JUDGMENT : Mr Justice Peter Smith : Chancery : 30th July 2004.

INTRODUCTION

1. On 25th March 2004, I ordered the trial of a number of issues relating in broad terms to the mental fitness of Robin James Symes ("Mr Symes") to instruct his solicitors and properly give evidence. The issue (the "Issue") involves four questions; namely whether Mr Symes:-
   a) Is or had been during any period after 27th February 2001 (and if so during what period) a patient within the meaning of CPR 21;
   b) Is or has been during any such period incapable by reason of any mental disorder from fairly participating generally in these proceedings;
   c) Is or has been during any such period unable to give evidence either orally or in writing and/or be cross-examined;
   d) Was incapable by reason of any mental disorder from fairly participating in the hearing commencing 30 April 2003 and/or was mot responsible (by reason of such mental disorder) for the swearing of the affidavits and the making of witness statements which led to that hearing.

2. Mr Symes did not participate in the hearing as to his mental capacity, nor did he instruct solicitors. In view of the importance of the decision from his point of view, the Official Solicitor has appeared by Counsel (Mr Behrens) to assist the court by putting the case, insofar as it is proper for the Official Solicitor so to do, that Mr Symes would have put had he participated in the proceedings.

3. The proceedings were held in private because of the personal nature of the evidence, which was going to be given in respect of Mr Symes' capacity.

PRINCIPLES

4. The nature of the inquiry and how that inquiry is to be conducted can be discerned from the recent Court of Appeal decision of ***Masterman-Lister –v- Brutton & Co. [2003] 1 WLR 1511***.

5. The following points arise:-
   1) A person of full age is presumed to have the mental capacity to manage his property and affairs until the contrary is proved, and the burden of proving the contrary rests on whoever asserted the incapacity (i.e. in this case Mr Symes).
   2) The court as a matter of practice should investigate the question of capacity whenever there was any reason to suspect its absence, even if the issue did not appear to be contentious.
   3) Where an issue of capacity arose, after a decisive step had already been taken, the court could regularise the position retrospectively under the rules provided everyone had acted in good faith and no injustice could be caused.
   4) The test of mental capacity was issue specific and depended on the nature and complexity of the transaction in respect of the decision as to the capacity failed to be made.
   5) For the purpose of CPR Part 21 the test to be applied was whether the party to the legal proceedings were capable of understanding, with the assistance with such proper explanation from legal advisers and experts in other disciplines as the case might require, the issues on which his consent or decision was likely to be necessary in the course of those proceedings, but although decisions actually made were likely to be important indicators of the existence or lack of understanding, a person was not to be regarded as unable to make any rational decision merely because the decision made would not have been made by a person of ordinary prudence, or conversely having mental capacity merely because his decision appeared rational.

6. The case provides some guidance as to evidence. Thus Kennedy LJ (paragraph 39) reviewed the non-medical evidence at trial. He referred to evidence of the Claimant's parents and two of his friends and accepted the submission that lay evidence "***was important evidence which the judge failed sufficiently to analyse***".

7. In paragraph 40 he referred to a mass of documentary evidence, including in particular the Claimant's diaries and that was relied upon by the Claimant's counsel in that case to demonstrate the lack of capacity. It is equally true, having regard to Kennedy LJ's uncritical acceptance of that evidence that such evidence could be used (not exclusively) to assist in determining whether a person ***had capacity***.

8. Chadwick LJ (paragraph 84) observed:- "*For my part, I find it of particular significance that, in this case, two experienced solicitors did not recognise the need for the appointment of a next friend; and that no criticism is made of either in that respect.*"

9. Such factual matters cannot of course be determinative because non-expert observers might not be sufficiently alert to indications that ought to have led to a conclusion affecting a person's capacity. Conversely, the evidence of experts is of value, but not of such value as to be determinative. In short, one looks at the evidence of lay people, the evidence of the way in which the person conducts himself, any documentary evidence which is available which might throw light on his or her ability and the evidence of experts who have observed the person in question and applied appropriate tests in order to come up with an opinion as to that person's capacity.

10. In this case I have had evidence covering all such areas.

HOW DID THE ISSUES ARISE?

11. In order to understand the terms of the Issue and evaluate the evidence, it seems to me that it is necessary to have regard to the overall context in which it arose and to some of the important points of the background history.

12. From the 1970's or thereabouts, Mr Symes and Christo Michailidis ("Christo") shared a home in London and built up a very successful business trading in antiquities. Mr Symes in particular became one of the foremost experts in the world in dealing with Egyptian antiquities.

13. Christo died in an accident in Italy on 5th July 1999, domiciled in Greece. On 8th February 2001, Letters of Administration were granted out of the Oxford District Probate Registry to the First and Second Claimants (First and Second Respondents to the Issue) ("the Administrators").

14. The affairs of Mr Symes and Christo were complicated having a world wide flavour. During 2000, discussions took place with Mr Symes and his Swiss lawyer, a Mr Tavernier, and with Dimitri Papadimitriou (Christo's nephew) and the family's Athens lawyer, Mr Anthony Papadimitriou (no relation) with a view to sorting out the complex affairs of the business, which had operated in the United Kingdom through a company called Robin Symes Limited ("RSL") as well as from Switzerland through various offshore corporate vehicles. Those discussions foundered. Ultimately, on 12th February 2001 the Administrators wrote a very full letter to Mr Symes setting out the family's views with regard to the business relationship between Mr Symes and Christo. The Administrators' contention was that their business had been a partnership and that RSL was a partnership asset. The contention was that the partnership being a partnership at will was dissolved consequent upon the death of Christo, with the result that its affairs ought to be wound up, consequent upon that dissolution with the usual partnership account and enquiries, with a view to realising the assets, paying its debts and returning the in effect equal shares to Mr Symes and Christo's estate.

15. Mr Symes by then had left the United Kingdom and was living in Switzerland.

16. He commenced proceedings on 23rd February 2001, in the Athens' courts, which were served on Christo's sister (Mrs Despina Papadimitriou) and his mother, both of whom were and remain resident in Athens. They were also served on the Administrators in London. By those proceedings Mr Symes sought negative declarations in respect of the existence of a partnership and in respect of several collections of antiquities and in particular a collection of art deco furniture by Eileen Gray which had been in the Chelsea house occupied by Mr Symes and Christo, and which was said to be worth in excess of US$15 million.

17. The Administrators contended that the purpose of Mr Symes' proceedings in Athens were to block any attempt to recover Christo's share of the partnership and to delay (because then proceedings in the courts in Athens were taking decades rather than years) any prospect of successful recovery.

18. I make no observation about that as it is not relevant to the Issue. However, the Administrators received advice that they could commence their own proceedings in these courts and they accordingly did so on 27th February 2001, when they applied without notice to Lloyd J, who made an order appointing a receiver over the partnership assets and granting various injunctions. On the return date

following the Order made by Lloyd J (7th March 2001) Mr Symes was represented by counsel and his first firm of solicitors Langshaw Kyriacou. Mr Symes did not attend, but (the Administrators allege) remained in Geneva attempting to secret away assets the subject matter of the dispute.

19. Mr Symes's first firm was replaced on 16th March 2001 by Baker and MacKenzie who acted for a period of some two weeks being replaced in turn by Lovells on 2nd April 2001. Lovells continued to act for Mr Symes until 29th January 2002, during which period a number of orders were made. One of those orders was made on 1st May 2001 by Neuberger J, (as he then was) permitting Mr Symes to draw on funds, but refusing the Administrators application for an order that Mr Symes be cross-examined on his assets. However, the Administrators submit that the significance of that is that the application was not opposed on the basis that Mr Symes was unfit to be cross-examined.

20. The receivership was replaced by an Interlocutory Regime ("the Interlocutory Regime") which commenced by undertakings given by Counsel on Mr Symes' behalf on 7th March 2001, which have effectively remained in place ever since (although replaced by a substantive first order of Hart J on 24th July 2002). Mr Symes at that particular time was un-represented but subsequent lawyers representing him have never sought to set aside the Interlocutory Regime.

21. The principle of the Interlocutory Regime was to enable Mr Symes to carry on the business, including the purchase and sale of antiquities subject to certain requirements. In particular Mr Symes was required to do the following:-
    1) To disclose all premises where Relevant Chattels (as defined to extend to the collections that were owned by the Michalidis/ Papadimitriou family) were situated.
    2) Not to deal with any assets save as prescribed by the Regime, namely selling only after notice to the Administrators' solicitors for full value at arm's length identifying the purchaser and setting out any third party interest in the object being sold.

22. The object of this Regime was to provide a measure of protection without the over expensive and heavy handed approach of the receivership.

23. Lovells ceased to act for Mr Symes on 29th January 2002 and he remained un-represented until Peter & Peters commenced to act for him in March 2002. They remained on the record until March 2003, save for a short period in July/August 2002.

24. The breadth of the disputes needs to be set out. To date, some 40 Orders have been made in the main proceedings alone. The dispute has spawned further worldwide litigation. In addition to the proceedings in Athens, there have been proceedings in the Isle of Man, brought by Mr Symes to remove Mrs Papadimitriou from her position as the Protector of the Seymour Settlement (which was an Isle of Man trust which owned the house in Seymour Walk in Chelsea in which Mr Symes and Christo lived). That action ultimately was dismissed on 18th September 2002 by Deemster Cain. The learned Deemster was highly critical of Mr Symes' tactics. Mr Symes did not give any evidence; the evidence was given by his then solicitor Mr Keith Oliver of Peters & Peters.

25. In Guernsey, Mr Symes commenced proceedings on 29th June 2001, preventing any dealings in two yachts owned by the Michailidis/ Papadimitriou family ***"LION HEARTED"*** and ***"MARINAI D'ITALIA"***. Finally, whilst the Administrators were negotiating with Mr Symes' legal representatives outside Hart J's court on 6th and 7th March 2001, Mr Symes was observed by enquiry agents, instructed by the Administrators, moving objects around Geneva Free Port, the existence of which had not been declared as premises under the Interlocutory Regime for storing relevant chattels. An ex parte application was accordingly made in Geneva on 29th March 2001.

26. In not one of those proceedings or the proceedings in the United Kingdom, was it ever contended that there was an issue over Mr Symes' mental capacity, until it was first raised in the Court of Appeal in October 2003.

SALE GIVING RISE TO PRESENT ISSUE

27. Shortly after Peters & Peters commenced acting for Mr Symes, they made an application on his behalf for permission to sell a Granodiorite statue of an Egyptian god ("the Statue"). The application was made in accordance with the procedure prescribed by the Interlocutory Regime and included the

Statue's RSL stock number together with information that the sale was for US$1.6 million to a company called Philos & Partners Inc., with a claimed address in Cheyenne Wyoming. It was stated that there were no third party interests in the Statue as required by the Interlocutory Regime. The application was supported by an affidavit sworn by Mr Oliver and by an affidavit sworn by Mr Symes himself for a validation order under s 127 Insolvency Act 1986 in respect of RSL.

28. The Administrators examined RSL's records and discerned that the Statue had been brought by RSL in 1998 for US$3.25 million from a Swiss company called Sycomore Ancient Art, which was and is a vehicle used by a Swiss dealer in antiquities (Mr Domercq) a friend and business associate of Mr Symes. The proposal for sale at US$1.6 million was at a substantial loss, but was the exact amount then required urgently by RSL's bankers to stave off liquidation.

29. The Administrators did not oppose the application and Hart J made an order permitting the sale on 27th March 2002.

30. The Administrators were however suspicious about the apparent fall in value and accordingly obtained an order requiring Mr Symes to disclose on Affidavit the reasons for the low price achieved for the Statue. In compliance with the Order he swore a further affidavit on 27th September 2002 (his eleventh) in which he repeated the sale had been for US$1.6 million and that was because of poor market conditions.

31. The sale was accordingly permitted to proceed and the sum of US$1.6 million was received and paid to RSL's bankers.

DISCOVERY OF TRUE SALE TERMS

32. In January 2003 a mediation took place in Paris, during which a chance remark was made to the effect that the Administrators knew that the true purchaser of the Statue, which was not Philos and Partners at all, but a Sheik Al-Thani, a prominent collector from Qatar. That remark was made in a meeting at which Mr Symes was present.

33. Shortly thereafter, Mr Symes served an Amended Defence where he abandoned the primary allegation that all the assets belong to him because Christo had been merely an employee and admitted for the first time (after nearly two years of litigation) that he and Christo had been partners. The partnership was an unusual one, in that he contended contrary to the normal presumption as between partners, the assets were held jointly and not in common, so that the same result ensued, i.e. he received all the assets by survivorship.

34. On 3rd February 2003, he swore his 14th Affidavit in which he admitted for the first time that the Statue had actually been sold for US$4.5 million to Sheik Al-Thani, but that there had been no breach of the Interlocutory Regime, because RSL had only owned a one third interest in it, the remaining two thirds interest being owned by Mr Domercq and Mrs Frieda Nussbeger (nee Tchacos) long standing friends of business associates of his.

35. It was plain therefore that on the basis of Mr Symes' 14th affidavit that there was clearly no argument that he had broken the Interlocutory Regime and that he had committed a contempt of court. On my direction, the Administrators on 13th March 2003, brought committal proceedings against Mr Symes arising out of his false evidence regarding the ownership of the Statue. In the course of that application, Mr Symes adduced witness statements from Mr Domercq and Mrs Nussberger asserting their third share interest in the Statue. Accordingly, I directed that there should be an issue as to the ownership of the Statue, to be heard at the same time as the committal proceedings and joined Mr Domercq and Mrs Nussberger for that purpose. They declined to submit to the jurisdiction and filed no evidence.

36. The Administrators became aware that Mr Symes was intending to visit the office of the Inland Revenue in Edinburgh on 28th April 2003, and they obtained an order without notice from Patten J, preventing Mr Symes from leaving the jurisdiction and ordering him to deliver his passport to the Administrators' office. Mr Symes refused to accept service of that order when it was served on him by Mrs Eyre a partner in the Administrators' solicitors, Lane & Partners, at Heathrow Airport. Such service took place on 29th April 2003, but Mr Symes did in fact attend court on 30th April without the

benefit of legal representation. He was ordered to produce his passport and the consequences of a failure to do so were explained to him by me. During the afternoon of 30th April a Richard Slade a partner in Bracher Rawlins introduced himself to Mr Symes and secured his retainer by Mr Symes. There were adjournments until 2nd May 2003, when Mr Symes was represented by Mr Harold Burnett QC, who represented him throughout the hearing.

37. At that resumed hearing, Mr Symes swore further affidavits admitting he had been in contempt of court in swearing and causing to be sworn affidavits that were misleading. The misleading nature of the affidavits according to Mr Symes case was the failure to reveal that RSL only had a third share in the Statue and was only selling a third share, i.e. that the breaches were technical.

38. At the resumed hearing on 2nd May 2003, Mr Burnett QC produced a letter written by Dr Roberts, Mr Symes' GP since 1968. Mr Burnett QC said this, when the letter was produced (2/5/03 pages 3/4):- "*The first matter, which came up is that you have had an opportunity to glance at least at that medical report put in on his behalf. My Lord, without going into it in detail, it must be clear that with respect the contents of that medical report are not totally irrelevant to the pattern of this case. There must, and I say this with great caution, because I have no evidence for it at the moment, be some doubt as to Mr Symes ability fully to take part in the case, but we will put that aside for one moment*".

39. Mr Burnett QC put it aside to such an extent that it was not referred to ever again during the subsequent hearing. It was never suggested that the trial should be adjourned pending an investigation as to Mr Symes' capacity and whilst the subsequent appeal against the adverse decision went to extensive grounds beyond a passing reference in ground 4 of the Appeal Notice "*the judge also entirely failed to take into account the effect which the First Defendant's medical condition had on his memory*".

40. Despite a lengthy skeleton argument in the support of the Notice of Appeal, no mention was made of this point there.

41. At the trial of the issue Mr Symes gave evidence over two days and was extensively cross-examined. I determined that the Statue belonged to RSL 100%. Mr Symes appealed that decision unsuccessfully. In respect of his admitted contempts, I sentenced him to a period of imprisonment for 12 months, suspended so long as he complied with undertakings, which he gave to the court as set out in the Order dated 22nd May 2003.

42. Thereafter a dispute arose between the Administrators and Mr Symes as to whether he had complied with the undertakings and was therefore entitled to have the suspension lifted and/or his passport returned. On 2nd July 2003, I made an order setting a timetable for that issue to be determined on 22nd August 2003.

43. Before that hearing the Administrators believed that they had further evidence of breaches of the undertakings and evidence of a sale by Mr Symes of a further statue ("the Akhenaten Statue") to the same Sheik. On 29th August 2003, I heard various applications namely that I recuse myself from the application, that Mr Symes be not cross-examined on his affidavits and the Administrators' application for Mr Symes' committal to prison or such other relief as may be asked as set out in their Re-Amended Application and Points of Claim dated 11th August 2003. I set a timetable for hearing of the Issue.

44. Mr Symes appealed the determinations in the May trial and the decision I made on 29th August 2003. The appeal against the rulings in the May trial were dismissed. In respect of the rulings on 29th August 2003, the Court of Appeal partly allowed an appeal by giving directions to ensure that the Issue as to breach of orders and any contempt application were dealt with on a separate basis to enable Mr Symes in the later to exercise his rights not to give evidence if he so wished. To that limited extent his appeal was successful.

AN APPARENT SENSE OF UNEASE

45. As I said, Dr Roberts, Mr Symes' GP wrote to Bracher Rawlins on 1st May 2003. That referred to Mr Symes' major illness, which has lead to the present enquiry, namely that in December 1979 he was taken unconscious to St Stephens Hospital and found to have spontaneous intra-cerebral bilateral frontal haematomas. That illness is the platform for the evidence as to Mr Symes' lack of capacity.

However, Dr Roberts' letter did not so suggest. The letter went on:- *"These were drained by Mr Crockard at Wellington Hospital and he made a good recovery apart from an alteration in his judgment and the on set of a friendly rather supercilious air…".*

46. Later on in the letter he said:- *"He made a remarkable recovery, having been originally unconscious for ten days. He slowly returned to a reasonably normal life. [But] subsequently he was vague and indecisive, lacked inhibition, showed anti-social behaviour, had impaired memory and on occasions did bizarre things such as buying five hats in a hat shop*".

47. He also said that he had told Mr Symes that he would never be able to conduct a business at the level he had previously achieved, as he was showing signs of frontal lobe impairment. However, Dr Roberts did note:- *"… Improvement in his dealing abilities was a surprise, although it was quite expected that he would be unable to manage the broader aspects of his business. To my knowledge this condition has not improved over subsequent years*".

48. He concluded that Mr Symes was as disabled as much as anyone, who for example has broken a limb.

49. That letter did not excite Mr Slade nor Mr Burnett QC, beyond its brief mention to me in court on 2nd May 2003.

50. After the judgment was delivered Dr Roberts wrote a further letter to Bracher Rawlins dated 2nd June 2003. He there said, having read the judgment (although confessing it was not his field) he felt he must make the point that there are some twenty occasions where Mr Symes' veracity was doubted, but that it was quite clear, medically, that he was totally unable to comprehend social, business and financial situations and their consequences. He concluded that the vagueness and inability to see the consequence of his actions, as allegedly found by me to be incredible, is no surprise, because it was symptomatic of "frontal lobe syndrome".

51. This letter too did not excite Mr Slade nor Mr Burnett QC, because they made no use of the letter whatsoever, nor (for example) was any application made to review the trial on the hearings that took place before me in July and August. Nor as I have said did it feature in the initial presentation to the Court of Appeal.

52. Mr Slade, however, had a unique opportunity to view Mr Symes. On 15th September 2003, Mr Slade swore an affidavit, which had been prepared on 22nd August 2003 (for use in the hearings before me in that month). In paragraph 26 he referred to paragraphs 41 – 45 of Mr Symes twenty-fifth affidavit. He said:- *"I have become extremely concerned by Mr Symes state of health in recent weeks. It seems to me, though I am no expert that it has deteriorated markedly. … it is also true that, while he had been in the office most of the day, almost every day since May, 6-8 hours each day, in the last week, he has been able to concentrate sufficiently to give me instructions only for about an hour a day. On Monday this week there was one occasions when he sat in front of me and appeared virtually catatonic he starred fixedly ahead and seemed not to hear my questions or to be able to speak. He shook. This lasted for several minutes*."

53. He sought an opportunity prior to the consideration of the adjourned applications to consult a neurologist and to have Dr Roberts present in court.

54. Mr Slade expanded on that at the trial of the Issue (day 2 page 12). There he said that the idea of consulting Dr Roberts was Mr Symes' idea. He formed the view that there was nothing wrong medically or mentally with Mr Symes and that he was able to instruct both him and counsel. He had of course seen Mr Symes daily for nearly three months. He was therefore uniquely in a position to provide factual evidence as to Mr Symes' performance. Mr Slade may not be qualified (a point to which I shall return later in this Judgment), but he is an experienced litigator. He was therefore in my judgment (in accordance with the observations of the Court of Appeal in ***Masterman*** set out above) able to provide a very telling piece of evidence as to Mr Symes' capacity. As I have said, Mr Slade's evidence is, despite the two warning shots from Dr Roberts, that he formed the view that there was nothing wrong with him mentally or medically, but that he formed the view that Mr Symes was (like many people faced with litigation of this nature, which appears to be going badly for him) becoming depressed. Mr Slade acknowledged that the result of the reports of Dr Zamar were a complete

surprise to him. The primary finding of that report was that Mr Symes was at the time of the making of the report ***and had been since December 1979*** been incapable of managing his affairs.

55. As a result of these concerns, as identified in Mr Slade's affidavit, Mr Symes had an assessment on 24th September 2003 for a neuropsychological report by Dr Julia Morris, consultant clinical psychologist. He was referred to her by Dr Zamar. The brief report produced by Dr Morris showed that on the Weschler Adult Intelligence scale, Mr Symes verbal IQ was 124 (average 100) and his performance IQ was 111. He demonstrated very poor immediate recall, good copying design, good delayed recall, but performed very badly on a test of verbal memory. Equally, he performed poorly on new learning tests and on the cognitive estimation test.

56. Dr Morris explained her report. She expressed the view that Mr Symes was a very intelligent man who now clearly had a poor short term memory for verbal material and that this was linked to a decrease in his ability to learn new material. She expressed the opinion that he suffered from periods of disorientation and suffered from clinical depression and high levels of anxiety. She made recommendation about his life style, living and the like. This represented her total examination of Mr Symes. Although she produced a later report dated 24th January that was an expansion of the existing report.

57. Significantly, she conducted no tests to examine whether or not Mr Symes was genuinely participating in the exercises. She was provided with no background material (thus she had no information about his lifestyle and how people had perceived him in the 24 years since his strokes). She had no access to the large amount of solicitor/client material subsequently produced and somewhat surprisingly, no one told her that Mr Symes had ***already given evidence for a number of days in May***. The report is plainly addressed to dealing with Mr Symes as she found him and giving advise as to how his lifestyle should address his perceived illness. It was not a report assessing his ability to participate in litigation, whether as instructing client or in a lesser way such as giving evidence and being cross-examined. Thus her report does not in my view clearly address the Issue and should be considered in that light.

58. Dr Kingsley also produced a report on 25th September 2003. This indicated the damage sustained in 1979 effectively, by Mr Symes, by taking MRI head scans. This was confirmed by a report of the same date by Dr Bomanji of the Institute of Nuclear Medicine UCL. I stress at this stage that nobody disputes that Mr Symes had either a stroke or a series of strokes, which damaged his frontal lobe. Such physical damage is irreversible. The dispute between the experts is as to the effect of that damage on his mental capacity.

59. On the basis of that material and an examination of him on 16th September 2003 for just over an hour, Dr Zamar produced a report dated 26th October 2003. The material available to Dr Zamar is very slender. First, he refers to his examination. Second, he refers to repeated discussions with Dr Roberts (although the latter denied there were any such discussions). In that context Dr Zamar kept no notes of any of the discussions and revealed the extent of the discussions only in piecemeal during cross-examination. I do not think any significant discussions took place between Dr Roberts and Dr Zamar as he suggested. He also relied on the MRI scan and the brain scan to which I have referred, Dr Morris's assessment, a newspaper article from the Daily Telegraph dated 31st July 2003 and Mr Symes' medical notes from Dr Roberts' office. He expressly referred to the fact that he did not have any of the evidence about the trial.

60. He was provided with a letter of instruction from Mr Slade from which he may well have extracted some of the factual information, although interestingly he records on page 1 of his report, the strokes as having occurred in 1982, but he himself makes mistakes because later on he referred to the blood clot as having been sustained in 1980 and later in 1981 (pages 4 and 5).

61. He performed a number of tests which are referred to in his report and as a result of that evidence expressed the view that "***my recommendations to the court are the following:-***

i) Mr Symes is not fit to provide evidence, go through cross-examination, or give reliable accounts about past, present and future events.

ii) Mr Symes is unable to manage his own affairs, including his medical care and I recommend the Court of Protection proceedings ought to be considered.

Recommendations

With regards to giving instruction in complicated litigation, Mr Symes:-

i) Does understand that he has a problem in respect of which he needs advice;

ii) He is not able to instruct the advisor with sufficient clarity to enable him to understand the problem and advise appropriately.

iii) He is not able to understand the advice and make decisions or give effect to the advice received."

62. That was a quite staggering clinical conclusion. All the experts are agreed that if Mr Symes lacks capacity it stems from the strokes he had in late 1979. His position has neither improved nor worsened (apart from a relatively short period of recuperation after the strokes) since the early 1980's. Dr Zamar's conclusion therefore is that in effect contrary to Dr Roberts (who was his GP for the entirety of that period) all the evidence of his friends and professional advisers, that Mr Symes has been incapable of managing his own affairs for some twenty-four and a half years.

63. In respect of the litigation, the consequences are potentially severe. First, it would mean that the trial that took place in May 2003 would have to be reheard (if possible). It might mean that the orders made as a result of that trial (including the Court of Appeal dismissal of Mr Symes' Appeal) would have to be set aside. It would mean that the Bankruptcy Order made against him in March 2003 would be set aside and the default judgment in April 2003, would similarly be set aside. Finally, in the context of the litigation, all of the 40 orders or so, to which I have made reference, would have to be set aside, and in effect the Administrators would have to commence their action again.

64. It would mean theoretically, every transaction Mr Symes has carried out in the last 24 years is capable of being set aside because he lacked capacity to understand any such transactions.

65. The consequence to the solicitors is equally severe. By the application of the decision in ***Yonge –v- Toynbee [1910] 1 KB 215*** all of the solicitors retained by Mr Symes would be in breach of their warranty of authority, that they were authorised to act on his behalf vis-à-vis the Claimants. That would mean that they would be liable to pay all of the Administrators' costs incurred in this action. Such costs are now approaching £7 million. The Administrators in the light of the stance taken by Mr Slade on behalf of Mr Symes have intimated claims on that basis against all of Mr Symes' former solicitors, including Mr Slade. The claims against such solicitors were initially joined in the Issue. However, to save costs and time any claims against the solicitors only arise on further consideration if the answers to any of the questions in the Issue is affirmative as to Mr Symes' lack of capacity. As appears in this Judgment, six of Mr Symes former solicitors from Baker & MacKenzie, Peters & Peters, and Mr Slade gave evidence as to their understanding of Mr Symes' ability to participate in the litigation. No solicitor from Lovells was called to give evidence, so I have no evidence before me as to their views as to his ability to participate fully in the litigation.

66. I will refer to the evidence of these solicitors further in this Judgment, but at this stage, I should observe that they were all unanimous in their belief that Mr Symes was able fully to participate in the litigation, give instructions, comment on instructions, understand the issues and swear affidavits. I stress that no solicitor gave privileged evidence because Mr Symes at this stage did not waive privilege (he was not participating in the Issue in any way). Their evidence was therefore based on their assessment of his demeanour and performance. They all of course acknowledged that at times Mr Symes quite understandably was under stress (see Mr Slade's evidence, for example). They were all and are experienced commercial solicitors involved in "heavy" litigation. They are well aware of the stresses and strains that such litigation causes clients. Therefore they were all well aware of the need to be alert to that and address it. They might not be trained observers from a medical point of view, but they are, in my judgment, trained observers in the environment/area in which they operate. As I have said, their evidence is not conclusive, but it is significant. All the experts agreed with that save Dr Zamar. He alone expressed the view that their evidence was of no value because they were not trained to perceive the lobal damage sustained by Mr Symes. This with respect to Dr Zamar is one of the many errors he made in his evidence. There is no dispute that Mr Symes suffered frontal lobe

damage. The question however, is what ***impact*** that damage had on his ability to manage his affairs and to participate in the litigation. There is absolutely no reason why people who are accustomed to assessing witnesses being alert to the stresses of litigation are not in a position to see whether or not Mr Symes for example is able to understand instructions, to participate in instructions, give evidence in affidavit and witness statement form which he understands and to perform as a live witness and be subjected to cross-examination. This is a process of evaluation, which occurs in all cases for all witnesses. There is nothing in Mr Symes' frontal lobe damage in my judgment, which deprives such witnesses of giving valuable evidence as to how Mr Symes conducted himself when they were in contact with him.

67. The same is true, in my judgment, when one looks at the evidence of friends and employees. It is equally true when one looks at documents in which Mr Symes had a role, i.e. commenting on his instructions to counsel, commenting on witness statements, giving detailed information and instructions to solicitors. As will be seen from this Judgment, there is a considerable amount of evidence which shows Mr Symes was apparently well able to fulfil all those tasks over the entirety of the period covered by his illness. There is almost a total lack of any evidence clearly pointing to the contrary.

THE COURT OF APPEAL

68. Mr Slade received Dr Zamar's report shortly before Mr Symes' appeal was due to take place. On 24th October 2003, he signed a witness statement drawing the reports to the attention of the Court of Appeal and stating that he concluded there was a serious possibility that Mr Symes was or had become a patient with CPR 21.1 and that in effect the Court of Appeal should adjourn the appeal to enable him to find a litigation friend. He provided a further witness statement on 31st October 2003, seeking to explain to the Court of Appeal why he felt unable to act for Mr Symes further in the proceedings. Part of that was in respect of the medical evidence and part related to inconsistencies in evidence which Mr Symes had apparently given to him in respect of the sale of the Akhenaten Statue, which is, as I have said, not a point before me.

69. The Court of Appeal refused to allow an adjournment and heard the appeal on the basis of the written submissions that had already been provided. That appeal was substantially dismissed and the application of the Administrators was remitted back to me for further consideration in the light of the Court of Appeal's guidelines as to how the application based on breaches of orders as opposed to applications for contempt should be disposed of.

70. In view of the evidence it was clear however, that in accordance with the ***Masterman*** case the nettle of Mr Symes' capacity would have to be firmly grasped. In a series of orders culminating in the March Order referred to earlier in this Judgment, I set in train the determination of the Issue. Mr Slade participated as the solicitor for Mr Symes for limited purposes. Mr Symes has not given any instructions, has not responded to any correspondence and has taken no part in the Issue, as I have said. This caused me concern as it was essential, in my view, that the Issue should not be determined by default because Mr Symes does not participate, nor because any evidence supporting the view that he lacked capacity was not led. Ultimately, the Official Solicitor appeared through Mr Behrens, to ensure that that evidence was properly put before me. The Claimants caused the Official Solicitor to be funded by the request of the release of funds from Despina Papadimitriou, the sister of Christo. Accordingly, the Official Solicitor called a number of lay witnesses and three experts, namely Dr Morris (after a delay) Dr Zamar and Dr Green, all of whom had provided substantive reports in January 2004.

THE EVIDENCE OF MR SYMES' EXPERTS

71. The way in which the evidence was produced was unsatisfactory. Initially it was proposed only to call Dr Zamar and Dr Green. When I pointed out that Dr Morris's report was relied upon by Dr Zamar Mr Behrens made enquiries and Dr Morris was produced to give evidence.

72. The Administrators had obtained (quite properly) a power of attorney from Mr Symes. Using that power of attorney they had obtained access to files from solicitors who had been instructed by Mr Symes between 1977 and 2001. No less than 45 separate items were disclosed. These ranged from the

purchase of properties to Mr Symes' divorce. They covered periods before and after the illness so they make for good comparison as to how he performed both before and afterwards. Further areas included disputes over properties and sales of statues, tax advice, criminal proceedings in relation to certain Italian sculptures and insurance claims. Messrs Eversheds were instructed in the period 1992 through 2001 extensively in relation to financial aspects of the antiquities business. It is plain from an examination of that material (which I do not propose to set out extensively in this Judgment) that Mr Symes apparently was able to understand fully the nature of the disputes in each case, give and receive detailed instructions, swear affidavits, which he clearly apparently understood, offer alterations to the affidavits, instructions to counsel (including correcting errors made by solicitors in draft instructions sent to him to consider), participate in conferences with counsel and in the preparation of instructions to counsel and make his own suggestions as to the preparation of the various cases. There was no discernible difference in his apparent ability to deal with issues before and after his illness.

73. The material was served on Mr Symes and Bracher Rawlins and is to be found in the 18th and 19th affidavits of Mrs Eyre, sworn on behalf of the Administrators on 26th February 2004 and 2nd April 2004 respectively. I was concerned to ensure that Mr Symes' Medical Experts saw that material well in advance of any hearing of the Issues. Accordingly, on 3rd March 2004, I directed the Administrator's solicitors, Messrs Lane & Partners, serve that material. It was sent to Bracher Rawlins and Mr Symes' Experts and was also sent to the Official Solicitor and Mr Symes. Such service was by letter dated 8th March 2004. Dr Zamar responded to that by his letter of 9th March 2004. He indicated that as he had not been paid he would not do any further work until he was paid. That might or might not be a reasonable stance at the time. I understand his fees were some £26,000.00, nearly 10 times those of the Administrators' comparable experts. It may be that the fees are justified, but it is difficult to see that justification at this point in time. I have, however, some sympathy with Dr Zamar in the sense that he was being required to do work without an instructing solicitor or client and therefore nobody to reimburse him for the time that he would spend. However, he had provided a report to the court and his duty as an expert to the court requires him (amongst other things) to correct or reconsider any report in the light of changed circumstances. He did not know whether his report would be used or how it would be used if it was used. It was therefore incumbent upon him (and Dr Green) if they were going to give evidence or going to permit their reports to remain as reports provided to the court to ensure that they read the material and satisfied themselves that that material did not lead to any change in the conclusions in their reports. They were aware there was to be a hearing because Lane & Partners told them expressly and also gave the then date (5th July 2004).

74. Lane & Partners replied on 9th March 2004, addressing the issues as to costs and pointing out the responsibility for costs was with Bracher Rawlins and not with the Administrators who were on the other side (save in one point, where I ordered the Administrators to fund the meeting of experts). They suggested that Dr Zamar should apply to Bracher Rawlins for payment of his past fees, as Bracher Rawlins had retained him.

75. That attracted a most extraordinary letter, which was signed by both Dr Zamar and Dr Green. The letter said that Mr de Walden's letter of 8th March was "***the most outrageous and unprofessional letter I have ever seen from a solicitor in my career***". The letter goes on to take objection to Lane & Partners drawing to his attention the apparent discrepancies as to the amount of the fees and indicating that "***if you wish me to proceed any further with documents you have sent me I will do it only on the following preconditions [they relate to payment of costs]***". The letter concluded "***I have discussed this matter with Dr Green and we have decided that neither he nor I will proceed unless the above points are met***". There was no further correspondence. Both Dr Zamar and Dr Green were aware from the correspondence the trial was originally fixed for 5th July and was later put back one week.

76. Dr Zamar never read the material before he went into the witness box but he still verified his two reports as expressing an honest professional opinion in accordance with his duties as an expert. He further confirmed that there was no need for him to change his repost. He thus initially gave evidence

before me, that in his professional opinion Mr Symes was incapable of managing his affairs in accordance with CPR 21.1.

77. When the material was put to him in cross-examination, he objected that he had not read it and was not in a position to deal with it. This was a serious failing on the part of Dr Zamar as an expert for the court. I do not see how he could have put forward any credible or proper evidence in accordance with his duties as identified in "***The Ikarian Reefer***" 2 [1993] Lloyds Reports 68 and CPR 35 without assessing this material. At the very least given the circumstances of its provision he ought to have considered it if only to disregard it (with a proper justification). In this context 35PD.1 1.6 requires an Expert if he changes his report to communicate that to the parties and "***when appropriate to the Court***". It was at all times open to Dr Zamar and Dr Green having considered the material to communicate to the Court if it was felt such evidence affected the conclusions in their reports. Neither did so. Both came to Court initially to uphold their Reports.

78. In the light of this failure to read the material I adjourned that aspect of his evidence to enable him to reassess his evidence in the light of that extra material. Having done so he withdrew his contention that Mr Symes had been a patient.

79. Dr Green suffered a similarly embarrassing dénouement. He too had not read the material, apart from a preliminary perusal. Unfortunately, his grandson had apparently removed it from his study and he had overlooked it. He read it shortly before he was due to give evidence. Having seen the documentation he too, unequivocally, withdrew his opinion as stated in his report that the answer to the question was he incapable of managing and administering his affairs specifically in litigation was "plainly yes".

80. That in effect put an end to the determination of Issue 1 in favour of Mr Symes, as Mr Behrens has properly acknowledged in his closing written submissions. It has arisen from an extreme stance taken by two experts on the basis of flimsy evidence. The consequences have been quite severe and it is a matter of regret that the experts so casually approached their duty given the fact that the material had been in their possession since early March but remained unread.

81. Equally, Dr Green accepted that the evidence of the solicitors and the other contemporary evidence of how Mr Symes conducted his affairs was vital evidence, which he had not considered.

82. Accordingly, the only issues that remain, are issues (2), (3) and (4). Those relate to his ability to participate in the proceedings, being able to give evidence orally or in writing and/or be cross-examined and whether or not he was incapable from fairly participating in the hearing commencing on 30th April 2003 and/or was not responsible by reason of such mental disorder for the swearing of affidavits and making of witness statements which lead to that hearing. That is a very different form of inquiry from Issue (1).

83. Further Mr Steinfeld QC in his closing submissions contended that with the failure of Mr Symes to establish any credible evidence in respect of Issue 1 there was no prospect of him challenging the impact of his illness on his evidence in the hearing before me commencing on 30th April 2003. This arose because, absent a finding in his favour on Issue (1), Mr Symes remains bankrupt and the default judgment remains in place. He thus has no locus to pursue a challenge of the determinations as that can only be done by the persons affected namely RSL (by its Liquidators), Mr Symes' Trustee in bankruptcy, Mr Domercq and Mrs Nussberger. None of them appealed and the Court of Appeal dismissed Mr Symes' appeal on that basis. That remains the position and there is no basis for interfering with the judgment absent a challenge by the affected parties.

84. Mr Behens was constrained to accept that was the correct analysis having reviewed the judgment of the Court of Appeal. I agree with the submission and accept it.

85. Further Mr Steinfeld QC submitted that with the failure to establish a case in favour of Mr Symes under Issue 1 it necessarily involves the determination of Issue 2 against him as if he had capacity to manage his affairs generally it meant that he also had the capacity to participate fairly in the Proceedings. Mr Behrens was once again constrained to acknowledge the force of this submission and I agree with it and accept it.

86. It follows that there is only one live issue namely Issue 3 in respect of his ability to give evidence and be cross examined. Issue 4 only remains live as regards the trial commencing on 30th April 2003 for the reasons I give below. There is once again no evidence as regards his ability to swear affidavits and make witness statements save Dr Zamar's insistence that the illness also tends to make people lie generally. I reject that evidence for reasons which I will set out in later parts of this judgment.

87. In case there is a belated application for the judgment to be reviewed by such parties it is in my view important that the evidence before me on Issue 4 is considered now.

88. I will now go on to consider the evidence. It fell into five categories, in my opinion. Those categories are:-
(1) Medical notes spanning the period of the illness.
(2) Evidence of lay people who had contact with Mr Symes (including for this purpose Dr Roberts).
(3) Documents in which Mr Symes had a role or was concerned.
(4) The evidence of his solicitors.
(5) The evidence of the Medical Experts (modified in the light of the concessions of Dr Zamar and Dr Green).

89. In that regard, despite the patent inadequacy of Dr Zamar's and Dr Green's evidence in relation to Issue (1), I do not for that reason alone reject their evidence on other remaining aspects in respect of Issues (3) and (4).

90. However, I do not see how if the material provided by Mrs Eyre's affidavits shows that Mr Symes did not lack capacity to manage his affairs that evidence does not have a similar impact on the remaining Issues where the standard required is a lower standard. Thus if the evidence shows he did not lack capacity it must surely show that he was able to deal with the others Issues as well. Dr Green conceded this in cross-examination; Dr Zamar persisted in his views. He was wrong to do so for the reasons which I set out further in this judgment.

MEDICAL NOTES

91. These comprise Dr Roberts' notes of his GP records attending on Mr Symes from 1969 through to January 2001. What is surprising about these notes is that (apart from an initial reference to the stroke and its immediate consequences) there is no pattern of Dr Roberts being concerned as to Mr Symes' mental capacities or ability to deal with things, despite the concerns expressed by him in the letters dated 1st May and 2 June 2004.

92. Mr Crockard, Mr Symes consultant neurosurgeon reported to Dr Roberts on a number of occasions. On 9th October 1980, for example, he wrote that Mr Symes (this is after his strokes) was "***mentally […] alert, showing signs of insight and incisive thinking which was certainly lacking at the last visit …***". On 22nd April 2002, he wrote saying that he saw Mr Symes and was delighted to see how well he looked. Apart from his physical fitness he was most impressed with his speedy reaction, and observed that he now appeared to have insight and knows when to stop dealing when he is tired and "***from my point of view, I do not think that there is any need see him again. I do not think he needs another scan and I am very glad that he has done so well***". Dr Zamar rejected that evidence as having any significance, saying "***A. neuro-surgeon. Well, a consultant neurosurgeon, your Lordship, is not when he said he made a full recovery, I mean, I would be curious to see, and that is the point that Dr Toone raised in the joint meeting, I would be curious to know under what test did he do to say full recovery***" (day 3 page 55). He persisted in this. When I put to him that it appeared that there was a consultant neurosurgeon who said he was mentally alert, showing signs of insight and incisive thinking in 1980, and suggested that it was very valuable evidence Dr Zamar's response was that you would expect some improvement, but it is not clear what tests Mr Crockard did, but certainly "***he may relate to someone who's potentially half dead with two strokes in the brain initially***". I observed to Dr Zamar that I thought that it was most unlikely that a competent neurosurgeon would describe somebody in that position as being mentally alert and incisive.

93. In my view, the evidence of Mr Crockard was very valuable evidence in relation to the remaining Issues. It was carried out by a consultant neurosurgeon and it was carried out at the time when Mr

Symes was recovering from his illness. If there had been any doubts about Mr Symes abilities, it is inconceivable in my opinion that Mr Crockard would have simply written, as he did in April 1982, that no further investigation was required. All the other experts (including Dr Green) were of the view that this was valuable evidence, and I agree with that. This too is a further example of the failure of Dr Zamar properly to understand his function and duties as an expert to the court.

94. In my judgment, as Mr Steinfeld QC for the Administrators put to him (but which he denied of course), Dr Zamar produced an over hasty extreme report in October 2003 and then thereafter instead of addressing the matter dispassionately and objectively looked for evidence to justify and support that conclusion rather than looking at evidence objectively with a view to a proper determination of the Issues. He was fixated with the view that Mr Symes had suffered severe frontal lobe damage and in effect such a person must inevitably lack capacity or be unable to participate in the trial. Faced with that firm belief, he looked for evidence to substantiate it rather than review the evidence as a whole, with a view to evaluating what was the correct answer to the questions posed by the Issue. In effect Dr Zamar rejected all of the above categories of evidence because (as we shall see) they did not accord with his opinion and in effect dismissed it all because it did not accord with his predetermined view of the consequences of such illness and in the light of the slender material upon which his Reports were based.

95. As I have said, apart from those matters there is no other evidence in Dr Roberts' notes, which suggests that any of the remaining Issues should be determined in favour of Mr Symes. The evidence, such as it is, is against that point.

LAY WITNESSES

96. I will recount in this part of my Judgment the evidence that they gave. When I come to deal with the Experts, I will deal with the Experts' opinion of the value of that evidence. As I have said earlier in the Judgment, for the purposes of the Issues Dr Roberts is a lay witness and not an Expert.

97. The significance of the evidence of non-expert lay people in my judgment is clear. One has to remember that these people viewed him over a period of some twenty-four years or more since his illness. Dr Leng called by the Administrators thought that the evidence "***speaks for itself and I think it is very important evidence***" (day 5 page 74, line 9). Dr Green was of the same opinion (day 5, page 144, line 24). Professor Trimble was of a similar view. Dr Zamar was on his own as dismissing this evidence. Whilst this is mostly of relevance in respect of Issue (1), it is also significant in relation to the remaining live Issues. If Mr Symes is able to deal with complicated business affairs, without any serious doubt about his ability so to do, it seems to me extremely likely that he will have no difficulty in dealing with giving evidence and cross-examined (subject to the natural pressures that fall upon ***any person*** in Mr Symes' position). I will now review the witnesses of the factual nature.

98. First there was Ms Chantal Sparwasser, who provided two affidavits, namely 10th May 2001 and 26th January 2004. The purpose of the first affidavit was to emphasize Mr Symes' role in an attempt to relegate Christo's role to that of an employee. If there had been any doubts on her part about Mr Symes having such a role, (in contrast to Christo) her evidence would have been thoroughly dishonest. She made it clear however, (see for example paragraph 9) that even after Mr Symes had his illness, Christo would still bring items to Mr Symes at his hospital bed to seek advice about purchasing them. Tellingly, she said this:- "***Robin would either agree or disagree, but his decision was final***"

Equally, in paragraph 14 she referred to Mr Symes' poor numeracy skills, which existed before and after the illness. Her relationship with him ran from 1971 through to 1995. She indicated that she understood that that might be connected with his serious illness, but she had no material for that statement on her part. It seems to me that her evidence shows, in her own words that "***[Mr Symes] was the principal, the obvious decision maker and the person to who both the client and Christo deferred in the decision making process***".

99. Mr Lowes' evidence was very significant. He worked at Sotheby's between 1978 and 1982. He was aware of Mr Symes' illness in 1979, but as a consequence of the success of the business Mr Symes

invited him in late 1982 when he was recovering from his illness to join his gallery as an administrator. He remained in that role until 2000. His evidence showed that Mr Symes remained fully able after his illness to participate fully in the running of the business. He made the decisions. He referred to two exhibitions, which were held after Christo's death, which were entirely organised by Mr Symes. He also commented in the trial on the fact that Mr Symes looked at all the paper work that he Mr Lowes did for the business. He looked at individual transactions and he understood the documents that he looked at and he would check the invoice always and the accuracy of the stock lists.

100. Dr Roberts was called as a factual witness, but I found his evidence to be unsatisfactory, for a number of reasons. First his medical notes disclosed no evidence showing he had any concerns whatsoever about Mr Symes ability. Second, he recounted matters, which he alleged were said to him by Mr Lowes, whereas, Mr Lowes said he never discussed Mr Symes with him. His memory was clearly affected. He was unable to give any clear evidence of a direct nature as to incidents which caused him to have concerns. He relied mostly on hearsay matters. There was a dispute as to the evidence between him and Mr Slade as to who initiated the contact with him and a dispute between him and Dr Zamar as to whether or not any conversations at all had taken place between them. In this one respect, I accept Dr Roberts' evidence and reject Dr Zamar's. If any detailed conversations had taken place as alleged by Dr Zamar, which he thought were significant for his diagnosis, it is plain that it would have been incumbent upon him to prepare notes of such discussions and incorporate those in reports. No such notes were taken and Dr Zamar's recollection of these extensive discussions was vague in the extreme. Apart from that I base no weight on Dr Roberts' evidence.

101. Finally from the factual point of view was the evidence of Mr and Mrs Edelstein. I do not think the examples given by Mr Edelstein were of any significance in respect of any of the Issues. Mr Edelstien referred to two fantastic stories, which Mr Symes told him. The first of those was a story about him having been mugged in New York with someone who had run past him with a very sharp knife, which slashed through the fine jersey which he was wearing over a shirt, but did not damage the shirt. This Mr Edelstein thought was fantastic and unbelievable. I am not convinced that it is that fantastic. It is not inconceivable for that to happen in my view, with somebody skilled in the use of knives. The other clear possibility was that it was the kind of exaggeration that might take place when someone is recounting a story about someone for effect. It does not in my judgment amount to evidence, which shows Mr Symes' capacity was in any way affected. The second one was based on his (Mr Edelstein's) erroneous belief that Mr Symes was being hopelessly optimistic in 1999 or 2000 about buying an expensive nineteenth century house in Geneva. However, as Mr Steinfeld QC pointed out in cross examination, this was by no means farcical, because the Chelsea house was sold for US$10 million and at that time Mr Symes had every confidence in believing that the proceeds of sale of that property would be re-invested in another property in Geneva, if he so wished it. So there is nothing in Mr Edelstein's evidence. Equally, Mrs Edelstein, in my view, gave no evidence to assist me. She seemed openly determined to support Mr Symes, and thereby lacked objectivity, he being a close friend of his.

102. Taking the evidence of the lay people as a whole, the plain and obvious conclusion to be drawn from them (save where I have rejected them as set out above) is that there was clear evidence that in the decades following his illness, Mr Symes was able to participate fully in a complicated and successful and extensive business. The evidence shows that none of these people really thought his illness affected him (apart from his personality) in relation to his business affairs, except to make him (apparently) a more successful negotiator, because he became more bold. None of this shows that he is incapable of giving evidence and being cross-examined.

103. I go no now to consider the third aspect, namely the documentary evidence referred to in Mrs Eyre's two affidavits. A perusal of all the documents shows Mr Symes had outwardly a complete understanding of everything in which he was involved. In particular, for example, he participated fully in a claim against the estate of the late Gawain McKinley from 1996, which involved him considering and sending detailed instructions to Eversheds, participating in a 45 minute telephone

conversation with Miss Geraldine Andrews of counsel, participating in drafting instructions and providing hand written comments on those instructions and finally a detailed response from an hotel where he was staying at the time to Mr Alec Haydon of counsel raising a number of detailed questions regarding the intended claim.

104. In respect of a claim brought by a Mr John Elliott, both he and Christo attended a conference with Mr Clive Freedman, participated in drafting an affidavit, made comments on the skeleton argument and took part in a telephone consultation with Mr Daniel Serota QC, regarding a possible appeal.

105. I accept Mr Steinfeld QC's submission that these documents provide unanswerable evidence that Mr Symes appeared to be fully capable of managing his affairs generally between 1990 and 2001, and was capable of managing litigation. It is fair to say that in none of the cases did Mr Symes give evidence and that might be a different issue. However, given the complexity of the matters in respect of which he was involved and his clear ability apparently to understand and respond, there is nothing to suggest he would be particularly in difficulties giving evidence and being cross-examined in any way more than any person would be faced with the stress of litigation of this type.

106. I go now to consider the evidence of all of the former solicitors. I have already commented that Mr Slade had a particularly valuable insight having been constantly in attendance with Mr Symes for nearly three months. At no time did he consider that Mr Symes was unable to give evidence and be cross-examined by reason of his existing illnesses. It is true (as his affidavit dated 22nd August 2003 shows) that Mr Slade thought towards the end that depression was beginning to overwhelm Mr Symes and that might affect his evidence. Against that Mr Slade and Mr Harold Burnett QC of course represented Mr Symes when he was giving evidence and cross-examined. Apart from the opening reference to Dr Roberts' letter of 1st May 2003, at no time during the trial did Mr Burnett QC intervene to protect Mr Symes on the basis that he was having difficulty in dealing with questions and that his evidence might be affected because of his illness. There were occasions when Mr Symes said he was becoming a little tired (when a short break took place). There were other occasions (identified by Mr Behrens in his closing submissions) where Mr Symes expressed a view about being confused.

107. There are two points to note about the examples identified by Mr Behrens. First none of them was identified by Dr Zamar despite the fact that he apparently read the entirety of the transcripts of the hearings. It follows therefore that Dr Zamar did not consider those matters as being evidence showing Mr Symes was being affected by his illness in his ability to give evidence and being cross-examined. I agree with that negative analysis by Dr Zamar. It seems to me plain that there were instances of the type of difficulties all witnesses come under at one stage or another during the course of giving evidence. A court (and in addition of course a witness' legal advisors) are always alert to ensure that a witness dose not become overborne by the pressure of cross-examination for long periods. It is secondly significant that the very experienced legal team, which represented Mr Symes at the hearing, never thought that his evidence was so affected. That remained the position even after Dr Roberts' letter of 2nd June 2003, as I have already observed.

108. Third, one had to look at the transcript as a whole. Mr Symes was cross-examined over a period of two days (not full days). During that period, he was asked many questions and he answered them. The answers might not have been satisfactory (as regards credibility), but there is nothing in the transcripts which suggests that he had difficulty by reason of his illness. As the experts called by the Administrators showed in their evidence (see below) they would have expected there to be a significant number of instances of confused answers and misunderstandings if the illness was having an impact. The affected number identified by Dr Zamar, for example, was no more than 8 over this lengthy period of cross-examination. It seems to me inevitable that those answers identified by Dr Zamar in not one case can be ***on the balance of probabilities exclusively*** be shown to be caused by his illness as opposed to other possible explanations for them.

109. The other solicitors' evidence was equally firm, although it is true to say that their dealings with Mr Symes were in relation to taking instructions, preparing affidavits and witness statements (his ability in that regard is no longer in question in any event). Nevertheless, all of the solicitors of course would be mindful of the fact that if the case did not compromise, Mr Symes would have to give evidence and

be cross-examined. None of them entertained the slightest doubt as to his ability to go through that ordeal. They were all experienced solicitors and well aware of the difficulties that such an ordeal poses for any client. One of the important roles of experienced solicitors and counsel in litigation like this is to be alert to that possibility so as to ensure that if the matter proceeds to trial their clients have a fair opportunity to present their case.

110. In the one instance, namely the hearing last year, those representatives, as I have said did not think Mr Symes, during the course of giving his evidence and being cross-examined, was under any difficulties.

CONCLUSION AS REGARDS NON-MEDICAL EVIDENCE

111. In my view, all of the evidence from non-medical sources points unhesitatingly one way, and that is that Mr Symes will not by reason of his illness be unable to give evidence and/or be cross-examined at any subsequent hearing. The evidence also shows that he was not so disabled in the hearing last year and the evidence of the hearing last year (i.e. the transcript and the non action on the part of his lawyers) shows that on the occasion when he did give evidence he was not prevented from presenting his case fairly, as regards giving evidence and being cross-examined by reason of any illness he might be under.

112. In this context I should say that I reject Dr Zamar's evidence that Mr Symes has a propensity to lie by reason of his illness. I prefer unhesitatingly the very extensive expertise of Professor Trimble in this area and his firm evidence that the illness itself does not mean a person suffering from that illness will lie, so that he can have no responsibility for the lies. I accept his evidence (and the evidence of all the other experts save Dr Zamar) that the illness might cause someone to act impulsively and in an over hasty way. Thus in fact a person suffering from such an illness might lie badly in the sense that (adopting Dr Zamar's words) his responses were unplanned so that he gives the game away more easily than someone suffering an illness. That is unfortunate, but it is not a reason for such a person not to give evidence and be cross-examined. Allowances can be made, but such an allowance should not extend to giving him time to provide a better quality form of lying.

113. All of the above evidence, as I have said, shows that Mr Symes is able to give evidence and be cross-examined. I reject, as I have said Dr Zamar's professional opinion that no weight should be given to that evidence. Given the long period over which it is suggested Mr Symes was affect by the illness, such evidence is vital.

MEDICAL EVIDENCE

114. I go on now to consider the medical evidence.

115. The Official Solicitor called Dr Zamar, Dr Green and Dr Morris.

116. Dr Morris's evidence showed that Mr Symes performed badly in response to various tests that she put to him. However, that has to be taken in the context in which the tests are administered. I have no doubt that Mr Symes was under considerable pressure in September 2003. I have also no doubt that there is a possibility that Mr Symes was performing badly because it suited him so to do. I do not make any decision in that regard, but it has to be borne in mind that Dr Morris performed no tests to evaluate whether or not he was simulating a bad performance. It is fair to say that Dr Leng, a very experienced clinical psychologist did perform simulation tests on Mr Symes. In his report he refers to tests which he applied (see paragraph 7.2.23) which show that Mr Symes performance was as expected, i.e. not so poor as to question the genuineness of his performance. Against that he also carried out another test (see paragraph 7.2.36) which showed that Mr Symes was just within the non-valid range, which suggested that there might be some exaggeration, but Dr Leng fairly conceded in that paragraph that these kind of tests had only been standardised on normal individuals and not on patients with frontal lobe damage. Such patients, he expressed the view, infrequently fail due to the fact that factors such as poor concentration, lack of insight or poor judgment. It seems to me that I should prefer the conclusions of Dr Leng to those of Dr Morris, because his reports were for the specific question of the Issue and covered far more material. Dr Morris, as I said, had no access to the court material, whereas Dr Leng not only had access to the court material, he also had access to the transcripts of the trial that took place last year. His conclusion in that regard (paragraph 4.6) is as

follows:- *"He appears to understand questions well enough, and to respond to these, often in considerable detail. These documents do not give the impression of the sort of concrete thinking, incoherent, rambling or confused responding one might expect with significant frontal lobe dysfunction, disordering their thinking and leading to them being placed under the Court of Protection* ".

117. That observation seems to me equally apposite to the consideration of the ability of Mr Symes to give evidence and be cross-examined. It is quite clear that the testing results of Mr Symes' mental abilities showed that he appears to have impairment of his short-term memory and has some difficulty in initially assimilating matters. However, the evidence overall shows that he has above average intelligence, has a good memory beyond the short-term period (which is measured in minutes) and his reasoning processes seem unimpaired. There was erraticism in his performance to the test administered variously by Dr Morris, Dr Zamar, Dr Leng and Dr Toone, but only Dr Zamar thought he could not give evidence and be cross examined. None of the others (including significantly Dr Green and Dr Morris) thought Mr Symes could not give evidence and be cross-examined. They suggested various matters to put by protection such as breaks, simple questions and watching to see if his answers were becoming confused so he might not be doing himself justice. Professor Trimble, however, was quite adamant that Mr Symes would be able to give evidence without any such checks and balances in any event.

118. In respect of the tests, the most significant observation in my judgment, is that of Dr Leng's in paragraph 84:- *"On the basis that the best level of performance provided the actual level of ability and that psychological test results if they are to be accepted as valid must be so ecologically, which is to say accurately reflect the patients true level of ability, then it would seem that today's test performance has rather underestimated the likely level of capability here. Of course Mr Symes reports feeling depressed, and under a lot of stress, due to all the legal proceedings and as noted above all of this may well have served to impair his ability to do his best*".

119. He amplified this in giving evidence. His point is that good performance cannot be faked, bad performance can. Therefore Mr Symes should be assessed by his best performance on the wide range of tests administered by the various experts. That seems to me to be logically compelling and I accept it. That to my mind is why all the experts (save Dr Zamar) concluded that there were no absolute difficulties, which would prevent Mr Symes giving evidence and being cross-examined. The reality is that the best evidence is how he performed last year. Only Dr Zamar, on analysing the transcript, thought he performed badly. Dr Leng, as I have said, and the other experts thought that he had performed in a way unaffected by his illness.

120. It is interesting therefore to look at the evidence which Dr Zamar relies upon in support of his belief that Mr Symes performed badly in the hearing last year. I preface that by observing that once again Dr Green, having considered the transcripts, thought they were not supportive of a view that they showed an inability on the part of Mr Symes to give evidence and be cross-examined.

121. In Dr Zamar's second report dated 28th January 2004, he instances ten examples which "***in my opinion, indicate that Mr Symes was not displaying an "extremely detailed knowledge and understanding of the issues raised***"". He put this in his report as a counter to Dr Toone's opinion who had suggested in his report that having examined the transcripts he appeared to understand very well the questions that were being asked of him and replied in a manner that suggested that he had a good command of the subject, good memory for detail, and an ability to express himself so that the court could understand.

122. I will deal with the ten examples in full because this is, in reality, the only evidence Dr Zamar relies upon for his contention that Mr Symes by reason of his illness should not give evidence nor be cross-examined.

123. The examples:-

(1) "Page 29, line 25:Question: I want to ask you about that document first of all is, do I understand it to be the case that this document records the terms upon which the granodiorite was held? Mr Symes' reply was "I think that's been put into the affidavit that I have given, hasn't it, I think?""

I personally do not find this to be significant. It was the second question asked of him by Mr Steinfeld QC in cross-examination, and he is in my view simply parrying Mr Steinfeld QC and reminding him that he has already dealt with it in an affidavit. It is to my mind of no significance.

(2) "Pages 31 line 12 to 13: In answer it is said Mr Symes shows either a clear failure to understand the role of directors of limited companies or the answer is so chaotic or unthought of to the point were it sounds as an unreasonable explanation trying to cover up for the answers which proceeded it."

I do not see that this answer is chaotic or unthought; or an unreasonable explanation. In the case of many private companies where individuals own the entire shareholding, it is regularly perceived by them that the company and themselves are indistinguishable. In practice, there is little of substance to complain about in that regard where the company is solvent, properly controlled by the director and has no (for example) different creditors. I do not see Mr Symes' answer as being of significance as contended for by Dr Zamar.

(3) "The interaction in page 41 line 18 and line 14 in page 42 shows that Mr Symes was unable to understand the question."

It is possible that this shows evidence of confusion. It is equally explicable however, on the basis that Mr Symes was facing an awkward question, which affected his credibility, and he could not answer it truthfully without damaging his case. He therefore appeared to be confused and thus sought to evade the question in the hope that would see off the question. This in my judgment is also not significant except to show Mr Symes is well able to deal with cross-examination and seek to evade giving inconvenient but truthful answers.

(4) "Page 55 line 1-21 clearly contradicts his affidavit that the sale was agreed with all parties (16th affidavit dated 2.5.03 paragraph 7). In my view it shows very poor planning."

Once again, this is Mr Symes being faced with a difficulty. All the experts (including Dr Zamar) acknowledged that there was no inability in respect of preparing affidavits and witness statements. He is not under immediate pressure and he has time to prepare them. Indeed the fact is that contradictory affidavits were sworn by him. It is therefore clear that in some way he was lying. Thus the original affidavit giving details of the sale cannot be true in the light of the affidavit sworn in 2003 correcting it. Conversely, if those affidavits are untrue, then that can only be on the basis that the earlier affidavit is true. None of that can be affected by an illness (I having rejected Dr Zamars' voice crying in the wilderness in respect of the illness making someone lie, for which he is not responsible). This question, once again, is simply bringing home the truth of his lies. Dr Zamar's explanation that it shows poor planning does not advance the overall position. That simply means that he knows that he is in difficulties and has lied badly. It does not invalidate the cross-examination; it merely made it more hard for him to lie effectively.

(5) "Page 56-62 again Mr Symes shows very poor planning and very poor understanding of finances."

I do not think this shows very poor planning and understanding of finances affected by his illness. Mr Edelstein gave evidence of Mr Symes always being poor with figures, as did Mrs Sparwasser. When Mr Symes was interviewed by Doctor Toone (paragraph 62 of his report), he described how he would when at school score 98% on religious knowledge, but only 15 to 30 % for maths. He said he was accused by his teachers of only applying himself to things that he enjoyed. Mr Symes seems to me to be someone who is "poor on figures" generally, but not because of his illness. Even then that is not necessarily clearly the case. At that part of the same transcript (page 58) Mr Symes under the pressure of cross-examination by Mr Steinfeld QC, actually does a quite bit of anticipatory correction to his calculations to deal with the fact that the initial basis of the division does not add up. It is true to say, that at page 60, in response to a question from me, when I show that he has given a number of different answers to the US$100,000.00 to be deducted, he said that was due to his lack of arithmetical expertise. However, it seems to me that this is more probably because he has been caught out in a lie. Even if it is down to arithmetical expertise deficiency I do not see that that is as a result of the illness.

(6) "I feel the most important point of the whole cross-examination record is contained in his answer page 65 line 6-9. Mr Symes clearly states "it was US$4 million, I believe, was required, was it not, and the statue was not that much money. I am afraid from 1988 I do not know the answer to that". The Citibank letter, which was provided in the affidavit is dated 29 May 1997 and the document with the agreement over the ownership of the statue is dated 17 November 1998. I was surprised to find Mr Symes referring to the events occurring in 1988, as this is exactly the pathology Mr Symes suffers from as I explained in my previous report."

This is Dr Zamar's most significant point, which I find quite extraordinary. First the transcript might simply be incorrect. That is a possibility that Dr Zamar was forced to concede. It is significant that whilst everybody was looking at the document at the very time when the questioning is taking place he is not corrected by anyone. The significant point, as regards the people participating in the trial at that time was therefore either not spotted or was so trivial as not to be worth considering. Yet this is Dr Zamar's crucial point. There is nothing in it in my opinion.

(7) "Page 72 line 8 question: "Were you present when discussions took place"? Answer: "No but they would have been discussed in Greek and in French". I feel that if an assumption is made, it should be that the discussion was in French as I assume all three parties spoke French so there was no need to discuss matters in Greek."

This was a mistake by Dr Zamar, because he did not understand that Mrs Nussberger was of Greek birth and therefore would speak in Greek. This was despite the fact that her Greek nationality was referred to earlier on on the same page of the transcript. This is a classic example of Dr Zamar fishing for answers to support his case rather than providing objective evidence.

(8) "Page 76 line 20-21. Mr Symes was telling the Court what his solicitors were advising him/telling him and Mr Burnett intervened saying, "you are not required to tell us what your solicitors told you"."

The idea that a person might make a mistake as regards disclosing privilege material, because of an illness of the like of Mr Symes, is ridiculous in my opinion.

(9) "Page 88 line 15. Question: "Have you in fact checked the banking records of RSL …". Answer: "No indeed". Question: "…to see when it was up to (up to repaid)". Answer: "No I am not". I believe the answer should be been "No 1 have not", not "No I am not". This again shows that Mr Symes did not understand the question."

The most probable explanation for this is a typing transcript.

(10) "Line 9-14: The question was whether Mr Symes was doing nothing improper. Mr Symes answer "I sold Robin Symes Limited share of the statue for 1.6 million dollars that's correct". It is clear that the answer did not at all approach the substance of the question and Mr Steinfeld QC then asked him whether this was proper."

I do not see that this is evidence of lack of clarity. Mr Symes is trying to reinforce his false argument by repeating the mantra that he needs to put forward then that he is selling a one third share for RSL and not the whole interest in the Statue.

124. Those are the entirety of Dr Zamar's justifications for suggesting that Mr Symes' "***understanding of the questions is poor, his ability to plan answers according to his affidavit is poor, his ability to relate precisely to the time and events is poor (1988 when events occurred in 1997) …***".

125. Hardly surprisingly, all of the other experts who read the transcripts disagreed with him. I concur in their disagreement.

126. The only other matter of significance to Dr Zamar was the story concerning a mysterious lady, called Hersa Fdala. She was introduced by Mr Symes in affidavits to explain a sudden emergence of US$10 million into one of the company bank accounts in Gibraltar. The explanation is unusual, but it is significant that Mr Symes still maintains it is correct. He says that he met the lady at an exhibition at the British Museum and she sympathised with his difficulties, provided the US$10 million by transfer into his account and then disappeared from his life having sent a letter saying she could not have any

further contact with him. A one stage during the investigation, a woman was put forward at a meeting to his solicitors as being the woman in question. Dr Zamar (page 34 of his report) noted that the name Fdala bore a similarity in Arabic to garbage. This seemed to him to be so unlikely that the story was incredible. The difficulty that Dr Zamar had is that the word Fdala does exist as the proper name of people from the Middle East and is also the name of a town in Morocco. The name Hersa, whilst not known in Arabic, is a known name of Germanic origins. It is possible that a woman of Germanic origins married someone from the Middle East. I do not see that this evidence can be shown to be unequivocally, on a balance of probabilities as indicative of Mr Symes' illness causing him to lie. An equally plausible explanation is that he is lying in a clever way over a period of time through different affidavits to avoid having to reveal the source of the US$10 million. It is equally possible that the story is true. The evidence is thus not capable of being relied upon as showing Mr Symes is unable to give evidence and/or be cross-examined.

127. The other end of the spectrum was Professor Trimble. In his second report (volume 3 tab 14 page 286) where he said:- *"I do not see that Mr Symes is anything but capable of being cross-examined. I do not believe he has a mental illness, which would render the evidence he has given between April and May 2003 unreliable. I do not conclude that he has a mental illness which would have affected his ability to produce evidence between those dates. I see no reason why the situation would be any different in March 2002* ".

128. I found Professor Trimble, Dr Toone and Dr Leng to be impressive and knowledgeable witnesses. None of them had the difficulties, which faced Dr Zamar and Dr Green, of not considering all the relevant evidence. The latter, in the event fell in line with the evidence called by the Administrators and acknowledged Mr Symes was fit to give evidence and be cross-examined, perhaps with some precautionary protections (day 5 page 135-145).

129. Dr Zamar persisted in giving evidence and ambiguously. At some stages he said that Mr Symes' illness prevented him from giving evidence at all, at other occasions he stated that he might have cause for concerns and that the inability to give evidence was not necessarily absolute (see day 3 page 174, day 4 page 189).

130. Dr Morris also ultimately acknowledged that Mr Symes was able to give evidence (day 4 page 184).

131. These concerns seem to me to be nothing more than the kind of precautions a Court readily takes when anybody is giving evidence.

132. In my view, the evidence of all the other witnesses is to be preferred to that of Dr Zamar. His evidence was coloured by his lack of objectivity. This arose from his belief that Mr Symes' illness would have meant necessarily that Mr Symes was a patient and that therefore he was unable to give evidence and be cross-examined. This was his view, but it simply failed to be sustainable in the light of all the contemporary evidence to which I have referred in this Judgment. It is also at variance with all of the other experts and in reality it offends common sense. The idea that Mr Symes could operate in this business for decades and be subject to an illness, which had the impact that Dr Zamar has is preposterous.

133. Dr Zamar's dogged determination to defend his initial assessment led that to cloud all other possibilities and avoid dealing with evidence, which was inconvenient to his view. He regularly saw his position as being one which required him to ***argue his case rather than present evidence in an objective way for the Court to consider***. Thus the following exchange took place between Mr Steinfeld QC and Dr Zamar (day 4 page 69):-

"*Q. … All of this could have been saved, could it not Dr Zamar, if you have looked at [Mrs Eyre's] material, compliant with the your duty to the court. Having looked at it, come back and said I am no longer of the opinion that he lacks or has lacked mental capacity as defined in the Civil Procedure Rules? Do you think that is helpful to the court?*

A. I would have still come and argued the case that with regards to handling the litigation, I still have concerns, even if I read this material, which is the point I have raised."

134. He demonstrated there a willingness to come and argue a point. His argument however, is ambiguous. He referred there to having "***concerns***". He was asked to explain this by a question I put to him (day 4 page 72):-

"*Q. Yes, but it has got to be so impaired that he is incapable of giving instructions and understanding it. Are you saying now that you still believe he is incapable of giving and receiving instructions and advice on a case, incapable?*

A. With what happened with the fracture of the arm, I think if that is the way he understands the advice, yes he would be incapable.

Q. So your evidence is now based wholly on Dr Becket and the pirate looking scar, is that right?

A. No, not solely that. My view is based on tests, the way he understands my questions to him regarding his health, the way I saw he understood my advice to him with regards to the scar. With regards to business dealings, as I mentioned earlier, there are aspects that appear preserved. With regard to him understanding and retaining information that gives me concerns, but with regard to him.

Q. You keep saying give you concerns. I could be concerned about a lot of things, but it does not mean I cannot do it. I need to know whether you are saying he is incapable of giving instructions, understanding the case or whether you are merely concerned about his having difficulties dealing with it and whether that is capable of being addressed.

A. I try to answer your question your Lordship.

Q. You keep changing the wording.

A. No, in two limbs. I said when you mentioned to me that there are concerns, the court can address them, this is in the limb of giving instructions. But when we say giving evidence, I think he is incapable of giving evidence, but I think if the court makes provisions for him, instructing lawyers making sure he understands what they tell him, then the court can manage that. That is why I qualify the first limb by having concerns, and the second by, I don't think he is able to give evidence.

Q. So you now say that he can give and receive instructions provided, in effect, there is a regime in place so that everybody can be satisfied that he understands what is going on?

A. Yes, that is what I said earlier when Mr Steinfeld said that the giving evidence is a separate matter, I was trying to separate to the two points.

Q. So the only total incapacity issue now is the ability to give evidence, is that right?

A. Yes."

135. This inability to receive instructions properly is at variance with every other expert witness, as I have said. It is based on a false proposition by Dr Zamar that person suffering from the illness that affects Mr Symes have a propensity to thereby to lie of itself. I have already rejected that evidence. Ultimately, Dr Zamar acknowledged that witnesses suffering as Mr Symes does can lie because they are lying rather than lying because their illness makes them do so.

136. It follows from this analysis that it is necessary to see whether there is any evidence, which shows Mr Symes is incapable of giving evidence and being cross-examined by reason of his illness.

137. I have no hesitation in rejecting Dr Zamar's opinion that Mr Symes is so affected, because his opinion is unsupported by any independent professional evidence, is at variance with all the other experts, is at variance with the perception of Mr Symes by lay people, his former solicitors and the telling evidence of the 45 instructions he gave to solicitors and his performance in May 2003.

138. Having heard all the Experts, I am quite clear in my mind that the evidence of Professor Trimble provides the key issue. There is nothing, which actually prevents Mr Symes giving evidence and being cross-examined. He faces the pressure of giving evidence and being cross-examined like any other witness. The other experts gave indications as to how that ought to be considered, but in truth, they are no more than the normal protections that the Court would in build into giving of evidence and cross-examination in complicated issues where the evidence is likely to run over many days.

139. I repeat, the experienced lawyers representing him last year never thought he was having difficulties in dealing with the cross-examination, save in effect difficulties in dealing with questions because answering them truthfully was inconvenient.

CONCLUSION

140. I therefore conclude that Issue 3 ought to be determined on the basis that there is and has been no period in which Mr Symes has been unable to give evidence, either orally or in writing and/or be cross-examined.

141. I also determine that Mr Symes was not incapable by reason of any mental disorder from fairly participating in the hearing commencing on 30th April 2003 (the only live balance of Issue 4).

142. I determine that having regard to the evidence, which I have summarised earlier in this Judgment, which frankly overwhelms Dr Zamar's solitary opinion to the contrary.

143. As regards a further hearing, it seems to me one should be alert (as would be the position in every case of the nature and complexity of the present one) to ensure Mr Symes has a fair opportunity to present his case when giving evidence and cross-examined. That involves ensuring that the questions are fairly put and that he has reasonable breaks, so that he does not become over tired. I accept Mr Steinfeld QC's submission that it would not be appropriate to put a rigid mechanistic period breaks. The court, those representing Mr Symes and indeed counsel representing the Administrators will ensure that a fair balance is struck. In short there is therefore no reason why the adjourned hearing should not now proceed (Mr Behrens does not argue to the contrary) and I propose with the delivery of this Judgment to set a timetable to consider the early disposal of those matters (bearing in mind the observations of the Court of Appeal in that regard last year).

Mr A Steinfeld QC, Mr J Stephens and Miss J Chappell (instructed by Messrs Lane & Partners) for the Claimants
Mr J Behrens (instructed by Messrs Berwin Leighton Paisner) for The Official Solicitor as Advocate for the Court