CA on appeal from Ch.Div (Mr David Kitchin QC, Sitting as a Deputy High Court Judge) before Thorpe LJ, Jacob LJ. 10th June 2003

1. **LORD JUSTICE THORPE**: Mr Justice Jacob will give the first judgment.

2. **MR JUSTICE JACOB**: This appeal by permission of Jonathan Parker LJ is from a judgment of 25 July 2002 of David Kitchin QC sitting as Deputy High Court Judge of the Chancery Division. Mr Kitchin dismissed an appeal by Mr Parks from a decision of Master Bowles given on 29 November 2001.

3. The dispute contains the estate of the late Shirley Clout. Mr Parks, the appellant, was her half-brother. Her widower, Mr Roy Clout, is the respondent. Following her death on 6 August 1999 Mr Clout, on the basis she had died intestate, obtained letters of administration. Under the intestacy rules he will inherit the entire estate. In these proceedings Mr Parks contends that Mr Clout has acted dishonestly and fraudulently in obtaining letters of administration. He says there indeed was a will and that Mr Clout has destroyed it. His particulars of claim, issued on 27 February 2002, seek that the court should pronounce:

   "1. For the force and validity of the deceased's will, believed destroyed by the defendant. The contents as outlined in the attached particulars of claim.

   2. On the false oath and fraud in obtaining probate and during the administration period."

4. The particulars of claim say this*: "It is believed that she left a Will, one of Joint Wills, made with her husband Roy Joseph CLOUT (the Defendant) of the same address.*

   To the knowledge of the Claimant, the said Will was never revoked or destroyed by the said deceased or by any other person in her presence or by her direction with the intention of revoking the same, but was at the time of her death a valid and subsisting Will. The Defendant claims that the deceased died Intestate and had no knowledge of a Will drawn by his late wife. The Claimant believes this to be untrue, and that the contents of the said Will were in substance and to the effect as follows:

   1. That the Claimant should inherit the capital and interest of the TRUST FUND set up by the Will of the grandmother of the deceased and the Claimant (Eleanor Maude PAUL, died 1948). Their mother, the late Eleanor Vera Parks (died 18 December 1999) had a life interest in the income of the Trust Fund.

   2. That two-thirds of the deceased and Defendant's jointly owned matrimonial home would be inherited by the deceased's next bloodline relatives (the Claimant and then his children). The remaining one-third was to go to the Defendant's bloodline relatives. This jointly agreed arrangement was to come into effect when both spouses eventually died. At various times the deceased inherited sums of money from her grandfather's aforementioned Trust Fund. These were largely invested in their previous and existing homes. Since the deceased had put in the greatest share, it was agreed between them that her bloodline relatives would have the largest portion, as there were no children of the marriage."

5. Mr Parks says why he believed that his late sister had made a will. In his affidavit he sets it out essentially in paragraphs 10, 11 and 13:

   "10. My sister, Shirley, when alive, was quite explicit to myself and our late mother (Eleanor Vera PARKS died 18 December 1999) as to what would happen to her estate upon her death. I believe that it is my duty as the sole survivor of my childhood family unit, and now head of family, to try and ensure that the wishes of my sister, as expressed to myself, my late mother and in her Will, are upheld. These are outlined in my Particulars of Claim: that my sister's share of equity in her home and the remaining capital from our Grandmother's Trust Fund, is eventually distributed to her surviving blood relatives.

   11. In a telephone conversation with me about two days before my sister's funeral, the Defendant admitted that they had signed Joint Wills. In his first sentence he stated that the funeral was a graveside burial and gave the time and place. In his second sentence, he said that 'Shirley (my sister) had not left a Will and Probate would take years.' I thought it strange that he should say this at that time. Later in the conversation, when somewhat relaxed, he inadvertently stated that there WERE Joint Wills. At the time, I did not question him on his contradiction of his earlier pronouncement. I thought it poor taste to argue about this issue so close to my sister's funeral and that he might be suffering grief. Since then, as stated earlier, he has refused to communicate with me and had made no effort to contact my mother before her death, nor did he attend her funeral.

   13. Mr sister, Shirley, had told me on a number of occasions that when they both eventually died, the Joint Wills stated that her two-thirds of the value of 71 Tumulus Road would go to her side of the family (Parks) and one-third to her

husband (Clout). this was because they did not have children and she had supplied most of the money to make the purchases. As I understand it, her husband had little or no capital and on a relatively low income. Had it not been for our grandmother's legacy, they would probably not have had sufficient means to purchase a home in those days."

6. So there were three things relied upon by Mr Parks: first, that his sister had been quite explicit as to what would happen and the conversation with him and his mother; second, the telephone call with Mr Clout with contradictory statements and third, earlier statements by his sister on a number of occasions. No precise dates as to any of these events are given, save for the telephone call. There is no information as to when the will was made, who the witnesses were or anything of the sort. In the course of argument Mr Parks indicated he thought the will would have been made by about 1985, but it may have been somewhat earlier.

7. The defendant applied to have the claim struck out, supporting his application with a witness statement. He said this, dealing first with the size of the estate: *"My wife's estate was modest, valued in total at some £17,843.87. I now, however, accept that to this sum must be added for the purpose of Inheritance Tax, her unsevered share in the joint bank account, assigned values of £45,000 and £10,273 respectively.*

6. In the event Tumulus Road was owned by us as expressed Tenants in Common in the shares 43/57% which reflected our contribution to cost of purchase.

7. We purchased the property some 30 years ago and until prompted by my current solicitors, had completely forgotten the property was held in Tenants in Common. I had understood that my wife's share in the property at 71 Tumulus Road, Saltdean and in the said bank account had on her death automatically vested in me.

11. To the whole of the best of my knowledge, information and belief, at no time did my late wife make a Will and she never intimated to me that she had made a Will. I absolutely deny having destroyed any such Will. The Claimant seems to base his case, as to the existence of a Will based upon conversations that he says that he had during my wife's life and an alleged statement by me, after my wife's death that she and I had signed 'joint Wills'.

12. In response:

(i) there cannot be 'joint Wills'. I am advised that a joint Will is a single document made by more than one testator. I certainly have never made such a Will.

14. In summary, although the Claimant seeks to make much of it, he cannot rely upon any evidence of my late wife's alleged declaration that she made a Will. His only other evidence is he alleged conversation with me, to the effect that there was a Will which I absolutely deny. No such conversation took place."

8. There can therefore be no doubt that what Mr Parks is advancing is a very serious claim indeed. This is not a case in which it is suggested there was a will but it has been mislaid or overlooked. His allegation is that Mr Clout must have known about the will all along, having participated in its creation. This is a case of deliberate destruction or concealment, a false oath on the claim for letters of administration and a false witness statement in these proceedings, or it is nothing.

9. Master Bowles struck the claim out pursuant to the provisions of CPR Part 24. He held that the claimant had no realistic prospect of success. He was upheld by Mr Kitchin. Jonathan Parker LJ granted permission for this further appeal. He did so saying this:

"11. The Master accordingly concluded that the evidential material then before him was insufficient to give rise to any realistic prospect of Mr Parks being able to establish that Mrs Clout died testate, and he went on to conclude (in paragraph 34) that there was no real prospect of any further material becoming available at trial, were the action to proceed. He said that the fact (if it were the fact) that Mr Clout had lied about the value of the estate 'was of no evidential weight' in establishing that a valid Will existed.

12. On Mr Parks' appeal the deputy judge took the view that Master Bowles had approached the matter correctly and agreed with the Master's conclusion that Mr Parks had no real prospects of success at trial. The deputy judge continued, in paragraph 24 of his judgment:

'In my judgment, the matters alleged in support of the claim, even if accepted at trial, would fall far short of establishing that Mrs Clout made a valid Will complying with the formalities required by the Wills Act.'

13. The deputy judge accordingly dismissed Mr Parks' appeal and confirmed the costs order made by the Master.

16. Turning to the substantive issue, however, whilst it is undoubtedly the case that Mr Parks will face considerable difficulties in establishing the existence of a valid will should the case be allowed to proceed to trial, I nevertheless take

> *the view that it is at least arguable that, in so far as they concluded that due execution of a Will can never be established by inference from circumstantial evidence, the Master and the deputy judge may have been setting too high an obstacle in Mr Parks' way. And if it be possible to prove the existence of a duly executed Will by inference from circumstantial evidence, then, on the basis of the material sought to be relied upon by Mr Parks in the instant case, it must (I think) be at least arguable that it should be left to the trial judge to determine whether that material is sufficient to support such an inference."*

Jonathan Parker LJ was, of course, not deciding this appeal. Unlike him we have had the benefit of argument on both sides.

10. I begin with the appropriate legal standard for a strike out. There was no dispute as to this before us: the claim will be struck out if it has no realistic prospect of success. That is to be contrasted with cases which are fanciful: see **Swain v Hillman** [2001] 1 All ER 91.

11. There is no different standard for the proof of wills or any other matters in civil proceedings. The standard of proof is the ordinary civil standard, namely, a balance of probabilities. On the other hand it is well-established that a civil court when considering a charge of fraud will naturally require for itself a higher degree of probability than that which it would require for a lesser test. The reasons for that were articulated in **Re H** [1996] AC 563 at 85-87 by Lord Nicholls. Essentially the point is that one does not set out assuming that people are dishonest. Fortunately most people are not dishonest. So, to find somebody dishonest is therefore to find that they have acted very differently from the ordinary citizen. Proof of fraud therefore requires evidence good enough to overcome a strong presumption of innocence.

12. Next, it is important to observe that hearsay evidence is now admissible and has been so since the Civil Evidence Act 1968. Once upon a time that was not so. Thus in **Atkinson v Morris** [1897] PD 40, it was proved that a testator had said she had destroyed one copy of a will she had made in duplicate. That would have had the effect of revocation. But hearsay evidence was inadmissible and her intentions were, to the annoyance of the court, frustrated. The fact that hearsay evidence is admissible in probate proceedings of this character of course can go either way. There can be cases where there is hearsay evidence of the existence of a will and hearsay evidence of the non-existence of a will. The court has to act on the balance of probabilities in all cases.

13. What then is the position in this case? Suppose the case came to trial and the evidence stands as it does now? I have no doubt that the claim would fail. I entirely accept, and indeed it was common ground, that a will can be proved by circumstantial evidence. Jonathan Parker LJ thought that might be an issue because the courts below perhaps had thought otherwise. But it is now common ground, whatever the position before, that circumstantial evidence can prove a will.

14. But what would the court have here? It would have some information that the deceased had said she had made a "*joint will*". That might even either be a single document executed by her and her husband or two separate wills. It does not follow she had in fact done so. People in life are quite capable of saying they have left things in their will when in fact they have not done so but intend to do it tomorrow. Sometimes they do not intend to do it at all; it is easier to promise to bequeath than to provoke a row in life. And even if someone thinks they have made a will it does not follow they have validly done so. Here, for instance, there is simply no evidence as to any attestation or signature.

15. Take another example. Supposing the will was made before 1 January 1983, which is quite possible. Before then the law required such will be signed at the foot or end (see section 9 of the Wills Act 1832). There is simply no evidence that it was ever signed. There may not even be sufficient evidence of exactly what would have been in this will. Mr Parks says it would have bequeathed a trust fund to him and two-thirds of the share of the house to his children. But there might have been other things. There simply is not enough information in this case to prove the actual making of a valid will or exactly what was in it.

16. The Master and Deputy Judge held that even if Mr Parks' evidence were accepted it would not have been enough to prove a valid, duly attested will. For the foregoing reasons I agree. The case does not turn on esoteric rules about the admissibility of evidence. It turns on the simple fact that a will is a serious and important document. It is so important that its validity depends upon proper form and attestation. Parliament has laid this down. People know that wills are serious documents and normally take care to preserve them and to see that people know where they may be found on their death. Compliance with

formalities really matters. One must have a reasonably firm basis for concluding that formalities were properly carried out, not merely as to what the substance of a supposed will was. I do not think the evidence which Mr Parks has gathered would be enough to establish a will.

17. I am not saying that hearsay evidence cannot be enough to prove a lost or missing will. A lot would depend upon what that evidence was. One can imagine a case where a witness says he was told by a solicitor that he, the solicitor, had prepared a will and that it had been properly signed and attested. Or the testator may have told a witness that he or she had been to a solicitor who had drafted the will and got it properly executed and attested. Then there may perhaps be a fair inference that the formalities were properly complied with. Mr Parks' hearsay evidence falls far short of that level of detail.

18. Nor is the extra matter Mr Parks invokes in this court add anything of significance. He says he has recently learnt that his ex-wife told his daughter that the deceased had told his ex-wife that she had made a will. In its present form it is hearsay upon hearsay, but one would assume that the ex-wife was actually giving evidence and giving evidence to that effect. That again simply does not amount to enough detail to establish the making of a valid will.

19. In this case there is more. Mr Parks would have to prove the serious allegation that Mr Clout himself made either a true joint will (ie a single document containing two wills) or one of a pair of wills and destroyed all evidence. There is nothing to show that he has done so. Mr Parks points to one matter which he suggests show a propensity to lie: Mr Clout initially declared in his application for letters of administration that the matrimonial home (bought in 1970) was held jointly, whereas it was held in common. Mr Clout acknowledges that - it was in fact held in accordance with the proportions to which he and his wife had contributed to it. But that, to my mind, does not point to any dishonesty, for it is not possible to see any dishonest purpose in this misdisclosure. It is not as though it could remotely bring the estate within the scope of estate duty.

20. Mr Parks suggested that it might be dishonesty here because the higher figure would mean that somehow the eagle eye of the probate office would have watched more closely at a higher figure. But even an eagle eye would not be interested in the difference between those two numbers.

21. Mr Parks submits that it would be wrong to stop the case here because more might emerge by way of disclosure or in some other way. He indeed seeks swinging disclosure of documents and information. The only matter he particularly referred to was the records of a telephone conversation which BT might have which would prove the telephone conversation took place. But as I understand it there is no dispute the telephone conversation took place. The dispute is what was said. His list of what he wants shows that this is essentially a speculative action hoping that more might turn up. How, for instance, would the deceased's entirely medical records help? - one of the matters for which Mr Parks seeks disclosure.

22. I have come to the conclusion that the Master and the Deputy Judge were right, and I would dismiss this appeal.

23. **LORD JUSTICE THORPE**: I agree that this appeal should be dismissed for the reasons given by my Lord. I only add that this is essentially a family dispute and accordingly the court endeavoured at an earlier stage to bring the parties to agreement through the offices of the Court of Appeal mediation scheme. Initial difficulties in setting up a mediation do not seem to have prejudiced in any way the contribution made by Mr James Perry and his colleague who conducted a joint mediation, bringing the parties together on two occasions without success. No agreement resulted and that is in a sense a matter of regret. But I would only wish to express the court's appreciation to Mr James Perry for the service which he performed in this case.

(Appeal dismissed; successful respondent's costs assessed at £3,000, payable within six weeks).

The Appellant appeared in person.
MR C WILSON (instructed by Dean Wilson Laing, Brighton BN1 1UJ) appeared on behalf of the Defendant