



Case No: HC0001295

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20th November 2001

Before:

THE HONOURABLE MR JUSTICE PATTEN

PROFESSOR BRIAN CLARKE
(Executor of the Will of Francis Bacon)

Claimant

- and -

(1) MARLBOROUGH FINE ART (LONDON)
LIMITED

And

(2) MARLBOROUGH INTERNATIONAL FINE
ART ESTABLISHMENT

Defendants

MR. G. VOS QC Mr. D. Foxton and Mr. A. Robb (instructed by Freshfields Bruckhaus
Deringer for the Claimant)

MR. M. BRIGGS QC and Mr. T. Grant (instructed by Harbottle & Lewis for the First
Defendant)

MR. M. LYNDON-STANFORD QC and Mr. M.C. Rollason (instructed by Allen & Overy for
the Second Defendant)

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this
Judgment and that copies of this version as handed down may be treated as authentic.

The Hon. Mr. Justice Patten

Mr Justice Patten :

Permission to amend

1. This is an application by the Claimant in this action, Professor Brian Clarke, who is the executor of the will of the late Francis Bacon, for permission to make further amendments to the Particulars of Claim so as to introduce a plea of actual undue influence. The claim in its current form relies upon allegations of breach of fiduciary duty and presumed undue influence as the basis for seeking an account, compensation and other relief from the Defendant companies in respect of their dealings with the paintings produced by Francis Bacon from 1968 until his death in 1992. A similar claim is also made in respect of lithographs. In order to understand the nature of the amendments for which permission is sought and the basis upon which this application is opposed it is necessary for me to say something about the issues in the action more generally.
2. The action was commenced and the Particulars of Claim served in March 2000. It is not in dispute that although an artist since the late 1920's Bacon had by the 1950's enjoyed relatively little commercial success from his paintings. At that stage he was represented by the Hanover Gallery in London but his earnings were modest. It is alleged, for example, that in the period from April 1956 to October 1958 the proceeds of sales from his works totalled only some £1,725. In October 1958 Bacon left the Hanover Gallery and entered into an agreement with Marlborough Fine Arts Limited (referred to in the pleadings as Old Marlborough) for a period of 10 years from 1st November 1958 but subject to the ability of either party to determine it on notice in October 1963. The full terms of that agreement do not matter for the purposes of this application. It is enough to record that the agreement provided for the acquisition by Old Marlborough of a specified number of Bacon paintings during the subsistence of the agreement and also for the gallery to have the sole and exclusive right throughout the world to sell and authorise the sale of artistic works of any kind produced by Bacon and to make and/or sell and to authorise the making and/or sale of reproductions of such works. The 1958 agreement was in fact terminated by Bacon in 1963 so as to permit him to deal through a Swiss gallery but those arrangements never materialised and Bacon continued to sell his paintings through Old Marlborough. I should mention at this stage in this judgment that there is a real issue between the parties as to the meaning and effect of the 1958 agreement. It is relied upon by the Claimant as giving rise to a relationship of agency, fiduciary in nature, which in itself gave rise to an obligation on the part of Old Marlborough to account for their dealings with the relevant works of art. The Defendants contend that far from being agents for the onward sale of Bacon paintings Old Marlborough and its corporate successors were purchasers of those works of art from Bacon on an arms-length basis and subsequently disposed of the paintings to third party clients free from any obligations to the artist in respect of the value ultimately obtained. That is of course a matter for the trial and need not be considered further for the purposes of the present application. But on the Claimant's case the relationship of trust and confidence which is relied upon emanated from the arrangements made during the currency of the 1958 agreement.
3. In 1968 Old Marlborough ceased to trade and it was dissolved in 1971. Its business was taken over by the First Defendant to this action, Marlborough Fine Art (London) Limited which is commonly referred to as Marlborough UK. The Second Defendant,

Marlborough International Fine Art Establishment, is a Liechtenstein company under the same beneficial ownership and control as Marlborough UK. I shall refer to it as Marlborough Liechtenstein. It is alleged in the Particulars of Claim and not I think contested for the purposes of this application or perhaps at all that both Old Marlborough, Marlborough UK and Marlborough Liechtenstein were owned and run during the period relevant to this application by the same individuals. These were Mr. Frank Lloyd, his son Mr. Gilbert Lloyd, a Mr. Harry Fischer and the Duke of Beaufort. Mr. Fischer ceased to be a director of Marlborough UK in about 1970. Mr. Frank Lloyd died in 1998.

4. In the original version of the Particulars of Claim it was alleged that the 1958 agreement gave rise to fiduciary duties on the part of Old Marlborough and that an essentially contractual arrangement continued after the introduction of Marlborough UK in 1968 until Bacon's death in 1992. This contractual arrangement was said to comprise firstly an exclusive sales agency for the artist's works and secondly an agreement, made by conduct, under which Marlborough UK would provide various management and other services for Bacon. These contractual arrangements are said to have included a number of implied terms including a duty on the part of Marlborough UK to act in Bacon's best interests rather than their own, not to allow their duties to Bacon and their own interests to conflict and not to make a profit from their fiduciary position. In the alternative it was pleaded that even if no underlying relationship of agency or any contractual agreement for the provision of management services existed there was nonetheless a de facto relationship of trust and confidence subsisting at this time between Bacon and the Marlborough companies under which Bacon was "content to put himself entirely in Frank Lloyd's and/Miss Beston's and/or Marlborough UK's and/or Marlborough Liechtenstein's hands relying upon them to be loyal and to act in his best interests reposing trust and confidence in them".
5. In May this year I heard a contested application by the Claimant for permission to amend the Particulars of Claim so as to excise any allegation of a contractual relationship in the form of the 1958 agreement after 1964 and to remove references to the alleged contract in respect of management services. The revised plea concentrated instead on the dealings between Bacon and the Defendants both before and after 1964 as giving rise to a fiduciary relationship between them under which the Marlborough Defendants were under a duty not to put themselves into a position of conflict between their personal interests and their duties to Bacon, a duty not to profit from Bacon without his fully informed consent and a duty to account to Bacon for all their dealings in respect of his work and for all monies received by them in respect of the paintings. This relationship and these duties are said to spring out of the alleged agency under the 1958 agreement and out of the arrangements under which Marlborough UK and Marlborough Liechtenstein acting through Frank Lloyd and Miss Valerie Beston continued in effect to run Bacon's life including his tax and financial affairs. Bacon is alleged (to use the words of paragraph 5(1) of the pleading) to have:

"Relied on them to advise and guide him in relation to his career and to advance and protect his interests and he relied on the knowledge and experience of Frank Lloyd and/or Harry Fischer and/or Old Marlborough in that regard, and came to repose his trust and confidence in them".

He is said to have been inexperienced and uninterested in matters of business, to have had very little interest in his financial affairs beyond worry about debt or tax matters of which he wished to be relieved and to have been without the benefit of any other source of independent legal or other advice concerning his relationship with the two Marlborough companies, their agency for him and what is alleged to have been their purchase from him of various works of art. There is said (see Re-Amended Particulars of Claim paras 30 and 39) to have existed between Bacon and the Defendants after 1968 a relationship of professional and personal proximity of the same kind as had previously existed between Bacon and Old Marlborough. He is said to have put himself entirely in their hands and to have reposed trust and confidence in them. A relationship of this kind with the fiduciary obligations it is said to have imposed is alleged to have subsisted until Bacon's death.

6. On 15th May 2001 I granted to the Claimant permission to amend the Particulars of Claim in the manner I have just described. That application was opposed by both Defendants on a number of grounds including that the various management and personal services provided to Bacon by Miss Beston and others were not capable of generating a fiduciary relationship of the kind alleged and that the arrangements with the gallery for the onward disposal of his paintings amounted to a series of contracts under which he sold the works of art to Marlborough at agreed prices on an arms-length basis with them buying as principals. There was no room, Mr. Briggs contended, for the imposition upon straightforward contracts for the sale and purchase of paintings of the fiduciary duties now alleged. It was, said Mr. Briggs, a straightforward commercial relationship and nothing else. For the reasons contained in the reserved judgment which I gave on that application I was unable to accept that these were issues which could properly be resolved on an application for permission to amend under CPR Part 17 or on a summary application for judgment under Part 24. I do not intend to re-visit those reasons in this judgment. The consequence of my decision which has not been appealed is that the Claimant had been able to formulate and was entitled to plead a case based on agency and/or a more general relationship of trust and confidence which if proved could entitle him to the relief sought. It seems to me that that must be the starting point for the proper consideration of the present application.

7. Since making that order the Claimant has been provided on disclosure with a copy of a contract dated 8th July 1964 signed by Mr. Fischer on behalf of Marlborough and by Francis Bacon. The agreement which is summarised in paragraph 13 of the Re-Amended Particulars of Claim in their current form was for a period of 5 years and granted Old Marlborough new rights to purchase Bacon paintings and to sell or authorise the sale of the pictures in any part of the world. I have not seen a copy of this agreement and it is not strictly relevant to the application before me but I mention it for completeness. The Claimant's case is that when Marlborough UK took over from Old Marlborough Frank Lloyd and Harry Fischer did not think it was necessary to enter into any further contractual relationship with Bacon on the part of the new company and no attempt was made to assign the benefit of the 1964 agreement to Marlborough UK. Subject therefore to the extension of the contractual arrangements with Old Marlborough from 1964 until 1968 the Claimant's case remains essentially the same as when I considered it on 15th May. Bacon's dealings with the gallery continued from 1968 as what is described as a "relationship of convenience whereby Bacon allowed Marlborough UK and/or Marlborough Liechtenstein to be the sole

agent for the commercial exploitation of his artistic output". Miss Beston continued to perform the same services for Bacon including the administration of his personal affairs and Bacon continued to repose trust and confidence in her and the Marlborough companies to perform these services and to act in his best interests. The Defendants, similarly, do not allege any overarching contract between themselves and Bacon after 1968. Their dealings thereafter (as before) are said to have comprised a series of separate contracts for the purchases of individual works of art governed by the schedules of prices or tariffs from time to time agreed in respect of his paintings. These are pleaded out in Marlborough Liechtenstein's Re-Amended defence.

8. An important aspect of Bacon's dealings with the Defendants concerned the banking arrangements made in respect of the payments from Marlborough for the various paintings. It is pleaded in paragraph 9 of the Re-Amended Particulars of Claim in relation to the period prior to 1968 that Old Marlborough opened bank accounts for Bacon and operated at least one such account through the signature of Miss Beston. It is pleaded in paragraph 45 that from 1968 onwards Bacon's professional and personal affairs were managed and administered by Marlborough UK acting through a combination of one or other of Frank Lloyd, Miss Beston, Gilbert Lloyd, David Somerset and Harry Fischer. Examples are given of communications between Miss Beston and Theodore Goddard who acted for Bacon in relation to his tax affairs. In paragraph 50 of the pleading it is alleged that neither Marlborough UK nor Marlborough Liechtenstein agreed any fixed rate of commission, agency fee or other remuneration with Bacon and that neither company ever sought to negotiate or agree a rate of remuneration and profit with Bacon in respect of their dealings with him. On this basis it is alleged that Bacon never gave and could never have given his fully informed consent to the remuneration and profits made by the two companies from their dealings with him and his work. This is taken further in paragraph 54 by the allegation that the Defendants retained profits from transactions concluded on his behalf in respect of which he did not know either the price at which the particular work of art was offered for sale by the Marlborough companies to any relevant third party or the price at which the work in question was eventually sold. He neither gave nor could therefore have given his consent to these transactions which were to his manifest disadvantage. Based on these allegations the Claimant contends that the sales of Bacon's paintings and the profits earned by the Defendants therefrom ought to be accounted for. This claim is made both on the basis of alleged breaches of fiduciary duty and also on the basis of a plea of presumed undue influence. In paragraph 70 of the Re-Amended Particulars of Claim it is pleaded that "by reason of the relationship between Marlborough UK and Marlborough Liechtenstein and Bacon referred to in paragraph 68 hereof the transactions whereby Marlborough UK and/or Marlborough Liechtenstein purported to purchase, publish or receive Bacon's work or lithographs thereof are presumed to be affected by undue influence and are therefore voidable and should be rescinded". In paragraph 71(2)(b) it is pleaded that Marlborough Liechtenstein through Frank Lloyd and/or Miss Beston and/or Marlborough UK was aware during the period from 1968 onwards that Bacon remained a man

"inexperienced and uninterested in business matters. His overriding interest in life was his work as an artist and he had very little interest in his financial affairs beyond worry about debt or tax matters of which he wished to be relieved and was content to put himself entirely in Frank Lloyd and/or Harry Fischer and/or Miss Beston and/or Marlborough UK and or

Marlborough Liechtenstein's hands, relying on them to give him a fair deal."

This is of course the same allegation as was made earlier in the pleading in relation to the pre-1968 period. Similarly paragraph 71(2)(c) also alleges that Bacon had no independent advice legal or otherwise before entering into contracts with Marlborough UK and/or Marlborough Liechtenstein in respect of the sale of his works or the publication or receipt of lithographs.

9. Although there have, as I have explained, been slight amendments and variations to the pleading which I permitted to stand in May this year the Defendants have not and could not have objected in the light of that ruling to the pleaded case which I have so far described. But they do object to paragraphs 71(A) to 71(I) which follow and which are the subject of this application for permission to amend. Those paragraphs, as I have already indicated, seek to plead a case of actual undue influence. In summary what is alleged is that in March 1978 Mr. Michael Peppiatt an art historian who was a close friend of Bacon at the time, informed Mr. Arnold Glimcher the founder and chairman of the Pace Wildenstein Gallery of New York, that Bacon was unhappy with his relationship with Marlborough. Mr. Glimcher asked Mr. Peppiatt if he could arrange a meeting between himself and Bacon in order to discuss the possibility of Pace representing Bacon in the future. Mr. Peppiatt agreed to do so. Consequently Mr. Glimcher came to London and met both Bacon and Peppiatt for dinner at Claridges on 2nd March 1978. Mr. Glimcher had a further meeting with Mr. Bacon (again at Claridges) on or about 3rd March 1978. During these meetings Bacon is said to have spoken to Glimcher of his unhappiness with Marlborough in particular in relation to the price paid for some of his paintings. Bacon is alleged to have stated that he wished to be paid £50,000 per large single panel painting and Mr. Glimcher is said to have stated that Marlborough was not marketing Bacon's paintings properly and was depressing their sale price by exhibiting them in large groups. It is said that by the conclusion of Mr. Glimcher's visit to London he had reached agreement with Bacon that Bacon would leave Marlborough and would thereafter be represented world-wide by Pace. Pace would make immediate, up front payments to Bacon of £50,000 for each large single panel work, would cover virtually all his expenses, and would market Bacon's paintings in smaller collections. The terms of this arrangement are stated to have been manifestly more advantageous to Bacon than the arrangement between him and Marlborough. To confirm the terms of this agreement Mr. Glimcher wrote to Bacon on 4th March 1978 reflecting on what he described as "our memorable meeting" and saying that after Bacon had had an "opportunity to relate the fact of our association to Mr. Lloyd" he would prepare a public announcement of the change of gallery. The letter went on to set out some of the other terms agreed including a reference to the payment of \$50,000 per painting which in a recent statement Mr. Glimcher has said was a mistake for £50,000.

10. In paragraph 71(E) of the proposed pleading the following allegation is made:

(1) "On a date unknown, but probably between 4th and 8th March 1978, Bacon approached Frank Lloyd and informed him of his intention to sever his ties with Marlborough and to be represented in the future by Pace. In the course of this approach, Frank Lloyd, acting for Marlborough, placed undue

pressure on Bacon to remain with Marlborough by threatening that if Bacon left Marlborough:

(a) Bacon would have problems obtaining access to the funds belonging to him which Marlborough had paid into Bacon's bank accounts in Switzerland;

(b) Bacon would be exposed to the English tax authorities.

The Claimant will contend that Bacon understood these threats to have affected Bacon, in amongst other ways, by making him think he would be unable to continue paying the fees of the nursing home where his sister resided, when he was the sole or principal means of her support.

(2) As a result of these threats, Bacon decided it was impossible for him to leave Marlborough".

11. Reference is then made in the pleading to a letter of 8th March 1978 sent by Bacon to Mr. Glimcher asking him to delay any announcement until he had heard further from the artist. On 17th March 1978 Bacon wrote a short letter to Mr. Glimcher stating that for the present time he had decided not to change his gallery in New York. The correspondence is concluded by a letter of 2nd May 1978 produced on disclosure by the Defendants in which Mr. Glimcher says that "I want you to know that I appreciated meeting with you in London and hope that if you ever extricate yourself from your present affiliation you will consider the Pace Gallery".

12. The pleaded allegations which I have just summarised are based upon a witness statement from Mr. Glimcher dated 1st November 2001. In paragraph 12 of that statement Mr. Glimcher says that the meetings at Claridges went extremely well

"and Bacon and I seemed to have an immediate rapport. By the end of the second meeting, we had reached an agreement on which we shook hands. There was no doubt in my mind at all that we had a deal and that Bacon had agreed to move to Pace, the terms of which will be identified later in this statement when I refer to my letter to Bacon dated 4th March 1978. All that was necessary for the agreement to take effect was for Bacon to inform Marlborough (and I agreed that there would be no publicity in advance of Bacon's meetings with Marlborough) so that Marlborough would hear the news first from Bacon".

In the light of this Mr. Glimcher says that he was devastated to receive Bacon's letter of 8th March 1978 and that soon afterwards he spoke with Michael Peppiatt by telephone. Mr. Peppiatt, he says, was already aware of the apparent reversal in Bacon's position signalled by the letter but told Mr. Glimcher not to contact Bacon. Michael Peppiatt, he says, "was very distant but said it was impossible for Bacon to leave Marlborough gallery. It was apparent that he was no longer trying to assist Pace in forming a relationship with [Bacon] and he would no longer be helpful to me".

13. The critical allegation is made by Mr. Glimcher in paragraph 33 of his witness statement. In that paragraph he said this:

“I was also told at this time that when Francis Bacon informed Frank Lloyd he was leaving Marlborough for Pace, Frank Lloyd told Francis Bacon that if he left Marlborough, Bacon would have problems accessing the funds that Marlborough paid to Bacon in Switzerland. I recall something that Bacon’s sister’s funding was in jeopardy. Apparently she was in a sanatorium of some kind. I was also told that there were threats by Frank Lloyd of income tax exposure.”

In paragraph 34 Mr. Glimcher deals with the source of that information. He says this:

“I do not now exactly recall who gave me the information I have set out in the previous paragraph. It could only have been one of two people; Michael Peppiatt, with whom I had a phone conversation on this specific matter; or another individual, a writer, who was a friend of Bacon’s. However, on reflection, it seems more likely that it was Michael Peppiatt, given his central role in the relationships at the time.”

As yet there is no statement in existence from Mr. Peppiatt confirming the allegations said to have been made by Bacon of threats relating to his Swiss bank account or that he was the source of this information. At an earlier stage in these proceedings it was envisaged that Mr. Peppiatt would attend an interview with representatives of all three parties at which he would submit himself to cross-examination by those present. His answers would be recorded in the form of a deposition which would then be produced at the trial. It was intended that he should be called as a witness by the Court and then cross-examined at the trial by Counsel for both the Claimant and the two Defendants on the basis of his deposition. Faced with this application to amend and the allegations of threats or blackmail which may depend upon Mr. Peppiatt’s evidence the Defendants are not now willing to agree to the deposition going ahead. They require Mr. Peppiatt (as they are entitled to) to be called by the Claimant and to give his evidence in chief without the benefit of cross-examination or leading questions. His evidence will not therefore be available before the trial.

14. No other direct evidence relating to these alleged threats has been provided in support of this application although Ianthe Knott, Bacon’s sister, has made a witness statement providing certain background information and the Claimant, Professor Clarke, says in a witness statement sworn specifically in support of this application, that at a subsequent meeting with Mr. Peppiatt in December 1999 in relation to another matter Mr. Peppiatt volunteered to him a comment to the effect of: “I suppose you will be wanting to know about the famous “blackmail” conversation with Glimcher”. To date Professor Clarke (as opposed to his solicitors) has not been able to take that matter further with Mr. Peppiatt. He did however have a further meeting with Mr. Peppiatt and his wife, Jill Lloyd, in June 2000 to discuss the possibility of their being offered the task of compiling a catalogue raisonné of Bacon’s work. I am told that this is likely to be a lucrative and prestigious project and these discussions are relied upon by Mr. Lyndon-Stanford as giving his clients additional concern that Mr. Peppiatt’s

independence as a witness may thereby have been compromised. This is an additional reason, they say, for requiring him to give his evidence in chief in the normal way. I intend to make no comment on that. It seems to me that if it provides a legitimate basis for the cross-examination of Mr. Peppiatt then this is something to be dealt with at the trial. For present purposes it is enough to record that Mr. Peppiatt will be unable to give the Court or the parties any further assistance until then. Finally I should observe that there is no evidence filed on behalf of the Defendants in relation to this application which deals one way or another with the truth or otherwise of the blackmail allegations. It was however accepted by them at the hearing on 15th May and is not I think in dispute that Bacon did not declare to the Revenue as part of his income the monies paid by Marlborough Liechtenstein into his Swiss bank accounts.

15. Although the allegation of threats having been made by Frank Lloyd to Bacon in 1978 would be new to the pleadings the relevant background to that allegation is not. It has I think always been an allegation in the pleadings that one of the services provided by Old Marlborough was to open bank accounts for Bacon and to operate at least one such account through the signature of Miss Beston. This is now pleaded in paragraph 9 of the Re-Amended Particulars of Claim. In Marlborough UK's original defence it was pleaded (in paragraph 8.3) that from June 1964 until his death Bacon had no contractual tie to Old Marlborough or to Marlborough UK and was free to dispose of his work as he thought fit. He was regularly approached by and met other gallery owners and was free to deal with them as he thought fit. In support of this plea reliance is placed amongst other things upon the letter dated 4th March 1978 from the Pace Gallery. The pleading goes on to say that "in fact, Bacon changed his mind and Pace Gallery did not act for him in America". In paragraph 71.1 of its Amended Defence Marlborough UK denies that Bacon was content to put himself entirely in the hands of Frank Lloyd or Harry Fischer or Miss Beston or Marlborough UK. It is also said that he was well able to make his own business decisions and did. It is also pleaded in paragraph 71.1(c)(iii) that "Bacon was regularly approached by other gallery owners who, it is to be inferred, offered him advice as to the terms on which and prices at which his works could be sold". A request for further information was served by the Claimant in respect of this allegation. In particular Marlborough UK was asked to confirm that it was still its case that the Pace Gallery reached a provisional agreement to act for Bacon in America and that Bacon "changed his mind". In response to the allegation that Bacon changed his mind Marlborough UK was invited to set out any positive case it intended to advance. Marlborough UK responded in these terms:

"It remains Marlborough UK's case that a provisional arrangement was made between the Pace Gallery and Bacon (as evidenced by the letter of 4th March 1978. Bacon responded to that letter on 8th March 1978 stating that he had not made up his mind about whether to move to Pace Gallery and wrote again on 17th March 1978 stating that for the present time he had decided not to change his gallery in New York.

Marlborough UK does not know why Bacon changed his mind but would invite the court to infer that Bacon decided that it was in his best interests to continue to work with Marlborough."

16. In its original defence Marlborough Liechtenstein took up and responded to the allegation that Bacon was lacking in experience in matters of business or that he had very little interest in his financial affairs. In paragraph 12.2.2 (3) it is pleaded that in the 1960's Bacon had a bank account in Switzerland at Dreyfus Soehne in Basle and from about 1970 also had a bank account at Rothschilds bank in Zurich. Marlborough Liechtenstein, it is said, was not responsible for opening or administering either of those accounts. The pleading goes on to refer to the fact that from about 1982 Bacon established a Liechtenstein Stiftung and admits that Marlborough Liechtenstein from time to time, when instructed by Bacon, made payment for his paintings to the bank account in Zurich and subsequently to the Stiftung's account. It is therefore accepted that Marlborough Liechtenstein was well aware of Bacon's Swiss banking arrangements prior to 1978. In its Re-Amended Defence Bacon's reply dated 8th March 1978 to the Pace Gallery's offer is pleaded as showing his personal involvement in the promotion and protection of his work and reputation. It is also said that Bacon himself wanted to sell offshore and that his VAT regime required that. The presumption of undue influence is denied.
17. Against this background Mr. Vos's submissions in support of his application can be summarised quite shortly. The Court's power to grant permission to amend under CPR Part 17 is to be exercised in order to give effect to the overriding objective of dealing with cases justly. In a normal case this will mean that amendments ought to be allowed, as they were under the old rules, so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party or parties caused by the amendment can be compensated for in costs and the public interest in the efficient administration of justice is not significantly harmed. The relevant principles were stated in these terms by Peter Gibson LJ in *Cobbold v London Borough of Greenwich*. The trial of this action is currently scheduled to begin in February next year. This is not therefore a late application which could lead to the postponement of the trial with consequent inconvenience and loss to other court users. It may necessitate an extension of time so as to allow the solicitors instructed on behalf of the Defendants to re-proof existing witnesses or to make further enquiries but that is a process, says Mr. Vos, which ought already to have commenced in order to make good the allegation in the pleadings that Bacon made a conscious choice in 1978 to remain with Marlborough in order to serve his best interests and as part of the necessary investigation of the nature of the relationship between Bacon and the Defendants during the period from 1968 onwards. The proposed amended pleading is based he says on a statement which in its final form Mr. Glimcher has only been prepared to sign very recently. It has therefore been made at the first realistic opportunity and is supported by appropriate evidence. To refuse the amendment would unfairly punish the Claimant for failing to make more promptly an application whose timing was not within his control but more importantly would prohibit the Claimant from advancing a case legitimately based on evidence which will have to be investigated at the trial in any event. The examination of the allegations of trust and confidence lie at the heart of this action.

Inconsistency

18. The first objection to the proposed amendment is one of inconsistency. To use the terminology of the old Rules of the Supreme Court the proposed amendment is said to be embarrassing because if allowed it will enable the Claimant to advance as part of a

unified (not alternative) case allegations that during the same period of time Bacon lived under a continuing threat from Marlborough to expose his tax fraud to the Revenue yet maintained in Marlborough trust and confidence that they would continue to give him a fair deal. Mr. Briggs submits that this allegation is made not in the context of a married or sexual relationship where the changes between threats and endearment are often constantly rung. Moreover, and perhaps most importantly, the threats if made would, he says, necessarily have been destructive of any belief by Bacon that Marlborough was continuing to act in his best interests or to use the words pleaded, to give him a fair deal. In these circumstances the amendment should be refused.

19. Mr. Briggs in his skeleton argument refers to the general rule that it is not possible to appraise and reprobate. One is required to elect between mutually inconsistent cases. But in argument reliance upon this doctrine was abandoned in favour of an application of CPR Part 22 which introduced the requirement that statements of case and witness statements should be verified by a statement of truth. This requirement is applied by CPR Part 22.1(2) to any amendments in the statement of case. Professor Clarke will therefore have to state in the amended pleading, if permission is given, that he believes that the facts stated in the particulars of claim are true: see paragraph 2.1 of the Practice Direction on statements of truth.
20. The purpose of the requirement that a party should verify the factual contents of his own pleadings was to eliminate as far as possible claims in which the party had no honest belief. The consequence of making a false statement in a document verified by a statement of truth are serious and CPR Part 32.14 provides for proceedings for contempt to be brought in such circumstances. It is therefore important at the outset to identify what Part 22 does and does not require. In relation to a pleading the claimant or other relevant party who puts the document forward as a statement of his case is required to certify that he believes the facts alleged are true. He is not required to vouch for the legal consequences which he seeks to attach to these facts. That is a matter for argument and ultimately for the decision of the Court. The purpose of Part 22 is simply to exclude factual allegations which to the knowledge of the claimant or other party are untrue or which the party putting forward the pleading to the Court is unable to say are true.
21. In the most simple case the requirements of CPR Part 22.1 will, if observed, exclude untruthful or fanciful claims but the notes to Part 22 also indicate that the purpose of the new rule was to discourage the pleading of cases which when settled were unsupported by evidence and which were put forward in the hope that something might turn up on disclosure or at trial. In these cases judgment had to be exercised by the pleader even under the old Rules of the Supreme Court. It was never proper for a case to be pleaded unless it had some evidence to support it. The practice of requiring a pleading to be settled and signed by Counsel was intended to operate as a confirmation to the Court that the professional rules of conduct had been observed by Counsel when deciding whether or not to advance a particular claim. In its current form paragraph 704 of the Code of Conduct states the rule in the following terms:

“A barrister must not devise facts which will assist in advancing the lay client’s case and must not draft any statement of case,

witness statement, affidavit, notice of appeal or other document containing:

- (a) any statement of fact or contention which is not supported by the lay client or by his instructions;
- (b) any contention which he does not consider to be properly arguable;
- (c) any allegation of fraud unless he has clear instructions to make such allegation and has before him reasonably credible material which as it stands establishes a prima facie case of fraud;
- (d) in the case of a witness statement or affidavit any statement of fact other than the evidence which in substance according to his instructions the barrister reasonably believes the witness would give if the evidence contained in the witness statement or affidavit were being given in oral examination;

provided that nothing in this paragraph shall prevent a barrister drafting a document containing specific factual statements or contentions included by the barrister subject to confirmation of their accuracy by the lay client or witness.”

Although the requirement that there be reasonably credible evidence to support a plea of fraud is not in terms applied to other statements of fact the reference in subparagraph (a) to the need for the statement of fact to be supported by the lay client or by his instructions presupposes that the facts are ones in respect of which there is some evidence to justify the pleading.

22. There may however be cases in which the claimant has no personal knowledge of the events which form the factual basis of the claim. Executors or liquidators of companies are obvious examples. They are often required to investigate matters years after they have occurred with a view to establishing a possible claim. In such cases the same rules of conduct will apply to those whom they instruct but a position will often be reached when the available evidence does not point clearly to any single factual possibility. In a case of alleged undue influence for example it may be possible to infer from the relative positions of the donor and donee coupled with the obviously disadvantageous nature of the transaction that some form of oppressive or abusive behaviour has occurred yet the precise form which the undue influence took can only be established (if at all) at the trial. The evidence at the pleading stage from various potential witnesses may disclose a number of possibilities. In such a case it seems to me perfectly legitimate for Counsel with sight of that evidence to plead out those possibilities as alternatives. There will be evidence to support each plea. The determination of which (if any) of the possibilities was the probable cause is a matter not for the pleader but for the Court at trial.

23. Under the former Rules of the Supreme Court no objection could be taken to a pleading in that form but if the Defendants are right the consequences of the new rules in CPR Part 22 may be to exclude pleadings of this kind even though the professional rules of conduct have been scrupulously observed in their preparation. Mr. Briggs declined in his submissions to go as far as this. He was minded to accept that an executor or liquidator with limited knowledge of the facts could assert alternative factual possibilities provided that he made that clear. What could not however be done was to plead alternatives that were actually contradictory of each other. In such cases the problem was not a lack of evidence. It was simply the impossibility of the client verifying two distinct sets of facts which could not possibly have co-existed. In such cases the claimant had to choose.
24. The problem is well illustrated by reference to the actual issues on this application. Mr. Glimcher in his witness statement of 1st November deposes to an allegation said to have been made by Bacon that he was subjected to threats and blackmail by Frank Lloyd in 1978 in order to prevent his leaving Marlborough for Pace. On the basis of this and other surrounding evidence Mr. Vos and his juniors have felt able to settle the proposed amendments. They include not only the allegation of the original threat in 1978 but also a plea in paragraph 71H that:

“It is to be inferred that throughout the period of 8th March 1978 and Bacon’s death in 1992, Frank Lloyd’s threats as pleaded in paragraph 71E(1) above continued to operate on Bacon, with the result that he believed that it was impossible for him to sever his connections with Marlborough or commercially to exploit his work other than through or with the consent of Marlborough.”

As a result of these threats and their continued operation it is said (paragraph 71I) that the dealings by the Defendants with Bacon’s works and the lithographs were affected by undue influence and should be set aside.

25. The Defendants’ case on inconsistency is that the continuing nature of the threats must have terminated after 1978 any reliance by Bacon upon Marlborough to give him a fair deal which is the basis of the claim of presumed undue influence. A relationship of trust of that kind is irreconcilable with the operation of a threat to expose to the Revenue his failure to declare a large part of his earnings for Income Tax purposes. Bacon either remained with Marlborough because he trusted and relied upon them to serve his best interests and to treat him fairly or because he was the victim of Frank Lloyd’s blackmail. But it cannot have been both. The Claimant is not prepared to accept this. I was told by Mr. Vos that the factual pleas contained in Part E1A (presumed undue influence) and those in E1B (actual undue influence) are really not alternatives and for that reason are not pleaded as such. Marlborough were only in the position to blackmail Bacon because they looked after him financially and arranged payment into his Swiss bank accounts in order to shelter his income from UK tax. The alleged threat to expose him in 1978 did not mean that he did not continue to place reliance upon Marlborough to give him a fair deal. It simply prevented him from leaving them to go to another gallery. Apart from that everything continued as before. Authorities such as *Re Craig* [1971] 1Ch.95 demonstrate that it is possible to rely

upon both actual and presumed undue influence in the same action. Both can be contributory factors.

26. As I have already indicated the proposed amendment pleads in terms in paragraph 71C that the terms offered to Bacon by Mr. Glimcher in March 1978 were manifestly more advantageous to Bacon than the arrangement between Bacon and Marlborough. It is also essential to the plea of blackmail that Bacon realised that they were and was prepared to leave Marlborough on that account. Had they seemed no better than what Marlborough was offering there would have been no reason for Bacon to have told Frank Lloyd that he intended to go. For the same reason Bacon must therefore have realised that what he was being offered by Marlborough, far from being a fair deal, was "manifestly" less advantageous than what another major gallery such as Pace was willing to offer.
27. The continued operation of the threats is said in paragraph 71H to have caused Bacon to believe that it was impossible for him to exploit his work commercially other than through Marlborough. For the reasons set out earlier in the amendment that belief must have been coupled with a realisation from his dealings with Pace that he could do better elsewhere. In these circumstances he cannot have believed that Marlborough was giving him a fair deal. It is also important to note that the proposed amendment comprised in Part E1B is not to be read cumulatively with Part E1A which sets out the case of presumed undue influence. The claim for rescission in paragraph 71I is based only upon the facts set out in Part E1B. It is a separate claim which in no way depends upon the existence of the relationship of trust and confidence pleaded in paragraphs 68 and 71. Actual undue influence as opposed to presumed or inferred undue influence does not require proof of a pre-existing relationship. It is express conduct which is actionable in itself: see *Royal Bank of Scotland v Etridge (No.2)* [2001] 3WLR 1021 per Lord Hobhouse of Woodborough at para. 103.
28. For these reasons I am unable to accept the Claimant's submission that no factual inconsistency exists between parts E1A and E1B of the proposed particulars of claim. My decision depends very much on the nature of the precise facts alleged. I accept Mr. Vos's submission that actual and presumed undue influence may co-exist in a particular relationship. Mr. Briggs does not contend otherwise. But in my judgment the particular relationships outlined in Parts E1A and E1B are mutually contradictory. I am not therefore prepared to give permission for the amendment in its current form.
29. That is not however the end of the matter. In his submissions in reply Mr. Vos asked the Court to grant permission for the amendment as an alternative plea to that contained in part E1A if I should be against him on his primary submission that there was no factual inconsistency. Although a draft pleading in this revised form has not been produced it is right that I should deal in principle with the possibility of treating part E1B as an alternative case. If the revisions to the draft amendment give rise to any further specific complaints that would have to be dealt with at a later hearing. The question which I have now to decide is whether by pleading the allegations of actual undue influence in the alternative the Claimant can properly satisfy the requirements of CPR Part 22.

30. If one of the consequences of CPR Part 22 is to exclude the possibility of pleading inconsistent factual alternatives then it will have achieved far more than the prohibition of dishonest or opportunistic claims. It will prevent even claimants in the position of an executor or liquidator from advancing alternative claims based on incomplete but plausible evidence in circumstances where they are not able to choose decisively between the rival possibilities without access to the trial processes of disclosure and cross-examination. A defendant to an honest claim will be able to compel the claimant either to choose between seemingly viable alternatives or to abandon the claim altogether. The former will require the claimant to make a judgment on the basis of incomplete information and in relation to witnesses to whom he may not have ready access and will mean that in many cases the alternative claim will re-surface at trial compelling the claimant to make a late application to amend with all the obvious difficulties which that will entail. I do not believe that this is what CPR Part 22 was intended to achieve. Nor do I believe that it is what the statement of truth requires. If the alternative set of facts is clearly pleaded as such then the claimant is not necessarily stating that he believes both sets of facts are true. In the present case if parts E1A and E1B are properly expressed as alternatives leading to an allegation of undue influence then what the claimant is affirming is his honest belief that on the basis of either one set of facts or the other Bacon was the subject of undue influence in his dealings with the Defendants. It is really a matter of drafting but unless it can be said that one of the alternatives is unsupported by any evidence and is therefore pure speculation or invention on the Claimant's part he is entitled in my judgment to sign a statement of truth in these circumstances. I reach this conclusion not without some hesitation and those responsible for reviewing the operation of the CPR should take the earliest opportunity of reconsidering the provisions of Part 22 in order to provide some proper and clearer guidance in relation to alternative pleas.

The strength of the evidence

31. For these reasons I believe that it is possible for the allegations of actual undue influence to be pleaded as an alternative case so as to comply with CPR Part 22. It is therefore necessary for me to consider the Defendants' second main ground of opposition to this application which is that the amendment has no proper or sufficient evidential basis and should be refused on that ground. For these purposes Mr. Briggs and Mr. Lyndon-Stanford submit that I should apply the same test as if this were an application for summary judgment under CPR Part 24 or an application to strike out under CPR Part 3.4. That seems to be right but it requires me to be satisfied on the basis of the material before the Court that the claim has no real prospect of success. The relevant approach to be adopted on summary applications of this kind is set out in two passages which I referred to in my earlier judgment of 15th May. For convenience of reference I set them out again:
32. In Swain v Hillman [2001] 1 AER 91 Lord Woolf CJ (at pages 94 and 95) said this:

"It is important a judge in appropriate cases should make use of the powers contained in Part 24. In doing so he or she gives effect to the overriding objectives contained in Part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and, I would add, generally, that it is in the interests of justice. If a

claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know this as soon as possible.....

Useful though the power is under Part 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. As Mr. Bidder put it in his submissions, the proper disposal of an issue under Part 24 does not involve the judge conducting a mini trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily."

This approach has been approved by the House of Lords in Three Rivers District Council v Bank of England (22nd March 2001) where an application was made to strike out a claim against the Bank based on alleged misfeasance in public office. In paragraph 95 of the speeches Lord Hope of Craighead said this:

"I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lloyd Woolf said in *Swain v Hillman*, at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all."

33. The first and a significant point taken by the Defendants is that Mr. Glimcher's witness statement of 1st November does not comply with CPR Part 32.8. This requires a witness statement to conform to the requirements of the Practice Direction which specifies what it must contain. Paragraph 18.2 of the Practice Direction provides that:

"18.2 A witness statement must indicate –

- (1) Which of the statements in it are made from the witness's own knowledge and which are matters of information or belief, and
- (2) The source for any matters of information or belief."

Although Mr. Glimcher says in paragraph 34 of his witness statement that on reflection it seems more likely that it was Mr. Peppiatt who gave him the information about the alleged threats it is clear that this is the product of a process of deduction and not recollection on his part. This appears from the opening words of paragraph 34. This evidence of attribution is, say the Defendants, inadmissible because it is the expression of an opinion by a non-expert on a question of fact. Paragraph 34 should therefore be disregarded and without it paragraph 18.2 of the Practice Direction is not complied with.

34. The requirement in the CPR for a statement of the source of any matters of information and belief seems to be derived from the old rules relating to the contents of affidavits. RSC Order 41 Rule 5(1) provided that with certain stated exceptions an affidavit should contain only such facts as the deponent was able of his own knowledge to prove. Hearsay evidence was therefore excluded as a general rule. The exceptions were proceedings under RSC Order 14, Order 86, Order 88 and Order 113 and more generally other interlocutory proceedings: see RSC Order 41 Rule 5(2). In such cases however the affidavit was required to state the source of any allegation based on hearsay evidence.
35. Now that hearsay evidence is generally admissible in civil proceedings by virtue of the Civil Evidence Act 1995 ("the 1995 Act") the distinctions made in RSC Order 41 Rule 5 are no longer appropriate and CPR Part 32.4(1) merely restricts the contents of a witness statement to the evidence which the deponent will be allowed to give orally. This now includes hearsay evidence. Section 2(1) of the 1995 Act requires notices to be given by a party of his intention to adduce hearsay evidence in accordance with rules of court made for that purpose but s.2(4) specifically provides that a failure to comply with these procedural requirements does not affect the admissibility of the evidence. It merely goes to weight. The rules of court referred to in s.2(1) are contained in CPR Part 33. The requisite notice is given by the service of the witness statement containing the hearsay evidence. Therefore the only purpose served by paragraph 18.2 of the Practice Direction under CPR Part 32 is to identify what is comprised in the hearsay statement and to provide details of the relevant source.
36. Given this purpose it is difficult to see why it matters whether the statement of the source is based on recollection or reconstruction. It seems to me that to treat an attribution to a particular source as constituting opinion evidence really mischaracterises the function of that part of the witness statement. An expression of opinion on a factual matter by a witness of fact is clearly inadmissible subject to the limited exception contained in s.3(2) of the Civil Evidence Act 1972. But the provisions of paragraph 18.2 of the Practice Direction under CPR Part 32 are not concerned with evidence of primary fact. They are simply procedural provisions requiring the deponent to identify the source of the hearsay evidence he will give. They do not require that attribution to be based only on admissible evidence. They

merely require it to be stated so that the party affected by the evidence knows who is the alleged source of the information. This Mr. Glimcher has done. Armed with that information the other parties to the action are then free to make such enquiries as they think fit. For these reasons there has therefore been compliance with paragraph 18.2 of the Practice Direction.

37. A further point made in relation to paragraph 34 of Mr. Glimcher's statement is that he has failed (indeed refused) to identify the other individual referred to in that paragraph as the possible source. A letter was sent seeking this information and it has not so far been forthcoming. The Defendants are entitled under s.2(1)(b) of the 1995 Act to such particulars relating to the hearsay evidence as is reasonable and practicable under the circumstances to enable them to deal with any matters arising from it being hearsay. I have no doubt that the particulars requested of the identity of the unnamed individual properly fall within this provision. The failure to provide this information does not of course render the hearsay evidence inadmissible but it is a matter for me to consider when I come to the Defendants' submissions about the lack of substance in the Glimcher evidence. It is to that that I now turn.
38. In order to understand the points made about the quality of Mr. Glimcher's evidence it is necessary to set out some of the history leading up to the making of his witness statement of 1st November. On 13th October 1998 Mr. Eastman, a New York lawyer who acts as an adviser to the Claimant, had dinner with the Duke of Beaufort. It is accepted that at that meeting no mention was made of any alleged blackmail specifically by Frank Lloyd of Bacon in 1978 in connection with Pace. The first intimation which Professor Clarke himself had of this allegation was in about December 1999 when he had the conversation with Mr. Peppiatt referred to in his witness statement. Nothing further immediately came of this. Mr. Eastman did however meet Mr. Glimcher in New York in December 1999 and it appears that Mr. Glimcher on this occasion made Mr. Eastman aware at least in outline of the blackmail allegation. Mr. Vos tells me that Mr. Glimcher was not prepared at that time to become involved in the dispute or to give evidence. On 31st January 2000 Messrs. Payne Hicks Beach, who were then acting as the Claimant's solicitors, wrote to Harbottle & Lewis stating that they understood that Bacon was "powerfully dissuaded by, or on behalf of, [Marlborough UK] from dealing with any other gallery". In March 2000 the proceedings were issued. As I have already indicated they contain no allegation of actual undue influence. In October 2000 Mr. Robert Hunter of Allen & Overy contacted Mr. Glimcher. As a result of that approach Mr. Glimcher became prepared to speak to Mr. Eastman again. According to Mr. Lomas of Freshfields Mr. Glimcher and his American advisers were not willing to permit a representative of Freshfields to interview him. The most that Mr. Glimcher was prepared to do was to provide a witness statement setting out his account of his meetings with Bacon in 1978. In paragraph 4 of that statement he said this:

"I was told that when Francis Bacon informed Frank Lloyd he was leaving Marlborough for Pace, Frank Lloyd told Francis Bacon that if he left Marlborough, Bacon would have problems accessing funds that Marlborough paid to Bacon in Switzerland and, in addition, exposure to the English tax authorities were threatened. I do not exactly recall who gave me the information."

Copies of this statement were provided both to Freshfields and to Allen & Overy. The statement was considered by Freshfields in consultation with Counsel and a decision was made that a plea of actual undue influence could not properly be advanced on the basis of the statement as it stood because the source of Mr. Glimcher's understanding of what may have transpired between Bacon and Frank Lloyd was not specified. Mr. Glimcher was unwilling to expand further upon his statement.

39. Mr. Briggs submits that although Mr. Glimcher was unable to recall in his statement who had given him the information about Bacon's conversation with Frank Lloyd Professor Clarke was already aware by that date that Mr. Peppiatt had had what he described as a "blackmail conversation" with Mr. Glimcher. He ought therefore to have realised at once that Mr. Peppiatt was the likely source of the information. In fact no further contact appears to have taken place with Mr. Glimcher until the end of September 2001. It is apparent from the Sixth Witness Statement of Mr. Lomas that Freshfields had already started to make enquiries from Mr. Peppiatt as to his ability to provide information of relevance to the issues in the action. A letter was written on 29th January 2001 asking to speak to him and to review any documents he might have. No reply was received and further letters were sent on the 8th and 19th February. On 21st February 2001 Mr. Peppiatt replied stating that he had reviewed the material he had and did not believe he had any documents relating to Bacon's relationship to Marlborough. He also stated that he was unwilling to involve himself in the legal proceedings. A draft application notice seeking disclosure of Mr. Peppiatt's documents was prepared and served on him on 4th July 2001. The documents sought included "the discussions and communications between Francis Bacon and the Pace Gallery in New York in 1978 as to the future representation of Bacon by the Pace Gallery, and the reasons why Bacon did not move to the Pace Gallery". Mr. Lomas says that it was Freshfields intention to issue the application notice so that it could be heard at the resumed case management conference fixed for 26th July 2001 and a further letter was sent to Mr. Peppiatt on 11th July recording this fact. In the event the application was not made it being preferred to deal with the matter on a consensual basis. As it happened on 26th July 2001 Freshfields were contacted by Messrs. Amhurst Brown Colombotti, a firm of solicitors who had been instructed by Mr. Peppiatt. They indicated that they wished to discuss the assistance he might be able to give and the terms upon which he would be prepared to provide any relevant information. A similar approach was made by Amhurst Brown to Marlborough UK's solicitors. Mr. Peppiatt's current position as I have already indicated is that he is prepared to attend a meeting with the three firms of solicitors and Counsel at which he will answer any questions put to him in effect in the form of a deposition. That will not now take place.
40. During July and September the amended defences to which I have already referred together with the replies to requests for information were delivered. Mr. Lomas says in paragraph 16 of his sixth witness statement that in early October 2001 he was informed by Mr. Eastman that he had very recently had further discussions with Mr. Glimcher as a result of which Mr. Glimcher had agreed to meet him in order to discuss the events of 1978. This meeting took place in New York on 11th October 2001. The terms of Mr. Glimcher's evidence were finally confirmed on 29th October 2001 and on this basis the proposed amendment was formulated.

41. Mr. Briggs submits that the only effect of the revised witness statement by Mr. Glimcher was to confirm that Mr. Michael Peppiatt is likely to have been the source of the information about the alleged threats made back in 1978. This, he says, was obvious from the information which Professor Clarke had as long ago as December 1999. There has been no change of substance in the quality or nature of the evidence available. No sensible explanation has been provided as to why the Claimant has delayed until now to put forward the proposed amendment. Mr. Lyndon-Stanford supports these submission but adds that I ought also to bear in mind that Mr. Glimcher is in competition with Marlborough in New York and acted for the Rothko estate in connection with its dispute with Marlborough in the 1970's. He is not therefore in any sense an independent witness. It is also, he says, of concern to his clients that despite Mr. Glimcher's apparent reluctance earlier on to become involved he did have further discussions with Mr. Eastman in September or October 2001 which led to the preparation and production of his most recent witness statement.
42. This historical review is relied upon by the Defendants to demonstrate that nothing has really changed in the quality of Mr. Glimcher's evidence since March 2001. In his earlier statement he was unable to identify the source of his information. Now by a process of deduction rather than recollection he has focused again on Mr. Peppiatt. But this process of deduction is unexplained and is insufficient, it is said, to justify the pleading on the basis of what is still in reality unattributable hearsay.
43. A number of other more detailed points are made about the Glimcher evidence. Mr. Lyndon-Stanford drew my attention to a number of alleged inconsistencies between the two statements. In paragraph 7 of the earlier statement Mr. Glimcher says that he does not know Bacon's views on the Rothko scandal yet in paragraph 28 of his latest statement he says that the topic was discussed between them in March 1978. Similarly he referred me to Mr. Glimcher's letter of 4th March 1978 which talks of being entrusted with Bacon's work in America yet in paragraph 26 of the Second Statement the representation said to have been agreed with Bacon was for Pace to act worldwide. A further point made by Mr. Lyndon-Stanford concerned Bacon's letter of 8th March. In paragraph 30 of his Second Statement Mr. Glimcher says that he was devastated to receive this letter because he believed that he had secured an agreement with the artist. This must mean that he treated the letter as a rejection of his offer. Yet if one reads the letter it merely says that Bacon has not yet made up his mind and would like any press announcements to be delayed. It is not a final refusal. That did not come until the letter of 17th March. Mr. Lyndon-Stanford also relied upon paragraph 10 of Mrs. Knott's witness statement in which she refers to the Swiss banking arrangements in the following terms:

"I never, however, understood the details and the exact purpose of this arrangement, but I did understand from Francis that this was strictly confidential and that I should always keep this very secret and never mention it to anyone. It worried him, and whenever subsequently he mentioned his Swiss accounts, he was worried that they (i.e. Marlborough) or he, would be found out and the arrangement would become public. He seemed to think that this would have bad consequences for him."

This indicates, he says, that Bacon's fears were simply that the illicit arrangements would come to light and lead to the exposure of both artist and gallery to the relevant authorities; not that Mr. Lloyd was threatening to bring that exposure about.

44. Mr. Briggs raised with me the alleged error in the letter of 4th March in relation to the figure of \$50,000. Although said to be a mistake for £50,000 that was in fact the figure communicated by Mr. Glimcher to Bacon. There is no evidence that Bacon came back to Glimcher on this and it may well have been the case, he says, that Bacon believed the offer from Pace was therefore less generous than the terms available from Marlborough.
45. This brief summary of the main points taken on the substance of Mr. Glimcher's evidence does not do justice to the quality of the forensic analysis undertaken by Counsel for the Defendants but I am not satisfied that any of these points (or a combination of them) are sufficient to entitle me to discount Mr. Glimcher's evidence for the purposes of this application. The points raised are matters for cross-examination at trial. Since I will be the trial judge it is not appropriate that I should express any further views about this evidence. It is sufficient in my judgment to pass the CPR Part 24 test and to form the evidential basis for the pleading. In reaching this conclusion I have taken into account the position of Mr. Peppiatt. The Defendants submit that there is every reason to suppose that he will not support Mr. Glimcher's account of the blackmail threats. I was taken by Mr. Briggs to various passages in Mr. Peppiatt's book: 'Francis Bacon: Anatomy of an Enigma' which was published in 1996. The book contains no reference to such allegations and indeed refers to Bacon being conscious that his career was in good hands with Marlborough. But this is not direct evidence and I decline to treat it as such. As things stand Mr. Glimcher's statement represents the best evidence available in relation to the allegations of blackmail. Whether that ultimately remains the position will be a matter for the trial.

Prejudice

46. The events to which the proposed amendments relate took place almost 24 years ago. Although Professor Clarke and Mr. Eastman knew about the blackmail allegations in December 1999 no attempt has been made to introduce them into the action until now. The delay (as I have already explained) is said by the Claimant to be due to Mr. Glimcher's unwillingness to provide a full statement until very recently. But it has had, say the Defendants, the effect of causing them prejudice including the additional costs involved in re-proofing witnesses and making further enquiries.
47. I accept that the proposed amendment will obviously involve the Defendants and their legal advisers in additional work of this kind at what is necessarily for them a busy stage in the action. But no suggestion has been made that this is beyond the resources of either Allen & Overy or Harbottle & Lewis to achieve and if I eventually make an order granting Mr. Vos the permission he seeks it will obviously have to be on terms which permit an appropriate extension of time for the service and exchange of the relevant witness statements. Therefore that aspect of the alleged prejudice can be dealt with in that way. The other matter relied upon is at first sight however more serious. Mr. Briggs submits that had the application been made at an earlier stage it would have

been possible for his solicitors to have discussed the matter with Mr. David Sylvester, a leading authority on Bacon, who died in the summer of 2001. It might also have been discussed with Gilbert de Botton, Bacon's friend and financial adviser, who died in the summer of 2000. Mr. Lomas has sought to meet this point so far as Mr. Sylvester is concerned by stating in his Eighth Witness Statement that he discussed this very matter with Mr. Sylvester on 22nd April 2001 and that Mr. Sylvester was unable to give any evidence in relation to it. It seems to me that if the inability of the Defendants' solicitors to discuss these matters with Mr. Sylvester and Mr. de Botton is to be relied upon as a serious allegation of prejudice then the Court needs to be provided with some reliable evidence indicating that either or both of them could have provided relevant evidence in relation to the matter in question and that such evidence cannot be provided from any other source. There is nothing to suggest that Bacon discussed these matters with Mr. de Botton and Mr. Lomas says that Mr. Sylvester knew nothing about it. I also I think have to take into account the inherent probabilities. If it is true that Bacon was threatened by Frank Lloyd in the manner alleged then he may have mentioned that fact to one or more of his confidants. Mr. Peppiatt may turn out to be one of these. If Mr. de Botton was another then the effect of his death will have been to prevent the Claimants from adducing this evidence in cross-examination. If on the other hand Bacon had said nothing to Mr. de Botton about this then that might indicate either than the event never happened or alternatively that Bacon was unwilling to raise it with Mr. de Botton. The evidence of silence would therefore at best be ambiguous. As things stand the Defendants will be able to contend that there is no evidence before the Court that this matter was ever mentioned to Mr. de Botton. In relation to Mr. Sylvester they will be able to rely upon Mr. Lomas' witness statement as confirming that no complaint was ever made to him by Bacon about any threats of exposure by Frank Lloyd. I am not therefore persuaded that the inability of the Defendants to discuss the events of 1978 with these witnesses is sufficiently serious to justify the refusal of permission to amend. Once again it is a matter which will need to be kept in mind at trial when weighing up the other relevant evidence. I should observe that in connection with this submission Mr. Vos emphasised, as I have mentioned earlier, that the events of March 1978 will require to be examined in connection with the Defendants' plea that Bacon decided to remain with Marlborough in 1978 of his own free will. Therefore, says Mr. Vos, these matters should in any event have been raised with such witnesses as Mr. de Botton. In the light of my conclusions on the issue of prejudice it is unnecessary for me to express any view about this.

48. Finally on prejudice I should mention a matter raised by Mr. Lyndon-Stanford. He tells me that these proceedings, not surprisingly, have generated considerable interest in the press and that many of the allegations raised in the pleadings have been widely reported. His clients are naturally concerned at the prospect of serious allegations of blackmail finding their way into the action. So that there should be no doubt about it I wish to emphasise that my assessment of the evidence in this judgment is not a determination or acceptance of its truth. That is not my function at this stage in the proceedings. The Court is only concerned at this time to filter out hopeless claims. For the reasons I have given the blackmail claim does not fall into that category. But that does not mean that it will succeed or that I have formed any view at all as to its truth.

Conclusions

49. For these reasons whilst refusing permission to amend in the form sought I am minded to grant permission provided that a suitable draft can be formulated to take account of the points raised in this judgment. I do not therefore intend to deal with Mr. Lyndon-Stanford's specific criticisms of the terms of the existing proposed amendment. I would hope that many of these points could be taken account of in the revised draft. In these circumstances the proper order for me to make is to stand this application over for further argument once the new version of the amendment has been formulated.

Video link

50. The Claimant also made an application to adduce the evidence of Mr. Glimcher at the trial by video link. This was opposed by both Defendants. Although I have an undoubted discretion to take the evidence of a witness by this means it does have obvious disadvantages. Even if there are no problems with the quality of the picture and the sound the process is remote and it is considerably more difficult for those cross-examining the witness to exercise their forensic powers in the same way as when that witness is present in Court. Correspondingly it is less satisfactory for the judge.
51. Given the importance of Mr. Glimcher's evidence my preference is that he should attend at the trial in London in the usual way. If he is prepared to provide a witness statement, as he has done, making serious allegations against the Defendant companies then he does have some responsibility in my opinion to comply with the usual procedures of the jurisdiction in which that evidence is to be used. I would therefore expect him to travel to London to give his evidence in the usual way. In the light of indications to this effect which I gave during the course of the hearing Mr. Vos did not press his application. I will therefore leave it to him and those advising the Claimant to bring my observations to Mr. Glimcher's attention. If he remains unwilling to come to London Mr. Vos is at liberty to make such further applications as he thinks fit in relation to the taking of his evidence.