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**In the estate of
GWENDOLINE JOYCE MORGAN (deceased)**

JOAN MARJORIE GRIFFIN

B

v

JOHN WOOD

C

High Court of Justice (Chancery Division)
Mark Herbert QC, sitting as a deputy judge

Hearing: 9 March, 10 May 2007
Judgment: 13 September 2007

D

*Probate action; attestation of will; presumption of due execution; knowledge and approval;
righteousness of transaction; burden of proof; summary jurisdiction*

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Gwendoline Morgan (M) was a childless widow who made, or attempted to make, a number of testamentary dispositions for the benefit of various persons, including the parties to the present action, who were both cousins. The claimant (G) sought to prove a will dated 6 December 2001 ('the 2001 will') under which she was the residuary beneficiary whilst the defendant (W), who stood to benefit from a pecuniary legacy under the 2001 will, sought to prove an earlier will dated 23 December 1999, under which he took a more substantial benefit.

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M, who died on 7 August 2003, left an estate valued in the order of £290,000. Though the 2001 will contained a standard form attestation clause, bearing the signatures of two witnesses who were both employees at the nursing home where it was said to have been executed, W's solicitor had made contact and procured from them multiple-choice answers to questionnaires which suggested that they had not actually seen M sign. A few days later, both witnesses were interviewed and indicated that they could not remember M signing in their presence.

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However, two years later, both witnesses swore standard form affidavits of due execution, which they stood by when challenged as to the contradiction with their earlier answers to the questionnaires. This was explained by one of them on the basis that it may have been filled in too hastily or without giving sufficient thought or understanding to what was required. Thus, the defence sought to put G to proof that the 2001 will had been duly executed as required by s9 of the *Wills Act 1837* and, in particular, that the two witnesses had been present when M had signed it.

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In reply, G relied on the presumption of due execution which followed from the presence of a standard form attestation clause and applications were made to strike out the defence and counter-claim, and for summary judgment. W responded in turn with an application for leave to amend his pleading by putting G to proof as to M's knowledge and approval of the contents of the 2001 will. District Judge Mithani, in an extempore

judgment on 27 July 2006, dismissed G's applications and gave W leave to amend his pleading. G appealed.

Held (allowing the appeal)

1. Whilst it was possible for the presumption of due execution to be rebutted by a detailed examination of the witnesses' evidence at trial, the district judge had been wrong to refuse summary judgment on this issue because he had failed to give sufficient weight to the strength of the presumption or to the guidance given by the Court of Appeal in *Sherrington v Sherrington* [2005] WTLR 587 and *Channon v Perkins* [2006] WTLR 425. In particular, the witnesses' answers to the questionnaires could hardly be described as 'the strongest evidence' that would be required to rebut the presumption in the light of their later evidence (para [29]). Moreover, having regard to how this issue would be dealt with at trial, it was overwhelmingly probable that their evidence would not be substantially changed from its present state.

2. As to the question whether W's proposed amendments were sufficient as a matter of pleading to arouse the suspicion and vigilance of the court, whilst G had been the conduit through which M transmitted her instructions, almost none of the new particulars could be justified as relating to the process by which the 2001 will was prepared and executed. Though weak, his pleaded case was nevertheless just sufficient to throw the burden of proof back onto G to prove that M did indeed know and approve the contents of the 2001 will. However, in assessing the degree of suspicion and vigilance aroused, it had to be said that the suspicion was to be regarded as extremely mild given that G did not actually draw it up herself - that being the work of a professional will-writer - nor was she present when it was executed (para [49]).

As to the question whether G's evidence, viewed with whatever doubts and suspicions appeared to be appropriate to the court, justified the submission that the defence and counter-claim ought to be struck out on the ground that W had no real prospect of defending the claim (even on the basis of the amended pleading), the evidence taken together was sufficient to show M's knowledge and approval of the contents of the 2001 will. In other words, the claimant had proved 'the righteousness of the transaction', having regard to a realistic analysis of the alternative scenarios available and to the inherent improbability of a capable testator not reading or understanding a will which he had executed and which remained in his possession. Accordingly, the district judge had been wrong to allow all of the proposed amendments and, as a result, he had failed to address the question whether W had no real prospect of defending the claim on the basis of the rest of his pleading (para [59]).

Were the matter to be dealt with at trial, it was overwhelmingly probable, having regard to the circumstances already considered, that W would not be in a strong position to adduce any further positive evidence, whereas G's evidence was more likely to be better than worse as compared with the evidence before the district judge (para [57]).

A Accordingly, G's appeal should be allowed, W's application to amend his pleading be refused, and the defence and counter-claim be struck out (para [60]).

Cases referred to

Barry v Butlin (1838) 2 Moo PCC 480

B *Channon v Perkins* [2006] WTLR 425

Re Dabbs, Hart v Dabbs [2001] WTLR 527

Fuller v Strum [2002] WTLR 199, [2002] 1 WLR 1097

Re R [1951] P 10

Sherrington v Sherrington [2005] WTLR 587, [2005] 3 FCR 538

Taylor v Midland Bank Trust Co Ltd [2002] WTLR 95

C *Wright v Rogers* (1869) LR 1 PD 678

Wright v Sanderson (1884) 9 PD 149

Statute referred to

Wills Act 1837, s9

D

Statutory instrument referred to

Civil Procedure Rules, SI 1998/3132, r3.4, Pt 17, Pt 24, r24.2, r52.11, Pt 57, r57.7(5)

JUDGMENT

E THE DEPUTY JUDGE:

[1] This is an appeal from a decision of DJ Mithani, as he then was, given on 27 July 2006. He had before him two applications:

F (a) The first was an application by the claimant Mrs Joan Marjorie Griffin to strike out the defence and counter-claim of the defendant Mr John Wood under r3.4 of the *Civil Procedure Rules 1998* on the ground that it disclosed no reasonable grounds for defending the claim, alternatively for summary judgment against the defendant pursuant to *Part 24* of the *CPR* on the ground that the defendant had no prospect of successfully defending the claim and that there was no other compelling reason why the case should not be disposed of at trial.

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(b) The second was an application by the defendant for permission to re-amend his amended defence and counter-claim.

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[2] In an extempore judgment (of which I have been given a transcript) the district judge gave the defendant permission to re-amend his amended defence and counter-claim, and dismissed the claimant's applications. On 16 September 2006 HHJ Norris QC gave the claimant permission to appeal.

[3] Appeals of this kind are by way of review: *CPR r52.11*. That rule goes on to provide that the appeal court will allow an appeal where the decision of the lower court was: (a) wrong; or (b) unjust because of a serious procedural or other irregularity. No one has suggested that there was a serious procedural or other

irregularity, so my task is to determine whether the decision of the district judge was 'wrong'. I take this to mean wrong in law, wrong on the facts, or wrong in the exercise of a discretion.

[4] The action is a probate action in the estate of Mrs (Gwendoline) Joyce Morgan, who died on 7 August 2003. The value of the estate was said in correspondence, as long ago as April 2004 (p300 of the appeal bundle) to be of the order of £290,000. The claimant Mrs Griffin is a cousin of Mrs Morgan, and she seeks to prove a will dated 6 December 2001 (which I shall call 'the December 2001 will') under which she is the residuary beneficiary. The defendant Mr Wood, who I understand is also a cousin of Mrs Morgan's, seeks to prove an earlier will of 23 December 1999 ('the 1999 will') under which he takes a more substantial benefit. In between the 1999 will and the December 2001 will Mrs Morgan gave instructions for a will in April 2001, but that will was never executed. In addition she apparently made a will in August 2001, but the original of that will has not survived. Later, on 15 July 2003 (not long before she died), Mrs Morgan attempted to execute a codicil to the December 2001 will, but it is common ground that that codicil was not properly attested.

[5] Both parties appeared before me by counsel, as they did before the district judge, namely Mr John Stenhouse for Mrs Griffin and Mr John Brennan for Mr Wood.

[6] The defence as originally served may be summarised as follows:

(a) By para 3 the claimant was put to proof that the December 2001 will had been duly executed in accordance with s9 of the *Wills Act 1837*, and in particular that the two witnesses to Mrs Morgan's signature were both present when she signed it.

(b) Passing over paras 4 and 5 for the moment, para 6 reads:

'6. In the circumstances, the defendant avers that a rebuttable presumption arose to the effect that the disputed will was executed as a result of the undue influence of the claimant.'

[7] In a reply and defence to counter-claim Mr Stenhouse responded to the effect that the pleadings at paras 3, 5 and 6 were abusive and should be struck out. As to attestation he relied on the presumption of due execution which follows from the presence of a standard-form attestation clause. He followed this up with the applications to strike out the defence and counter-claim and for summary judgment. Mr Stenhouse's complaints had substance. Presumptions of undue influence have no place in probate law, and the pleadings and particulars in paras 4 and 5 of Mr Brennan's defence came nowhere close to an allegation of actual undue influence.

[8] Mr Brennan responded in turn with his application for permission to amend his pleading (a small amendment had already been made at an early stage, apparently by agreement, though Mr Stenhouse says that that original amendment was not authorised or properly made). I shall need to look closely at the proposed

A re-amendments later, but in essence they seek to do two things, first to abandon the claim based on undue influence and secondly to put Mrs Griffin to proof of Mrs Morgan's knowledge and approval of the contents of the will, based on an expanded version of the pleadings and particulars in paras 4 and 5 of the defence.

[9] The evidence before the district judge was, on Mrs Griffin's side, the following:

B (a) A statement of Mr Nigel Paul Brooker provided on 6 December 2004, shortly before the claim form was issued and served. Mr Brooker is a professional will-writer, though not a solicitor, and it was he who was employed to draw up wills in April and August 2001, the December 2001 will itself and the later codicil.

C (b) An affidavit of scripts from Mrs Griffin herself.
(c) Affidavits of due execution, in a standard form, made by the two attesting witnesses, Mrs Anne Vernon and Mrs Rosemary Callear.

D (d) A statement of 30 March 2006 made by Mr Derek John Simmonds, a partner in Talbots, Mrs Griffin's solicitors.

(e) Supplemental witness statements by Mrs Vernon and Mrs Callear. I shall return to these later.

E [10] On Mr Wood's side there was a long witness statement made on 30 June 2006 made by Mr Richard Francis Dalton, a partner in Breakwells, Mr Wood's solicitors. This contains much factual information about a number of wills made by (or drafted for) Mrs Morgan from time to time in her last years, and about members of the family who might benefit under them. Amongst other things the statement expresses doubts about the due attestation of the December 2001 will, expresses suspicion about some of the evidence relied on by Mrs Griffin, and proposes the re-amendment of the defence and counter-claim. Those expressions of doubt about due attestation led to Talbots producing the witness statements from the two attesting witnesses which I have already mentioned, though one of them (Mrs Callear's) was dated much earlier, namely 16 February 2006, but apparently not served on the defendant until July 2006.

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G [11] I shall use Mr Dalton's witness statement as the basis for a summary of the material facts, though I shall draw on other sources as well. In particular Mr Dalton himself refers to Mr Brooker's statement, and so shall I. Naturally, none of this evidence has been tested in cross-examination, but much of it is consistent with the available documents.

H [12] Mrs Morgan was aged about 70 when she died in 2003. She was a widow without children. She had a number of cousins, including Mrs Griffin, Mr Wood and a Mr Chapman.

[13] The first will mentioned in the proceedings was the 1999 will, which Mr Wood admits with embarrassment that he drew up himself. It contained a gift in

favour of Mr Wood himself of a residential property in Walsall which (I understand) Mrs Morgan owned and occupied at the time, together with its contents, or alternatively her residential property at the time of her death, or (if she had no such property) the sum of £58,000. It contained other specific bequests, including some porcelain ornaments of birds for Mrs Griffin (or her daughter Lesley Hanson), some glassware and other items for the same Lesley Hanson, and some photographic prints for Mrs Griffin's son Peter. The residuary gift was for educational purposes, apparently charitable in nature.

[14] In April 2001 Mrs Morgan was introduced to Mr Brooker through Age Concern, and Mrs Chapman (the wife of Mrs Morgan's cousin) took Mrs Morgan to meet him. Mr Brooker cannot remember this meeting at all, but he evidently took instructions, and apparently wrote a note to himself on a post-it sticker attached to his attendance note reading, 'Make sure client alone at 2nd meeting'. Mr Brooker says of this note that he can only assume that he was concerned about whether the instructions he had been given were Mrs Morgan's true wishes. Mr Dalton expresses suspicion about the post-it note and Mr Brooker's explanation. Be that as it may, Mr Brooker says that the instructions were for a will largely in favour of Mrs Chapman.

[15] It was around this time that Mrs Morgan suffered a broken hip, went into hospital for an operation, and later lived at a nursing home, though she also sometimes spent time at her own house as well. As a result of this, and despite attempts by Mr Brooker to follow up the initial meeting, he was not able to make arrangements for a further meeting with Mrs Morgan, and this will was never executed.

[16] In August 2001 Mrs Morgan contacted Mr Brooker again, and according to Mr Brooker he saw her, alone, at the nursing home. He says: that she knew that she had given instructions before, but told him that she wanted to start again; that she had been diagnosed as having cancer and had been given six months to live; her instructions were to give three small pecuniary legacies and to divide the residue between a number of beneficiaries; she named six residuary beneficiaries at the meeting, but said that she wanted to include others as well. She sent details of these other beneficiaries by post. Mr Brooker drew up this will, there was a further meeting at Mrs Morgan's home, and he says that the will was duly executed, that he took the original away with him, and left Mrs Morgan with a copy. Only an unsigned copy of this will has been found, dated 23 August 2001. It gave residue to ten named individuals in equal shares, including Mrs Griffin, Mr Wood and Mr Chapman.

[17] Mr Brooker received a letter from Mrs Morgan dated 30 November 2001, saying she was unhappy with the will she had signed and that she wanted to see him urgently. Then he received a fax of handwritten instructions, written down by Mrs Griffin (she says at Mrs Morgan's direction). It is headed in capitals: 'The following is the gist of how Joy thought her will was reading. Amend page 2 of 3.' It then sets out 12 paragraphs numbered 5 to 16 containing words of gift in favour of various persons, rather more detailed and formal in fact than the word 'gist' implies. I take it that Mrs Griffin or Mrs Morgan was looking at the August will and Mrs Griffin was writing down ways in which a new will would differ from it.

A Mr Brooker realised that urgency was required. He drew up a will in accordance with the faxed instructions, and on 6 December 2001 he took it to the nursing home, where he again saw Mrs Morgan alone. The will was then apparently executed. Mr Brooker's statement does not mention any irregularity in the execution or attestation, merely that: 'Two employees... witnessed the will.' He says that he gave Mrs Morgan the original of the August will, to be destroyed by her (which explains why the original has not been found). The December 2001 will contains several pecuniary legacies, including £90,000 to Mr Wood, £5,000 to Mr and Mrs Chapman (this being by manuscript amendment from £10,000 to Mr Chapman alone, with the amendments apparently confirmed by the initials of Mrs Morgan and the two attesting witnesses), and personal chattels and residue to Mrs Griffin.

C [18] Eighteen months later Mrs Morgan asked Mr Brooker to prepare a codicil to her will. He did so, and because of the constraints he sent it to her by post with an explanation of the steps needed to have it attested. That codicil was signed, but it is common ground that it was not duly attested.

D **Attestation of the December 2001 will**

E [19] A large part of the district judge's judgment dealt with the question of due execution. The December 2001 will contained a standard-form attestation clause stating that that it was 'signed by the Testatrix in our presence and attested by us in the presence of the Testatrix and of each other'. The signatures of Mrs Vernon and Mrs Callear appear in appropriate positions under that clause. This raises a strong presumption that the will was indeed duly executed. However, the presumption is rebuttable, and Mr Brennan has pointed to other evidence tending to show that the witnesses were not present when Mrs Morgan signed the will. On the strength of that his pleading (original and amended) puts Mrs Griffin to proof of due execution.

F [20] The nature of that other evidence needs to be explained. In January 2004 Mr Wood's solicitor Mr Dalton made contact with the two attesting witnesses, who were both employees at the nursing home where the will was said to have been executed. He gave them identical questionnaires to complete. These consisted of 12 typescript questions, most of which had multiple-choice answers to be circled or crossed out. The most important was: '6. Did you see the testator sign the document?' The two alternative answers provided were 'Yes' and 'Testator already signed'. Each of the witnesses carefully circled the words 'Testator already signed'. The next two questions were: '7. Were you asked to countersign any alterations in the document?' '8. Did you see the testator countersign any alterations in the document?' In these two cases the alternative answers were simply 'Yes' and 'No', and each witness carefully circled the word 'No' in answer to both those questions. Each witness signed the questionnaire at the end, giving the date 16 January 2004.

H [21] Mr Dalton followed up those questionnaires with letters of 30 January 2004 (which are not themselves in evidence), and the replies to those letters are in evidence. In a hand-written letter dated 3 February 2004 Mrs Callear confirmed that it was her initials and her signature on the document. There then followed a sentence which was more equivocal than her answer to the questionnaire: 'I can only assume that

Mrs Morgan signed the document before I entered the room – but I cannot recall clearly enough to be absolutely sure.’ Mrs Vernon’s reply of the same date is typed. After confirming her countersignature and initials, her letter states: ‘I did not see Mrs Morgan sign this document as it had already been done before I entered the room.’

[22] A few days later on 6 February 2004 Mr Dalton visited the nursing home in person and interviewed Mrs Vernon and Mrs Callear, separately and in that order. In regard to Mrs Vernon his attendance note states:

‘So far as she was aware the Will had already been signed when she went into the room and she could not remember Joyce Morgan signing it in her presence.’

Later, the note states:

‘Rosemary Callear then came to see RFD [Mr Dalton] and she indicated that she did not remember seeing Joyce Morgan sign the Will... By the time she got to the room Joy was already there but she does remember seeing her sign the Will... She could not remember whether Joy [Mrs Morgan] signed whilst she was in the room but she does remember seeing her sign it.’

It is clear to me that the important word ‘not’ is missing before the word ‘remember’ in the second part of that last quotation. Mr Stenhouse protested that the attendance note had previously been presented as accurate, but that particular sentence is directly contradicted by the two others, and I am sure that the word ‘not’ has been omitted from the typescript in error.

[23] Coming forward in time by two years, Mrs Callear swore her standard-form affidavit of 16 February 2006, stating that Mrs Morgan signed the December 2001 will ‘in the presence of me and of the other Witness thereto’. Mrs Vernon made a similar affidavit on 29 March 2006. When these were served on the other side, Mr Dalton wrote to Mrs Vernon and Mrs Callear asking for an explanation. Mrs Vernon replied on 25 May 2006: ‘On reflection, I did see Joyce Morgan sign her will adding my own signature afterwards as confirmation of witnessing this.’ Mrs Callear replied on 9 June 2006: ‘... I stand by the sworn Affidavit signed at Partridge and Allen.’

[24] When all this material was served on Mrs Griffin’s solicitors with Mr Dalton’s witness statement, they interviewed Mrs Vernon again, and she gave a supplemental witness statement, dated 30 June 2006. In this she contradicted the crucial answers which she had given in the questionnaire, and expressed herself as confidently as in her letter of 3 February 2004, but in a contradictory sense. She referred to the affidavit of due execution which she had given on 29 March 2006 and confirmed that its contents were true. As to the questionnaire, she said that it may have been filled in too hastily, or without sufficient thought or understanding as to what she was doing. She said that the events surrounding the will were now very clear to her. In regard to her answer to question 6 she said:

A 'I am absolutely certain on reflection that the document had not already been signed, but was signed by her in my presence. I remember the solicitor explaining what had to be done and him asking Joyce Morgan to sign the Will. I really do not understand how, or why, I marked the answer that the testator had already signed.'

B No doubt 'the solicitor' was a reference to Mr Brooker. She went on:

'With regard to questions 7 and 8 and the alterations to the Will, I took it to mean that the questions related to my countersigning any alterations to the Will later.'

C She also referred to her letter of 3 February 2004 to Mr Dalton:

D 'I... confirmed in this letter that I had not seen Mrs Morgan sign the document which is not correct. As I have stated above, I am confident that I saw Mrs Morgan sign the Will. When writing my letter of 3 February 2004 I think I was confused and I thought what I was being asked was whether I had seen Mrs Morgan sign later amendments which I hadn't.'

E [25] Mrs Callear has also made a witness statement, but this was prepared at the same time as her affidavit as an attesting witness, namely 16 February 2006. It was therefore prepared before Mr Dalton's witness statement was served on the claimant. In this statement Mrs Callear has given a fairly full account of the signing of the will, including the following:

F 'When the will was signed in Joyce Morgan's room, present was [sic] Joyce Morgan, Vernon, the solicitor and myself... I can say quite categorically that all four of us remained in the room whilst Joyce Morgan signed the Will, and then Vernon and myself each witnessed the Will in each other's presence.'

G On the other hand Mrs Callear has not specifically explained the inconsistencies between her questionnaire and letter in 2004 and her evidence given in 2006,

H [26] In summary therefore both of the attesting witnesses have given inconsistent statements. None of those statements was made close in time to the actual events in December 2001. The first statements, made in early 2004, were closest in time and both stated that Mrs Morgan had already signed the will before they themselves came into the room. Letters and statements made soon after that were consistent with the answers to the questionnaire, though more equivocal especially in Mrs Callear's case. Finally in 2006, when there was at least the possibility that Mrs Griffin's solicitors had explained the legal consequences of their evidence to them, they gave sworn affidavits that the will was signed in their presence, backing those up then or later with longer, unsworn statements to the effect that their memories are now clear.

[27] The district judge referred to a number of authorities, including *Sherrington v Sherrington* [2005] WTLR 587 in which the Court of Appeal had referred to *Wright v Sanderson* (1884) 9 PD 149 and *Wright v Rogers* (1869) LR 1 PD 678, and also to *Channon v Perkins* [2006] WTLR 425. He accepted that those decisions emphasise the strength of the presumption of due execution which is derived from the use of a standard attestation clause. In *Sherrington* Peter Gibson LJ had even gone so far as to say at para 42:

‘Positive evidence that the witness did not see the testator sign may not be enough to rebut the presumption unless the court is satisfied that it has “the strongest evidence”, in Lord Penzance’s words [in *Wright v Rogers* (1869) LR 1 PD 678, 682].’

Nevertheless the district judge held that this was not a sufficient reason to decide the issue of due execution under the summary jurisdiction of *Part 24*. At para [32] of his judgment he said:

‘The reality is that the information given by the attesting witnesses to the defendant’s solicitor Mr Dalton is at variance with the information subsequently provided by them in their witness statements. There is at the very least the possibility that a more detailed examination of their evidence in the course of their giving oral evidence at the trial of the claim may lead the judge to conclude that the initial information provided by them to the defendant’s solicitors was correct and that the presumption of due execution has been rebutted.’

[28] I agree that that possibility exists. This is not a case where the witnesses have forgotten the event (as in *Channon v Perkins*) or did not realise that they were attesting a will (as in *Sherrington*). It is a case where each of the two witnesses does recall the event and its purpose but has given inconsistent and contradictory evidence about it. Their recent evidence, including affidavits given under oath, states that the will was duly executed. But their earlier evidence, unsworn and informal but given closer in time to the event in question, and closely similar between the two of them, stated or plainly implied that the will was not signed in their presence. (No one has suggested that Mrs Morgan *acknowledged* her signature in the presence of the witnesses, which would have been another way of satisfying the requirements of s9 of the *Wills Act 1837*.)

[29] That is enough to justify Mr Brennan’s pleading putting due execution in issue. But I have come to the conclusion that it is not a satisfactory reason for the district judge not giving summary judgment on the issue of due execution. That refusal fails to give the required weight to the extremely strong presumption or to the clear guidance recently given on this point by the Court of Appeal in *Sherrington v Sherrington* and *Channon v Perkins* (above). I regard that failure as sufficiently material to justify the description ‘wrong’. The evidence of the questionnaires is undoubtedly before the court, but it cannot properly be described as ‘the strongest

A evidence' in the light of all the later evidence from the two witnesses. It is true that, of the two witnesses, Mrs Vernon's initial accounts of the event were the more positive, and her recent evidence admits that she cannot explain how or why she answered question 6 of the questionnaire in the way that she did. But her more recent witness statement has explicitly addressed the inconsistencies and contradictions in her evidence, including a plausible explanation of her incorrect answers to questions 7 and 8 in the original questionnaire. As for Mrs Callear, I have already pointed out that she has not had an opportunity to explain the inconsistency in her statements, or to respond to other points made in Mr Dalton's statement. But her statement of 16 February 2006 was unequivocal and firm.

B
C [30] It is true that the evidence is not perfect. Also Mr Brooker has not had the opportunity to expand on his evidence or, in common with Mrs Callear, to respond to Mr Dalton's statement. Nor has Mr Brennan had an opportunity to test the evidence of any of those witnesses in cross-examination. Even so, on an application for summary judgment, even in a probate action (where such applications are relatively novel), it is in my judgement right for the court to consider realistically how this issue would be dealt with at trial. That approach is consistent with that encouraged by Stuart-Smith LJ in the Court of Appeal in *Taylor v Midland Bank Trust Co Ltd* [2002] WTLR 95, at 121B:

D
E 'In my judgement it is not sufficient to look and see whether the pleading technically discloses a course of action. Particularly in the light of the new Civil Procedure Rules, the court should look to see what will happen at trial. If the case is so weak that it has no reasonable prospect of success, it should be stopped before great expense is incurred.'

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G Stuart-Smith LJ also referred to the Practice Direction 24, in which para 1.3 states: 'An application for summary judgment under r24.2 may be based on... (2) the evidence which can reasonably be expected to be available at trial or the lack of it.' In my view a similar view should be taken about a defence having a reasonable prospect of success. On that footing it appears to me overwhelmingly probable that the evidence of the two witnesses would not be substantially changed from its present state and, having regard to the approach to the presumption of due execution exemplified by the cases mentioned above, that the trial judge would be persuaded that the adverse evidence relied on by Mr Wood does not amount to 'the strongest evidence' that the events described in the attestation clause did not happen.

H [31] The district judge also said that an order under *Pt 24* would be inconsistent with the procedure under which a party may, without putting forward a positive case, require the arresting witnesses to attend for cross-examination. This practice is embodied in *Pt 57* of the *CPR*: see *r57.7(5)*. Then, even if the court does give summary judgment in favour of the will, it is still open to the other parties to require the attendance of the witnesses. That right is expressly preserved by para 5.2 of the Practice Direction 57, which provides that if a defendant has given notice under *r57.7(5)* then any application by the claimant for summary judgment is subject to the right of that defendant to require those witnesses to attend court for cross-examination.

[32] It is not therefore right that the present claim for summary judgment is inconsistent with the procedure as the district judge thought. Even so, para 5.2 of the Practice Direction would have given Mr Wood (if he had not put forward a positive case and had served notice under r57.7(5)) the right to call for the attesting witnesses to attend for cross-examination. I have considered whether the existence of this practice is a reason for dismissing the appeal on this point, despite the view which I have reached above, on the ground that, if I am also minded to allow the appeal on the issue of knowledge and approval, Mr Wood will be unfairly left in a worse position than if he had not put the claimant to proof after all. But I have decided not to take that course. I shall return to the point after dealing with the issue of knowledge and approval,

Knowledge and approval

[33] On the original pleadings the issue of knowledge and approval was not raised at all, and the district judge was therefore right to say that the first, and possibly the decisive, step is to deal with Mr Brennan's application for permission to re-amend his defence and counter-claim. If that permission is refused, then Mrs Griffin will be entitled to summary judgment, on this issue at least.

[34] Mr Stenhouse claims that permission to amend should not be granted because, even as set out in the proposed amended defence and counter-claim, there can be no reasonable grounds on the part of the defendant for defending the claim, alternatively, the defendant has no real prospect of successfully defending the claim and there is no other reason why the case should be disposed of at trial. He derives the latter part of that test from r24.2 of the CPR, which strictly relates to summary judgment, not the amendment of pleadings. But he is entitled to put it that way. Part 17, relating to amendments, does not prescribe the criteria for refusing permission to amend, and I accept that an amendment should be refused if the amended defence has no real prospect of success, and this effectively brings the criteria of Pt 24 into play.

[35] All of this is affected by the burden of proof, and the identification of that burden is a little complicated, as it often is in probate cases, where presumptions can play a part. There is an overall burden on the party propounding a will, and in principle that includes the burden of proving that the testator or testatrix knew and approved its contents. But if the testator or testatrix is shown to have been of full testamentary capacity and the will is shown to have been duly executed, then a presumption arises that the testator or testatrix did indeed know and approve the contents of the will. And yet, if there are circumstances which (as it has been said) excite the suspicion and vigilance of the court, those circumstances, if duly pleaded, effectively restore the burden lying on the party propounding the will. The weight of that burden depends on the degree of suspicion engendered by the pleaded case. The relevant evidence then has to be evaluated in order to determine the issue as a question of fact. At that stage, as I see it, there is no presumption one way or the other. But it is for the court to be satisfied, on the basis of the admissible evidence and on the balance of probabilities, whether the party propounding the will has shown that the testator or testatrix knew and approved its contents. This has sometimes been described dramatically as a requirement to prove the righteousness

A of the transaction, but that can be misleading if it is taken to impose a greater burden than I have mentioned.

[36] One of Mr Stenhouse's criticisms of the district judge's judgment on this part of the case is that it relied on a number of unfounded allegations, doubts and suspicions contained in Mr Dalton's witness statement, whereas he should have confined himself to the pleadings which Mr Brennan is actually putting forward. He characterised Mr Brennan's case as comprising:

- B
- (i) his original pleaded case;
- C
- (ii) his revised case as proposed to be pleaded by amendment; and
- (iii) his un-pleaded case depending on Mr Dalton's witness statement alone and not embodied in his proposed amendments.

D He is right to draw that distinction. When I used the phrases 'relevant evidence' and 'admissible evidence' in the previous paragraph, I meant evidence that is relevant and admissible in relation to the issues raised by the pleadings as actually proposed. He is also right, as I shall explain, that the district judge did to a significant degree confuse Mr Brennan's revised pleaded case with his unpleaded case. For my own part I shall divide the issue into two questions:

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1. whether the proposed amendments are sufficient as a matter of pleading to arouse the suspicion and vigilance of the court and thus put knowledge and approval in issue; and
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2. whether the claimant's evidence, viewed with whatever doubts and suspicions appear to me to be appropriate in the light of Mr Dalton's statement, justifies Mr Stenhouse's submission that Mr Brennan has no real prospect of defending the claim even on the basis of the amended pleading.

G [37] The district judge was referred to several passages from the leading textbook *Williams, Mortimer & Sunnocks* (18th ed, 2000) in which the principles relating to knowledge and approval are enunciated by reference to quotations from familiar authorities. He quoted some of them in his judgment, and I shall repeat just the following:

H '13-26 "If a party writes or prepares will under which he takes a benefit," said Parke B in *Barry v Butlin* (1838) 2 Moo PC 480, 481, "that is a circumstance that ought generally to excite the suspicion of the court, and call upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased."

'In *Fulton v Andrew* (1875) LR 7 HL 448, 471 Lord Hatherley said: "There is one rule which has always been laid down by the courts having to do with wills, and that is that a person who has been instrumental in the framing of a will, and who obtains a bounty by that will, is placed in a different position from ordinary legatees who are not called upon to substantiate the truth and honesty of the transaction as regards their legacies. It is enough in their case that the will was read over to the testator and that he was of sound mind and memory and capable of comprehending it. But there is a further onus on those who take for their own benefit, after being instrumental in preparing or obtaining a will. They have thrown on them the onus of showing the righteousness of the transaction.'"

But these texts should not be read as if they were statutory provisions. The textbook continues in the same paragraph:

'The word "bounty" used by Lord Hatherley in the extract from his speech in *Fulton v Andrew* quoted earlier must mean a benefit substantial in relation to the size of the estate.'

On the other hand it continues:

'It is clear from *Fulton v Andrew* that it is not merely where a person writes or prepares a will under which he so benefits that the suspicion of the courts is aroused. For example a person may be instrumental in obtaining a will when he suggests terms benefiting himself and accompanies the testator to a solicitor of his own choosing, especially if he remains present while the instructions for the will are given. A variety of other circumstances may combine to show that a person has procured a will for his own benefit.'

[38] The final citation mentioned by the district judge was this:

'13-31...

A radical departure from testamentary dispositions, long adhered to, requires explanation, especially if the person in whose favour the change is made possesses great influence and authority with the deceased and originates and conducts the whole transaction; and such facts may raise strong suspicion that the change was not the result of the free volition of the deceased. But that suspicion may be dissipated by proof of a change of circumstances since the earlier wills.'

[39] Bearing those passages in mind, the first question is whether Mr Brennan's re-amended pleading contains allegations which, if proved, would excite the suspicion and vigilance of the court so as to remove the presumption which I have

A mentioned. Mr Stenhouse reminds me correctly that the facts pleaded, if they are to have this effect, must at least be relevant to the process by which the will was prepared and executed: *Re R* [1951] P 10.

[40] I must therefore look in detail at the proposed re-amendment. I have already summarised paras 3 and 6 of Mr Brennan's pleading. In their original form paras 4 and 5 were as follows:

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(a) Paragraph 4 pleaded that Mrs Morgan reposed trust and confidence in Mrs Griffin at the time of the disputed will. Six sub-paragraphs particularising this assertion were included, and I shall summarise these briefly as follows:

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- (i) Mrs Morgan, who was born in 1933, was a widow and childless;
- (ii) in the summer of 2001 she was diagnosed as suffering from terminal stomach cancer, with a life expectancy of only six months;
- (iii) in March 2003 Mrs Morgan allegedly gave Mrs Griffin an enduring power of attorney;

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- (iv) at the time of the December 2001 will Mrs Morgan was incapable of independent living and had moved into a residential nursing home;
- (v) at that time Mr and Mrs Griffin exercised control over Mrs Morgan's financial affairs; and

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- (vi) there was correspondence between Mrs Griffin and the will writer who drafted the December 2001 will, including a fax in her own hand setting out amendments to Mrs Morgan's previous will.

(b) Paragraph 5 pleaded that the disposition of the estate called for an explanation. Five sub-paragraphs of particulars followed, to the effect that:

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- (i) Mrs Griffin's two children benefit substantially under the December 2001 will by the gift of a house in Walsall;
- (ii) Mrs Griffin herself benefits substantially by the gift of residue;
- (iii) the relationship between Mrs Morgan and Mrs Griffin's children did not warrant such generosity and calls for an explanation;

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- (iv) in the apparent will of August 2001 Mrs Griffin's two children were not beneficiaries, except for legacies of £2,000 (these last few words being additions made by an early amendment of this pleading);

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- (v) in the instructions for a will given in April 2001 Mrs Griffin and her children were not identified as prospective beneficiaries at all; and
- (vi) in the 1999 will the only gifts for Mrs Griffin's family were of porcelain bird statuettes, given to Mrs Griffin or her daughter.

[41] The changes which are now proposed are these:

1. The first change is to add eight sub-paragraphs by way of particulars of para 4(v) which had pleaded that Mrs Griffin and/or her husband had

exercised control over Mrs Morgan's financial affairs. I shall summarise them rather than set them out in full:

- (a) Mrs Morgan lent Mrs Griffin her car soon after she herself had been knocked down by a car in a road accident in November 1998.
- (b) In about December 1999 Mrs Morgan told Mr Wood that Mrs Griffin tried to impress her opinions on her (citing a conversation apparently verbatim).
- (c) In about April 2001 Mrs Morgan's solicitor had drawn up a hire purchase agreement by which she had sold another car to Mrs Griffin's daughter, allegedly at an undervalue.
- (d) In about November 2000 Mrs Griffin's husband had sold an investment bond belonging to Mrs Morgan, worth about £60,000.
- (e) In late July or early August 2001 Mrs Griffin was pestering Mrs Morgan to grant a power of attorney to Mr and Mrs Griffin.
- (f) Later Mrs Griffin had repeatedly tried to dissuade Mrs Morgan from moving into a larger room at the nursing home where she was then living.
- (g) On two dates in July 2002 Mrs Griffin's husband had a total of £40,000 transferred from Mrs Morgan's bank account to Mrs Griffin's. When challenged, Mrs Griffin gave an explanation which Mr Wood regards as unsatisfactory.
- (h) Mrs Morgan did not appreciate how much money she had. A few weeks before she died she told Mr Wood and his wife that she might have to leave the nursing home because her money was running out, and that Mr and Mrs Griffin had told her that her investments had fallen in value and that care was expensive.

2. There is a new para 4A, which pleads: 'The claimant played an active role in the preparation of the disputed will.' This is supported by reference to Mrs Griffin having drawn up the faxed instructions for the December will (which previously formed sub-para (vi) of the particulars to para 4 in the original pleading).

[42] This re-amended pleading picks up a number of themes from the passages cited from *Williams, Mortimer & Sunnocks* (above):

- (a) First, Mrs Griffin is said to have been instrumental in drawing up the will: para 4A. Her instrumentality is not said to have been overpowering – after all, she did not actually draw up the will, she sent the proposed amendments to Mr Brooker, and she was not present when the will was signed. Even so, she is said to have been instrumental to the extent pleaded.
- (b) Secondly, she and her family benefit substantially from the December 2001 will, sufficient to satisfy the old-fashioned word 'bounty' in *Fulton v Andrew*.

- A (c) Thirdly, the December 2001 will showed a departure from earlier wills: para 5. But it was not 'a radical departure from... dispositions long adhered to' (to use the phrase in para 13-31 of *Williams, Mortimer & Sunnocks*, because Mrs Morgan appears to have changed her mind more than once in the period between 1999 and 2001.
- B (d) Fourthly, there is pleading that Mrs Griffin had influence over Mrs Morgan's financial affairs: para 4(v), to which Mr Brennan now seeks to add several sub-paragraphs of particulars.
- C (e) Fifthly, it may be the combination of several factors which show the procurement of a will: see the final words cited in para [37] above.

[43] In my view there is no doubt that Mr Brennan's proposed amendments go too far. Indeed, on examination, almost none of the new particulars to para 4(v) can be justified as relevant to the process by which the will was prepared and executed. I have already mentioned in passing that this requirement is derived from *Re R* [1951] P 10. In that case the next-of-kin defendants were challenging a will which had not been procured by the principal beneficiary (and he had had nothing to do with its preparation and execution). Instead they pleaded a number of facts about the testator and the beneficiary (some of them regarded at the time as scandalous), and they relied on a passage from *Mortimer's Probate Law and Practice* (2nd ed), a forerunner of *Williams, Mortimer & Sunnocks*, which suggested that in some circumstances matters extraneous to the preparation and execution of the will may properly be held to excite the suspicion of the court as to whether the deceased knew and approved the contents of the will:

F '... the fact that the testator gave no instructions for the will, and was without independent advice, legal or otherwise; that persons who benefited assumed authority over him while he was weak or debilitated; excluded his relations and friends; obtained money from him; and assumed control of his affairs.'

G Willmer J went put of his way to criticise that passage (the editor and his son being counsel in the action), doubted whether it was consistent with *Barry v Butlin* (1838) 2 Moo PC 480, and pointed out that the authorities cited in support all predated that case. He went on at p18:

H 'In these circumstances, is Mr Mortimer [for the defendants] well founded in contending that the matters alleged are such that they will have to be brought to the attention of the court? The answer must be, only if they are relevant in some way to the preparation and execution of the will - that is, only if they go to show that the will was prepared in circumstances capable of raising a well-grounded suspicion that it does not express the mind of the testator, to quote the phrase used by Davey LJ in *Tyrell v Painton* [1894] P 151.'

The conclusion I draw from *Re R deceased* [1951] P 10 is that excluding relations and friends, obtaining money from the testator, and assuming control over his affairs, are relevant to knowledge and approval only if they are truly part of the will-making process and tend to show or suggest that the will may not have expressed the actual intentions of the testator or testatrix.

[44] The district judge dealt with this issue on the pleadings in two paragraphs towards the end of his judgment:

[49] It is clear to me from the very many facts and matters upon which the defendant relies in support of this assertion that there is no basis whatsoever for striking out or giving judgment against the defendant in respect of that part of the defendant's defence. The circumstances set out in the evidence given by the defendant's solicitor on behalf of the defendant in support of this head of the defendant's defence are compelling. There is, in my view, little doubt that if proved they would excite the suspicion of the court and call upon it to be vigilant in examining the circumstances that gave rise to its existence – and to refuse to pronounce in favour of it unless it is satisfied that the contents of the will expressed the true wishes of the deceased.

[50] I cannot see how it is possible for the claimant to assert, in line with the decision in *In re R deceased* [1951] P 10, that the facts and matters the defendant refers to cannot be said to be connected in any way with the preparation and execution of the disputed will and therefore relevant to the issue of want of knowledge and approval. Many of the matters are directly relevant to that issue. Almost all of them have some relevance with the manner in which the disputed will came into existence. It is artificial to suggest, it seems to me – having regard to the proximity of the various dispositions or purported dispositions which were made pursuant to the various purported testamentary documents that were generated – that the majority of the facts and matters relied upon cannot be said to be relevant to the purported execution of the disputed will. The relevance of such matters to the execution of that will – certainly in the context of the present application – seems to me to be quite clear.'

[45] The district judge was therefore aware of *Re R*. However, with great respect, I have three criticisms of those paragraphs. First, it seems to me that the district judge has failed to distinguish between Mr Brennan's proposed pleadings and Mr Dalton's evidence. Secondly, he has failed to identify which assertions in Mr Dalton's statement he was addressing. Thirdly, in any event and most importantly, I do not see how most of the proposed sub-paragraphs of para 4(v) can in truth be accepted as relevant to the preparation and execution of the will. I am persuaded that sub-paras (a), (b), (c), (d), (f), (g) and (h) are all disqualified by the principle expressed in *Re R* (above). The facts alleged in those sub-paragraphs either had nothing to do with the will-making process, or they occurred in a different period of time, or both.

A The allegation in sub-para (g) certainly gives rise to a suspicion, and the suspicion has not been allayed by any evidence presented on behalf of Mrs Griffin, or by the varied and conflicting explanations given:

(i) in a response to a request for further information;

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(ii) in correspondence between solicitors; or

(iii) by Mr Stenhouse to me.

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But the relevant facts occurred in July 2002, some six months after the will was signed, and on reflection I do not see how this suspicion could be said to be relevant to the preparation and execution of the December 2001 will or to suggest that the will might not have expressed Mrs Morgan's actual intentions.

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[46] On the other hand I agree that sub-para (e) of para 4(v), coupled with para 4A and the existing para 5, is sufficiently relevant to the preparation and execution of the will. Sub-paragraph (e) asserts, though only by implication, that Mrs Griffin or her husband was attempting during the relevant period to gain greater control over Mrs Morgan's financial affairs, and that is at least capable of relevance to the issue. I would therefore, at least, vary the order of the district judge by excluding all the sub-paragraphs except (e) of para 4(v) from any permission to amend.

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[47] Having regard to those exclusions I turn to the second aspect of this question, namely whether on the basis of the proposed amendments Mr Wood has no real prospect of defending the claim. This requires an assessment of the depth of the suspicion aroused by the amended pleading and an examination of the evidence presented to allay that suspicion.

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[48] The combined effect of Mr Brennan's pleading, if re-amended as I have mentioned, is that:

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(a) Mrs Morgan changed her will to a significant extent over the last few years of her life. I add that the pleaded facts, aided to a degree by the evidence of Mr Brooker (not Mr Dalton) and by Mr Wood's admission of his own preparation of the 1999 will, show something of a history of Mrs Morgan making wills favouring one or other of her cousins who (or a close relation of whom) was influential in having the will prepared and executed. But the December 2001 will was made 18 months before Mrs Morgan's death, so that there was ample time for her to write a new will if she wanted to do so.

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(b) Mrs Griffin was pestering Mrs Morgan for an enduring power of attorney.

(c) Mrs Griffin was instrumental (by writing and sending a fax to Mr Brooker) in the preparation of the will under which she and her family benefit to a substantial degree.

[49] Summarised in that way Mr Brennan's pleaded case is revealed as exceptionally weak. I am narrowly persuaded that it is just sufficient to throw the burden of proof back onto Mrs Griffin to prove knowledge and approval on the part of Mrs Morgan but, in assessing the degree of suspicion and vigilance aroused, I have to say that the suspicion must be regarded as extremely mild. Mrs Griffin did not actually draw the will up herself, that being the work of Mr Brooker. Nor was she present when the will was signed. It is admitted that she wrote and sent the fax to Mr Brooker which formed the instructions for her will, but her evidence is that she took down the contents of the fax as dictated by Mrs Morgan herself, and sent the fax to Mr Brooker at her request. As to the allegation that Mrs Griffin pestered Mrs Morgan for an enduring power of attorney, I should make it clear that I do not regard that as suspicious to any significant degree in regard to the contents of the will. Enduring powers are useful instruments, and it is common for people with elderly relatives living in residential nursing homes to suggest them. I dare say it is common enough for the elderly relative to be sufficiently resistant to the idea that something justifying the description 'pestering' sometimes takes place. But this is not highly suspicious.

[50] What then does Mrs Griffin rely on to show Mrs Morgan's knowledge and approval of her will? Mr Stenhouse refers to three positive pieces of documentary evidence:

1. the manuscript amendments to the will itself;
2. a brief note in Mrs Morgan's handwriting dated 2 December 2001, not explicitly addressed to anyone but saying, 'As John Wood has made previous attempts for me to write my will his way, please Do Not allow him to try again. My Will is exactly how I want it to read'; and
3. the terms of the invalid codicil.

I would myself add:

4. the contents of the will itself (which contains nothing intrinsically surprising);
5. the obvious evidence of Mr Brooker that he left a copy of the will with Mrs Morgan after it was signed; and
6. the negative evidence (implicit in the evidence of the invalid codicil) that she took no steps for some 18 months to alter the terms of the will until she gave instructions for some alterations to the specific gifts to be effected by a codicil.

It should be remembered that Mrs Morgan was no more than 70 years of age and no one has suggested that she suffered from any form of mental impairment. The events in August and December 2001, and indeed July 2002 (except for the actual process of

A attestation), show that she knew how to change her will, and how to get in touch with Mr Brooker for that purpose, if she wished to.

B [51] None of these points is conclusive individually. The manuscript amendment related only to one specific gift, and this does not itself show conclusively that Mrs Morgan approved any other part of the will (though it is some evidence that she did). The manuscript note of 2 December 2001 literally shows little except that Mrs Morgan was determined not to allow Mr Wood to be involved in the testamentary process. It was dated four days before the December 2001 will, so there may even in theory be some ambiguity about the will to which it referred, but it was apparently left in a sealed envelope to be opened after Mrs Morgan's death. Mr Wood does not accept that it is genuine. The invalid codicil is perhaps the best of the three documents, but strictly even that does not show conclusively that Mrs Morgan knew what residuary gift the December 2001 will contained (the codicil would have affected only the specific gifts for Mr Wood and the Chapmans).

D [52] I bear in mind also that none of the witness statements on the claimant's side makes any attempt to demonstrate or assert that Mrs Morgan read the 2001 will before signing it, or that it was read over to her, or that in some other way she showed that she knew and approved its contents. In a sense that is not surprising, because all but one of the witness statements on the claimant's side were written and signed before the claimant was served with the proposed amendments which would put knowledge and approval in issue. I would accept that there is no absolute requirement of direct evidence of this kind, but the fact is that the only positive evidence of knowledge and approval consists of the matters mentioned in para [50] above. Even Mr Brooker's statement does not state that he discussed with Mrs Morgan whether the will represented her instructions. He writes that he spoke to Mrs Morgan on the telephone before he received the fax of 30 November 2001, and he adds in the context of the execution of the will: 'I do not specifically recall the discussion about the changes in the legacies or the reasons why.' Mrs Vernon's witness statement was written after service of the proposed amendments, but that too did not mention Mrs Morgan reading the will or anything similar.

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G [53] However, taken together, the evidence mentioned above is in my judgement sufficient to show Mrs Morgan's knowledge and approval of the December 2001 will. Realistically the only alternative scenario is that Mrs Morgan, having already made a number of wills, and knowing that the December 2001 document was a will (because she invited two people specially to come and witness it as such), signed the document prepared by Mr Brooker (whom she had used before as a will-writer), but did not read the document before signing it, was given a copy but never read that either, even though she later gave rational instructions for a codicil to it some 18 months later. To my mind that alternative scenario is literally incredible.

H [54] I have gone into this evidence in far more detail than is normal on an appeal of this kind. The reason is that the district judge dealt with this part of the case very briefly and without explicitly addressing the pleadings or the evidence in a systematic way. In paras [51] and [52] of his judgment he said this:

[51] In the circumstances the claimant's application to strike out or seek judgment on this ground fails too. There is nothing in the judgment in *Fuller v Strum* [2002] 1 WLR 1097 that suggests that this is not an appropriate course of action in the present case. That case is simply authority for the proposition – which has always been clear – that a person who has been instrumental in preparing a will under which he is also a beneficiary has to satisfy the court on the balance of probabilities only – nothing more – that the testator knew and approved the contents of the will, and that although any suspicion aroused by the circumstances of execution or contents of a will varies from case to case, there is no basis for imposing a burden of dispelling it beyond all reasonable doubt.

[52] It is quite clear from that case that these are matters that are ordinarily appropriate for consideration at the final hearing. The fact that there is evidence on the part of the claimant that goes the "other way" and the fact that the claimant considers that her evidence is unlikely to be strongly challenged, or is likely to withstand any challenge, does not seem to me to justify making an application to strike out in circumstances where it is at the very least possible that when all these matters are put to the claimant the court may well come to the conclusion that the will was executed in circumstances which were suspicious and that they do engage the court's vigilance in relation to whether the deceased had knowledge and approval so it seems to me that that basis is also unsustainable in relation to the claimants' application to strike out.'

[55] Again with respect, I have criticisms of those paragraphs. First, and allowing for the fact that the judgment was given extempore, the final words seem to be addressing the question whether the suspicion and vigilance of the court are engaged, and the district judge's view on that question is weakened by his earlier reliance on Mr Dalton's evidence as opposed to the pleadings properly relevant to the will-making process. This part of the judgment ought to have been concerned with the factual question whether Mrs Morgan knew and approved the contents of her will.

[56] My second criticism is that *Fuller v Strum* [2002] WTLR 199 is far more important to the present case than the district judge suggests. It was a strong example of the Court of Appeal reversing, on the facts, the decision of an experienced deputy judge who had made findings, in the trial of the action, that the testator in that case did not know or approve almost all of the contents of his will. The Court of Appeal emphasised the limited scope of the court's enquiry in such cases, namely to decide on the balance of probabilities whether the testator knew and approved the contents of the will. The circumstances of the will-making process in that case were far more suspicious than in the present case. Mr Fuller, who propounded the will and took a significant benefit under it, actually wrote the will out in his own hand (he said, at the testator's dictation) in a private meeting with the testator which no one else attended and of which therefore no one else could confirm his evidence. Even so, the Court of Appeal were prepared to reverse the judge's

A decision and pronounce in favour of the will. Essentially, they relied on the facts that the testator knew that the document was a will and that he had control of it before and after its execution, so that they concluded that it was incredible that he never read it or, if he did read it, did not understand it. Peter Gibson LJ pointed out at para [41] that it was not the 'normal case' of suspicion, where the propounder of the will procured the will in his favour and then prevented the testator from reading it and understanding it first or checking it later. Peter Gibson LJ also referred with apparent approval to the decision of Lloyd J in *Hart v Dabbs* [2001] WTLR 527, in which the judge inferred knowledge and approval from similar considerations in circumstances which were at least as suspicious as those in *Fuller v Strum*.

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C [57] I am driven to the conclusion that the district judge was in error to have allowed all of Mr Brennan's proposed amendments, and that he has in the result failed to address the question whether the defendant Mr Wood has no real prospect of defending the action on the basis of the rest of his pleading. It is therefore right for me, as the appellate tribunal, to decide for myself whether the claimant Mrs Griffin is able to show knowledge and approval or whether Mr Wood has a real prospect of defending the claim. As with the issue of due execution, it is right to consider how the matter would be dealt with at trial, and in my view it is overwhelmingly probable, having regard to the mild suspicion which the circumstances of the execution generate and to the positive evidence and considerations which I have mentioned, that the trial judge would be guided by *Fuller v Strum* and similar cases to find that Mrs Morgan did know and approve the contents of the December 2001 will. I have in mind also that Mr Wood will not be in a strong position (any more than he is now) to adduce any further positive evidence of the factual circumstances surrounding the execution of the will relevant to Mrs Morgan's knowledge and approval of its contents, whereas at trial Mrs Griffin's witnesses would be able to fill gaps in the evidence such as those mentioned in para [52] above. In short the claimant's evidence at trial is more likely to be better than worse as compared with the evidence before the district judge and me.

Conclusions

G [58] *Part 24* is a departure from previous practice in allowing probate actions to be dealt with summarily, and it is understandable to start from the assumption that probate actions should go to trial. No doubt they normally do. But *Pt 24* plainly does apply to probate actions, and in my view such actions should now be approached in the same way as other claims.

H [59] Having reserved this judgment I have been influenced by three particular matters. The first is the exceptional strength of the presumption of due execution, revealed in the judgments of the Court of Appeal in *Sherrington v Sherrington* [2005] WTLR 587 and *Channon v Perkins* [2006] WTLR 425. The second is the insistence, derived from *Re R* [1951] P 10, on the pleaded facts on the issue of knowledge and approval being restricted to those relevant to the process by which the will was prepared and executed. The third is that *Fuller v Strum* [2002] WTLR 199 emphasises that the grandiose phrase 'the righteousness of the transaction' requires the claimant,

on analysis, to do no more than show that the testator knew and approved the contents of the will, based on a realistic analysis of the alternative scenarios available, and having due regard to the inherent improbability of a capable testator or testatrix not reading or not understanding a will which he or she has executed and which remains in his or her possession. In my judgement the judgment below failed to take those matters properly into account, and this has led me to find that his judgment was wrong and ought to be reversed. In my judgement the defendant has no real prospect of defending the claim based on knowledge and approval, and in that case permission to amend his pleadings in the way proposed should be refused.

[60] I will therefore allow Mrs Griffin's appeal, refuse Mr Wood's application to amend his defence and counter-claim, and strike out the defence and counter-claim. That leaves the question which I left open earlier, namely whether provision should be made in the order for Mr Wood to have the opportunity, within a short time-frame, to serve notice under r57.7(5) of the CPR if so advised, or whether I should pronounce in favour of the December 2001 will without further delay. That question may be affected by the question of an application for permission to appeal, and I shall say no more about it in this judgment.

Counsel

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