to what the trial judge, Vos J, said about Andrew's challenges to the will in the judgment which he gave after a trial. In summary, the executors of the will succeeded and Andrew failed.

7 The second round of litigation, which led to a costs order in the High Court on 6 March 2018, related to an application made to set aside a transfer of the property, Woodlands House, which is the property the subject of the charging orders and the order for sale. I know rather less about the 2018 litigation because I have not been shown the judgment of the deputy judge, Mr Campbell QC, who decided it. I understand that the position was that Woodlands House was initially in joint names, that is, of Andrew and his wife. There was a point when the joint registered proprietors transferred the property to Andrew's wife alone, and that transfer was set aside by Mr Campbell QC in 2018. He made that order pursuant to s.423 of the Insolvency Act 1986. Pursuant to the order the transfer was set aside. Later Andrew's wife died and the legal title to the property is in the name of Andrew alone. In view of the fact that the order for sale was made against Andrew alone and he is the sole applicant before me, I do not think that I need to consider for today's purposes anything as to whether anyone in addition to Andrew has a beneficial interest in relation to Woodlands House. I also note that some of the charging orders, at least, were made in relation to both Andrew and his wife.

8 The second High Court charging order related to three costs orders, one of them made as early as 16 November 2010, the second made on 19 September 2012, and the third made on 10 July 2013. That last one has the same date as another order which is the subject of the first High Court charging order. I understand that when the charging orders were made it was appropriate to distinguish between the various orders for costs. I also understand that the second High Court charging order relates to costs in the litigation about the will.

9 There are substantial sums due pursuant to these costs orders. I am told that the sums due under the costs orders which are the subject of the first High Court charging order come to something over £132,000, to which there is to be added interest and indeed further costs. I am told that the sums due under the costs orders the subject of the second High Court charge are in excess of £206,000, to which is to be added interest and costs.

10 I have already stated that there has not been an appeal against the charging orders. Similarly, there has not been an appeal against the five orders for costs to which I have referred. Further, up to date at any rate, there has been no other application to set aside the charging orders or the five orders for costs.

11 While the charging orders remain valid and effective orders, I have not heard anything to suggest that it was in any sense inappropriate to make an order for sale pursuant to them. I have seen the skeleton argument that was put before Mr Morrison when he made the order for sale and the essential parts of that are repeated in the skeleton argument before me, and those parts of the skeleton argument have not been the subject of any criticism or challenge by Andrew on this application. He puts his case in an entirely different way, as I will explain.

12 In procedural terms, I consider that the applications before me are made under CPR Rule 39.3. It is said that the hearing before Mr Morrison was a trial, and I will assume that to be the case. It is also said that it was a trial in the absence of Andrew. It is true that he did not

participate in the virtual or remote hearing which led to the judge's order. Rule 39.3(3) says that:

> "Where a party does not attend and the court gives judgment or makes an order against him, the party who failed to attend may apply for the judgment or order to be set aside."

So I am proceeding on the basis that that is the procedural basis of this application before me.

13 Rule 39.3(4) states that an application to set aside an earlier order must be supported by evidence. The material which I have been asked to consider in this case is very far from satisfactory. Andrew is acting in person. He has tried to obtain legal advice and assistance but has been unable to obtain it. I think that he would have to admit that he does not know what the rules are and what the rules require on an application of this kind. He has been critical in the past of High Court staff, saying that they have ignored this or ignored that and they have failed to give him guidance. I have explained in the course of his submissions that the role of the court is to process the applications which are made by the parties and to put those applications before judges for adjudication, where both sides have an opportunity to make their case. It is not enough for a litigant to make statements in emails if he does not make an application for a court order to give effect to what he wants to achieve. Further, although the court staff perform a valuable role and do assist to the extent they are able, they are not legal advisors. First, they are not legally qualified; secondly, it is not their function to advise one party as distinct from acting even-handedly between two parties who are engaged in adversarial litigation.

14 With that explanation, the material that has been generated on Andrew's side is extremely difficult to navigate and interpret and use for the purpose of making findings. Andrew's son, William Jeffery, has sent a large number of what he calls witness statements to the court. The witness statements are a series of assertions and allegations and complaints. What the court needs in terms of evidence is a statement of fact made by a person who knows the facts or who can rely upon a statement made by a third party who knows the facts. I have found that the material that has been put before me is very high up on the scale of allegation and assertion and very low down on the scale of facts that one could make findings about, facts which constitute evidence. Nonetheless, I have made allowances for Andrew's lack of understanding of what is required.

15 Reverting to Rule 39.3, the rule provides that the court may set aside an earlier order only if three things are shown. All of these three things must be shown. If two of them are shown but the third is not, then I am not able to set aside the earlier order. If all three are shown then I may set aside the earlier order but I am not obliged to do so because there may be reasons why it would be inappropriate to set aside the earlier order.

16 The first of the three requirements is that Andrew acted promptly to make this application. There is no issue about that. It might have been said that Andrew did not make the application and that it was made by his son, William, but no point of that kind has been taken; in substance, it is an application by Andrew. That might be a rather favourable or indulgent attitude to take but that is what I will do.

17 The next matter which must be shown is that Andrew had a good reason for not attending the trial before Mr Morrison. As I have explained, that has to be the subject of evidence, so there has to be a witness statement which sets out the facts as to why Andrew did not participate in the hearing, given that he is able to participate in this hearing before me. I must say that, on the material before me, I am not persuaded that he has adduced evidence which shows there was a good reason for not attending the trial. If that was my ultimate conclusion, then that would be fatal to this application. However, given the long history of this dispute, I do not want Andrew to go away thinking that he has failed because of a procedural point that he could quite easily have dealt with if he had known how to go about it, so I will go to consider the next requirement, which is that I can only set aside Mr Morrison's order if Andrew has a reasonable prospect of success at the trial.

18 I need to consider what would happen if I were to set aside Mr Morrison's order, I were to refix the application for an order for sale; how would that trial at the refixed hearing proceed? Would Andrew have a reasonable prospect of persuading the court that the order for sale ought not to be made? While the charging orders remain in place, it cannot be said that Andrew has a reasonable prospect of resisting an order for sale. An order for sale is quite obviously the only real order the court could make while the charging orders remain in place. That would again seem to be fatal to this application to set aside the order of Mr Morrison.

19 I will explain first briefly and then in more detail what Andrew is really saying on this application. What he is really saying is that this order for sale is made pursuant to a charging order, or charging orders, which were made to give effect to five costs orders but these costs orders should now all be set aside. The foundation of the charging order would then be removed and the basis for an order for sale would be removed. I think that this is not a ground for setting aside Mr Morrison's order at today's hearing. At the highest, it would be a ground for an application to stay Mr Morrison's order while Andrew and perhaps others who may have an interest in doing so bring proceedings to challenge the five costs orders one way or another.

20 In this case, in principle, there are two relevant ways of challenging the previous orders of the court. One is to appeal; the other is to have the order set aside on the ground that the orders were obtained by fraud. As to appeals, the orders were in some cases made a very long time ago. One order was made on 16 November 2010. It would be remarkable if, after that passage of time, the court would extend the time for an appeal. The other matter is that the basis of any appeal which Andrew would want to bring would not really be about anything that Vos J allegedly got wrong in the will dispute. It is really on the basis that Vos J was misled and that would take one into areas of alleged fact which, in this case, would not be best dealt with by way of an appeal but would be better dealt with by way of a fresh action.

21 Therefore, I am going to consider the application before me on the basis that it is an application to stay the operation of the order for sale pending the bringing of a fresh action to set aside five costs orders and two charging orders on the grounds they were obtained by fraud.

22 The first thing I need to consider is what are the legal principles which a court should apply on an application to set aside an earlier court order allegedly obtained as a result of fraud. Happily, there is clear guidance in the form of the decision of the Supreme Court in *Takhar v Gracefield Developments Limited* [2020] AC 450. The principal judgment in that case

was given by Lord Kerr, with whom other members of the Supreme Court agreed. He expressed his conclusions at paras.54 to 57 of his judgment. He approved, subject to qualifications, the following statement of principle which he took from an earlier case, and in particular from the judgment of Aikens LJ in, *Royal Bank of Scotland plc v Highland Financial Partners LLP* [2013] 1 CLC 596 at para.106. That paragraph is in these terms:

> "The principles are, briefly: first, there has to be a 'conscious and deliberate dishonesty' in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned. Secondly, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be 'material'. 'Material' means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court's decision to give judgment in the way it did. Put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision. Thus the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was. Thirdly, the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence."

23 As Lord Kerr explained in para.55 of his judgment, that general statement is subject to qualifications. He explained that:

> "Where fraud has been raised at the original trial and new evidence as to the existence of the fraud is prayed in aid to advance a case for setting aside the judgment, it seems to me that it can be argued that the court having to deal with that application should have a discretion as to whether to entertain the application."

He did not express a final view on that point. There was a further qualification which I will not refer to as there is no material before me to suggest it is applicable in this case.

24 Other members of the Supreme Court also commented on the test laid down in the *Royal Bank of Scotland* case. Lord Sumption said at para.67 in the *Takhar* case:

> "I recognise the risk of frivolous or extravagant litigation to set aside judgments on the ground of fraud, but like other members of the court, I think that the stringent conditions set out by Aikens LJ in *Royal Bank of Scotland plc v Highland Financial Partners LLP* [2013] 1 CLC 596, para 106, combined with the professional duties of counsel, are enough to keep it within acceptable limits."

25 Just commenting on that, I note that Lord Sumption referred to "the stringent conditions" laid down in the *Royal Bank of Scotland* case. The professional duties of counsel are of course well known. It is unprofessional for counsel, or indeed a solicitor, to put his or her

name to a pleading of fraud unless there is evidence which supports that pleading. It is often the case that clients put pressure on their professional advisors to make allegations of dishonesty and fraud and it is the professional duty of the professional advisors to resist those pressures and to make allegations of this kind only where it is proper professionally to do so.

26 Lord Briggs in the *Takhar* case said at para.76:

> "I agree that the dicta of Aikens LJ in in *Royal Bank of Scotland plc v Highland Financial Partners LLP* [2013] 1 CLC 596, para 106, cited by Lord Kerr, provide some protection against the abusive use of fraud allegations as a way of re-opening decided cases."

27 Those are comments which are of assistance to me when I consider the test to be applied in the present application. I should say that the case of *Takhar v Gracefield Developments Ltd* went to trial in the High Court following the decision in the Supreme Court. In *Takhar* the earlier judgment was set aside on the ground it had been obtained by fraud. The neutral citation of the High Court judgment is [2020] EWHC 2791 Ch. The judge in that case applied what I have read from the decision of the Supreme Court in *Takhar* itself. The judge was asked to apply a slightly different, more relaxed version of the test. He was asked to hold that it was sufficient that there is a real danger that the fraud affected the outcome of the trial but he held that was not the test.

28 Those are the legal principles which I will apply today and which would apply if Andrew were to bring proceedings seeking to set aside the five orders for costs. In the remainder of what I will say, I am going to concentrate on the three orders for costs made in the will dispute. That is because I have the judgment given by Vos J in the will dispute. I cannot do quite the same exercise in relation to the s.423 dispute because I have not been given the judgment in that case. Because Andrew has to set aside all five costs orders if he is to make progress in getting the order for sale set aside, it will be sufficient if I examine the three costs orders in the will dispute.

29 Vos J gave a detailed judgment, running to 250 paragraphs, about fifty pages, dealing with the will dispute and the reasoning in that judgment is of considerable relevance to the matter before me today. Andrew would say that there is no point looking at the findings made by Vos J because he was misled. I do not agree. I consider that I should pay close attention to what was decided before I go on to consider whether the suggested new material would have entirely changed the way in which Vos J approached the matter and came to his decision. The judge referred to the will of Daphne Jeffery, referred to the fact that the main beneficiaries were Nicholas and Andrew's three children, but not Andrew. The judge set out in great detail the factual history that the parties had disputed and placed before him. He referred to the detailed terms of the will. He referred to the assets in the deceased's estate. One of those assets was a half share of a property at Fairmile House. There was also a reference to the monthly rent on Fairmile House withheld by the former husband of Daphne Jeffery. At para.86 of the judgment, the judge itemised the five defences raised by Andrew. They were:

> "i) The Deceased lacked capacity;
>
> ii) The 2007 Will is affected by undue influence.

> iii) The 2007 Will was affected by the fraud of the Deceased in relation to other matters;
>
> iv) The Deceased did not know or approve the contents of the Will;
>
> v) The executors are unfit to act as such."

30 The judge then set out the detailed case made by Andrew. He then, in a long passage in his judgment, referred to all of the evidence which had been given. I need not, I think, list all the witnesses, but the claimant called a large number of witnesses. It may be true that most of them were dealing with the question of capacity and knowledge and approval, rather than internal matters within the family, but that I think does not apply to all the witnesses. One of the witnesses was the co-executor, Mr Eyre, who was the Chief Constable of the Nottinghamshire Constabulary, and his evidence was accepted unreservedly.

31 Vos J commented on the evidence given by Nicholas. He seems to have given detailed evidence at some length. He was cross-examined by Andrew acting in person. The judge made adverse comments on the utility of and the efficacy of Andrew's cross-examination but the judge very humanely pointed out that the cross-examination was an emotional trauma for both Nicholas and Andrew. The judge said at para.173 that, "Nicholas was not the most impressive witness, but I think he was doing his best to tell the truth." The judge commented on the stressful nature of the proceedings. The judge said:

> "Overall, however, I think Andrew wholly failed to show that Nicholas was dishonest or had sought to overbear his mother's will. Rather, I gained the impression that Nicholas was something of a pawn in his mother's hands. She was undoubtedly dominant, and Nicholas was, perhaps, not particularly good at standing up to her. But none of that goes anywhere towards supporting the kind of case being advanced by Andrew."

32 The judge then turned to the defendant's factual evidence. There was evidence from Dr Fahey and then evidence by Andrew himself. The judge began his consideration of Andrew's evidence at para.185:

> "Andrew accepted that both he and his mother had, on occasions, written each other's names on documents. He said that they were both quite happy to do this as '*an expedience issue if there was some reason behind it*'."

That does suggest forgery but the judge did not condemn it in those terms. Then at para.197, the judge said this:

> "I do not think that Andrew set out to give false evidence. Indeed, I think he tried hard to answer the questions that were put to him truthfully. That led to him making a number of important concessions during his evidence. I think the problem rather is that Andrew's feud with the Deceased, and now with his brother Nicholas, has made him completely blind to any points that do not fit in with his grand conspiracy theory. I have no doubt that Andrew genuinely believes that his family have

> conspired to 'block' him, to prevent him obtaining relevant documentation, and to stop him inheriting from the Deceased or benefiting under the family trusts."

33 The judge then commented on Andrew genuinely believing something. He then continued:

> "Despite his undoubted intelligence, Andrew is somehow able to ignore or explain away any fact that does not fit in with his case theory. The same applies to his equally genuinely held opinion that his brother actively brought about these events. As will appear in due course, my own view is rather different. For the reasons I have sought to give, it has been hard to accept Andrew's evidence at face value. But, as I say, insofar as he answered questions orally, I thought he was being broadly truthful. His statement and skeleton argument, on the other hand, are rather more exaggerated and unreliable."

34 The judge then directed himself as to the legal principles to apply. It is not said that his self-direction was in any way inappropriate. The judge then began to come to his conclusion and to give his reasons, starting at para.217. He had difficulty pinning down the precise nature of Andrew's case but he did what he could to achieve that. At para.219 he said:

> "In my judgment, this whole edifice is built upon the sad fact that Andrew cannot, even today, bring himself to believe that the Deceased disinherited him of her own volition. He has, in his mind, invested Nicholas with gargantuan powers of influence and coercion over his mother, when the truth, I regret to say, is more pedestrian. Nicholas, as Andrew virtually accepted in closing, was, like Andrew himself, just one of the two children that his mother liked to control."

The judge added some further comments.

35 At para.223 the judge said:

> "If I may be permitted one more comment on the characters of the parties, Andrew is obviously not a man who likes to accept the blame for failure. He appears in the Upper Tribunal proceedings to have blamed others for the problems that occurred, just as he has done in these proceedings. Here, he has heaped all the blame on Nicholas. I regret to have to say that I have concluded, after deep consideration, that he has done so quite unfairly."

36 The judge then came to his final comments on the case being put forward by Andrew at 227 to 229. Because I am dealing with a possible further claim saying that Nicholas has been guilty of fraud by concealing the fraud of Daphne Jeffery, I ought to read these three paragraphs:

> "[227] It has been a feature of this case that Andrew picks out of a long story or a series of innocuous events, one fact or issue that he condemns as '*lies* '*complete fabrication'* or just plain rubbish. He then proceeds to contend that the whole of the document or record is falsified by that one

> inaccuracy. It was instructive that he did this when seeking to demolish the 106-page decision of the Upper Tribunal released only during the retrial."

The judge continued:

> "Andrew did not say that the Upper Tribunal was wrong to find that he lacked integrity, that he was not a fit and proper person or any of the other findings it made, but he tried to imply that the decision was worthless because of the '*error*' about the post.
>
> [228] In this case, Andrew has repeatedly picked out small points from the history of his stormy relationship with the Deceased to accuse her of fraud, forgery, lies or deceit. It was hard to reach any conclusion on many of these minutiae. Insofar as the allegations were levelled at the Deceased, she was not in court to defend herself. Insofar as they were levelled at Nicholas, there was always inadequate notice and a lack of documents making the truth hard to discern. I am quite sure, however, that not one of these small allegations of forged signatures, allegedly threatening conduct or petty dishonesty was relevant in any way to what I have to decide. If there were threats to be made, they were made by Andrew to his mother as she reported in her affidavit to the Principal Registry. I do not accept that Nicholas ever threatened Andrew. The Deceased may have done, but that has nothing much to do with her capacity or the other issues affecting the 2007 Will.
>
> [229] These minutiae have much extended the retrial. On examination, each of them turned out to amount to little or nothing. I take as examples, the forms on which the Deceased is said to have lied – in 1999 as to not taking prescription drugs, and in 2008 as to owning 25 and 29 Brewery Lane. As to the latter, what she said on the form was true and anyway to her disadvantage; as to the former, she should have said she was taking drugs, but I have no way of knowing now why she did not – she may very probably have simply been mistaken."

37 The judge then dealt with the five issues raised by Andrew Jeffery. He held, as to capacity, that there was no evidence of any kind which came close to establishing that the deceased lacked full capacity to make her will in 2007. On undue influence, the judge said that he had explained why he formed the view that Nicholas did not influence his mother, let alone unduly. He then made a number of specific findings. On knowledge and approval, the judge was entirely satisfied that the defendant knew and approved the contents of her 2007 will. Under the heading, "Issue 4: Extrinsic fraud" at para.243, the judge said:

> "I wholly reject the allegation that the 2007 Will is affected by any extrinsic fraud, whether by Nicholas or any other person. No such fraud has been made out on the evidence I have heard."

Issue 5 was to do with replacement of the executors and the judge did not replace the executors.

38 At para.246 the judge expressed his overall conclusion. He said:

> "I said in my conclusion to the Judgment that this was '*a simple and clear case'*. Now it has been contested over 4 full days in court, I must revise that statement. This is a clear case, but Andrew has succeeded in making what was obvious and simple look apparently complex. It was and is not complex. The deceased obviously had capacity to make her wills. She never suffered from any mentally incapacitating complaint, even if she did experience occasional anxiety and mild depression. If people suffering from such complaints were unable to make wills, a large percentage of the population would be so inhibited."

39 The judge said that the allegation of the lack of capacity was wholly unsubstantiated. He also said that the allegations of undue influence and coercion were simply false and wholly unsupported by any evidence and he rejected them completely. The will:

> "…was regularly executed under sound legal advice, and the Deceased plainly and obviously, on the evidence, [knew] of and approved its contents."

40 There was no appeal against that judgment. There was no appeal against the three costs orders made in the will litigation. There has not, until today's date, 19 February 2021, been any application by Andrew to set aside that judgment. The suggestion at the hearing today is that Andrew may bring, perhaps will bring, a new High Court action to set aside that judgment, and that is what I need to reflect in my decision whether to stay the order for sale.

41 I referred earlier to the way in which the material has been put forward, the material on which Andrew wishes to rely to show that there has been fraud. I pointed out to him, and I believe it to be obviously right, that his list of frauds and deceits, in so far as they occurred after Vos J gave his judgment, cannot be said to be operative on Vos J when he gave his judgment. I asked him to give me his best case, his strongest case, his clearest case, of something that could possibly qualify as fraud leading to the making of Vos J's judgment. If Andrew succeeded on his best point, then it would not be necessary to consider his weaker points. Indeed, this is a case where if he cannot succeed on his best point, there is no real prospect that he might succeed on his weaker points. What he told me is that in around 2005, that is several years before the trial before Vos J, a property known as Fairmile House was owned by a company, Jeffery Flanders Limited, and that company transferred it, or a half share in it, to Daphne Jeffery. As I indicated, Vos J referred to Fairmile House, or a half share in it, being one of the assets in the estate of the deceased.

42 The circumstances surrounding the transfer of Fairmile House would appear to have little, perhaps absolutely nothing, to do with the challenges to Daphne Jeffery's will. However, what Andrew Jeffery would wish to say is that in 2005 Daphne Jeffery was dishonest and in some way or other she had failed to make a payment for the property or had tricked Jeffery Flanders Limited. I think the evidence, so far as it can be called evidence, is that there are statements in which it is alleged that Daphne Jeffery had said she had paid for her share of Fairmile House and there are other statements that say she did not pay for her share of Fairmile House. If there was some deceit or dishonesty, the victim would have been, it seems, Jeffery Flanders Limited. The beneficiary of the deceit would have been Daphne Jeffery and then, in due course, her estate. If Jeffery Flanders Limited, as victim, have a

claim, they could perhaps seek to bring proceedings to remove Fairmile House from the estate, but it is difficult to see how that has any bearing upon the judgment as to capacity and knowledge and approval or the other challenges to the will.

43 I remind myself that I am not trying a claim by Jeffery Flanders Limited against the estate of Daphne Jeffery. I am instead asking myself whether, on the material before me, Andrew has demonstrated that he has got any real prospect of success in a future action to set aside the three costs orders in the will dispute. I therefore need to apply the law as stated in *Takhar v Gracefield Developments Limited*.

44 The case, as presented against Nicholas and his co-claimant and co-executor, Chief Constable Eyre, would have to be that they were guilty of conscious and deliberate dishonesty in the earlier litigation. I suppose it might conceivably be said that Chief Constable Eyre was an honest man but he did not know of the dishonesty of Nicholas and is not to be tainted by it, so I will make that assumption and look at the position as regards Nicholas alone.

45 So far, Andrew has not produced evidence to show that Nicholas was guilty of "conscious and deliberate dishonesty" in relation to what he said or what he did not say about Fairmile House. The case would have to be that Nicholas knew very well that his mother had committed a dishonest act in 2005, eight years before the trial, and he did not volunteer that information at the trial, and the explanation for him not volunteering that information was that it was deliberate dishonesty on his part.

46 Having read the judgment of Vos J, what strikes me very forcibly is that the points being made about dishonesty on the part of Daphne Jeffery had really nothing to do with the challenge to her will. Even if she had been guilty of dishonesty and increased the assets of the estate as a result of her dishonesty, I do not see how that really had any bearing on the question of capacity or knowledge and approval.

47 Andrew skilfully suggests in his submissions today that it would have had a bearing on undue influence; that because Nicholas was aware of his mother's dishonesty in relation to Fairmile House, he was able to assert influence over her and therefore, under that influence, not doing what she wanted to do but being coerced into doing it, she cut Andrew out of the will and left part of her estate to Andrew's children but not Andrew. It is a far-fetched theory but, more relevantly, it is essentially the same theory that Andrew put forward in great detail before Vos J. I have read the relevant bits of the judgment which show that this theory, that there was undue influence because Nicholas knew of his mother's dishonesty and had her under his influence, was fully considered by the judge. That was dealt with in paras.227 to 229 and undue influence was dealt with in paras.238 to 240. When the judge dealt with extrinsic fraud at 243, the judge found there was absolutely nothing in it. I would add that it is far-fetched to think now that Andrew would have had a better case based on undue influence by reason of this allegation as to Fairmile House.

48 Therefore, having struggled to see whether there is a case of conscious and deliberate dishonesty on the part of Nicholas Jeffery, I now ask whether the alleged fraud, the alleged concealment by Nicholas Jeffery, was an operative cause of the court's decision and whether the fresh evidence would have entirely changed the way in which the court approached and came to its decision. It seems to me that that is a highly remote possibility which does not have a real prospect of succeeding.

49 It is also relevant that Lord Kerr in the *Takhar* case said that where fraud was raised at the original trial and new evidence as to the existence of fraud is prayed in aid, it is not exactly the same as alleging for the first time that a judgment has been obtained by fraud. It may very well be that the court would take the view that this matter was fully ventilated; perhaps not every detail was examined under a microscope but there was still a full ventilation of this unhappy dispute between the two brothers, which involved an allegation of fraud. The family relationship was gone into in a sensitive and humane way, and in a thorough way, and the judge reached his conclusions and he had no hesitation in reaching the conclusion that the will was a valid will.

50 The other matter I bear in mind is that these conditions for setting aside orders made as a result of an alleged fraud are stringent conditions. I am not to water them down and say that throwing up in the air some generalised allegations of an unfocused kind is going to satisfy these conditions. I also bear in mind that these conditions are meant to provide protection against the abusive use of fraud allegations as a way of reopening decided cases. This allegation of historic fraud in 2005, followed by alleged concealment at a trial in 2013, appears to me to be an abusive attempt in 2021 to reopen a decided case.

51 Strictly speaking, I am not today deciding whether these costs orders will or not be set aside for fraud. There is no application before me to set them aside for fraud. That application has not yet been made, so I come at the end of this judgment to what I am asked to do. The question I have to address is: do I grant a stay of the order for sale during the period that will elapse while Andrew brings proceedings for an order setting aside the three costs orders made in the will dispute? For the reasons I have given, I regard the material before me as not disclosing a real prospect of success on an application to set aside the costs orders. It follows, therefore, that there is no proper basis on which I could grant a stay of the order for sale. The result is that the applications which are before me will be dismissed.

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CERTIFICATE

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