FACV No. 12 of 2004

IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 12 OF 2004 (CIVIL)

(ON APPEAL FROM CACV NO. 460 OF 2002)

Between:

NINA KUNG alias NINA T.H. WANG	Appellant
and	
WANG DIN SHIN	Respondent

Court: Mr Justice Chan PJ, Mr Justice Ribeiro PJ, Mr Justice Litton NPJ, Sir Noel Power NPJ and Lord Scott of Foscote NPJ

Dates of Hearing: 12 and 13 October 2006

Date of Judgment: 25 October 2006

JUDGMENT ON COSTS

Mr Justice Chan PJ:

1. I agree with the judgment of Mr Justice Ribeiro PJ.

Mr Justice Ribeiro PJ:

A. The proceedings and the present application

2. On 16 September 2005, the Court unanimously allowed the appeal lodged by the appellant ("Mrs

Wang”). The will dated 12 March 1990 of her deceased husband, Mr Wang Teh Huei (“Mr Wang”), was admitted to probate as his last will.[1]

3. This was the culmination of extremely lengthy and hard-fought litigation which began on 2 September 1997 with the respondent (“Mr Wang Snr”) applying, against resistance from Mrs Wang, for leave to swear to the death of Mr Wang. Contested probate proceedings followed, leading to a trial before Yam J which started on 6 August 2001 and lasted 172 days over a 14-month period. Mr Wang Snr’s case, supported by expert and other evidence, was that the will promulgated by Mrs Wang was a forgery, a contention upheld by the Judge who ordered her to pay 85% of the costs on an indemnity basis.

4. Mrs Wang’s appeal to the Court of Appeal was dismissed with costs by a majority after a 28-day hearing. The costs orders made by Yam J were varied to cover 75% of Mr Wang Snr’s costs on an indemnity basis. However, two of the three judges overturned Yam J’s finding that the signature of Mr Tse Ping Yim (“Mr Tse”), witnessing the will, had been forged; although the (differently composed) majority continued to accept that the purported signatures of Mr Wang were forgeries. Yuen JA espoused a view in favour of what was referred to as “the subtle form of forgery” in relation to Mr Tse’s signatures. This involved the suggestion (not in the pleaded case) that, while genuine, those signatures had been appended to the documents neither on the date nor in the circumstances to which Mr Tse had deposed.[2]

5. When the appeal came to be argued before the Court (at a hearing lasting ten days), Mr Wang Snr maintained that Mr Wang’s signatures had been forged and that Mr Tse’s signatures, although now accepted as genuine, involved the “subtle form of forgery”. In allowing Mrs Wang’s appeal, it was crucially held by the Court that there was no basis for treating Mr Tse’s signature as other than genuine and that Mr Wang Snr had not discharged his evidential burden in relation to the issue of forgery.

6. The parties lodged written submissions as to costs and the Court was re-convened to deal with them. Two issues are raised by these submissions: (i) what orders the Court should make as between the parties regarding the costs of the proceedings; and (ii) whether certain orders should be made with a view to identifying persons who allegedly funded Mr Wang Snr’s litigation and ordering them pay Mrs Wang’s costs.

B. The costs orders sought in relation to Mr Wang Snr

7. Mrs Wang initially indicated that she would not be seeking costs against Mr Wang Snr in order “to be conciliatory and to restore harmony in the family”. However, in the light of Mr Wang Snr’s assertion that he is entitled to a beneficial interest in some 20% of the Chinachem Group of companies (which Mrs Wang rejects), Mrs Wang presently seeks an order that he should pay the costs of the proceedings here and below on a party and party basis, including the expenses of the administrators *pendente lite*. She is, in other words, contending that the costs should follow the event of her success on appeal.

8. However, Mr Geoffrey Vos QC, appearing with Mr Benjamin Yu SC and Mr Ramesh Sujanani on Mrs Wang’s behalf, informed the Court that, recognizing the impecuniosity of Mr Wang Snr, Mrs Wang does not propose to enforce any costs order she may obtain against him. Rather, she would seek to use such order as a basis for pursuing the alleged funders of the litigation (if jurisdiction and the evidential basis for doing so exist) and also as a basis for setting off any claims Mr Wang Snr may make for payment of certain interlocutory costs orders made in his favour. Mrs Wang also seeks an order that the costs she has incurred be recovered out of the estate

insofar as they have not already been otherwise paid. A certificate for five counsel at first instance and for four counsel at each appellate hearing is also sought.

9. Mr **Wang** Snr's position is that his costs should be paid out of the estate, or alternatively, that there should be no order as to costs. Mr Edward Chan SC, appearing with Mr Albert Tsang and Mr Victor Luk for Mr **Wang** Snr, submits that the Court should only grant a certificate for three counsel at first instance but, since four counsel were also instructed on his client's behalf in each appellate court, stated that he would not object to a certificate for four counsel in respect of each appellate hearing.

C. The applicable legal principles

C.(i) The broad principle

10. The award of costs as between the parties in contested probate proceedings, as in other areas of litigation, is in the court's discretion.[3]

11. The principles guiding the exercise of that discretion in relation to a party who has unsuccessfully opposed a will are well-established. In *Spiers v English*, Sir Gorell Barnes P stated:

"In deciding questions of costs one has to go back to the principles which govern cases of this kind. One of those principles is that if a person who makes a will or persons who are interested in the residue have been really the cause of the litigation a case is made out for costs to come out of the estate. Another principle is that, if the circumstances lead reasonably to an investigation of the matter, then the costs may be left to be borne by those who have incurred them. If it were not for the application of those principles, which, if not exhaustive, are the two great principles upon which the Court acts, costs would now, according to the rule, follow the event as a matter of course. Those principles allow good cause to be shewn why costs should not follow the event."[4]

12. Accordingly, the general rule where opposition to a will is unsuccessful is that costs follow the event. However, if the case can be shown to fall into one or other of the two exceptions, the order is, in the first category (where the litigation is caused by the conduct of the testator or the residual beneficiary) for the costs to come out of the estate; and in the second category (where circumstances lead reasonably to an investigation of the will's validity) for there to be no order as to costs. I shall refer to these two categories as "the first exception" and "the second exception" respectively.

13. In *Re Cutcliffe's Estate*,[5] Hodson LJ observed:

"*Spiers v English* [1907] P 122 was cited in this court in *In the Estate of Plant, Wild v Plant* [1926] P 139, apparently with approval, and, so far as I know, that statement of principle as a useful guide to judges who have to exercise their discretion in matters of costs in probate actions has been consistently followed since 1907."

These principles have been adopted in Hong Kong.[6]

14. In 1863, Sir J P Wilde explained the underlying objectives:

"It is of high public importance that doubtful wills should not pass easily into proof by reason of the cost of opposing them. It is of equal importance that parties should not be tempted into a fruitless

litigation by the knowledge that their costs will be defrayed by others."[7]

C.(ii) Hostile litigation

15. It is, however, important to note that the manner in which the challenge to a will is mounted may determine the court's approach to costs. A case may fall prima facie within one of the two exceptions, but if opposition to the will goes beyond putting the proponent to strict proof of its validity and takes the form of hostile litigation, the general rule whereby costs follow the event is likely to be applicable. This is implicitly recognized by O 62 r 6(1)(c) of in the Rules of the High Court which provides:

"(1) Notwithstanding anything in this Order or in section 52A of the Ordinance –

(c) unless the Court is of opinion that there was no reasonable ground for opposing the will, no order shall be made for the costs of the other side to be paid by the party opposing a will in a probate action who has given notice with his defence to the party setting up the will that he merely insists upon the will being proved in solemn form of law and only intends to cross-examine the witnesses produced in support of the will."

16. Thus, in *Re Cutliffe's Estate*,[8] where the defendants had unsuccessfully put forward a positive case of undue influence and fraud, Hodson LJ stated:

"It must surely be obvious to anyone who has studied the history of litigation in the Probate Division, notwithstanding the exceptions which are to be found in the books, that where pleas of undue influence and pleas of fraud are made, the probability, at any rate, if they are unsuccessfully made, is that the people who make such charges and fail will be condemned in the costs not only of that charge but of the whole action."

In relation to the case at hand, his Lordship added:

"It was not one of those cases where the defendants merely put the plaintiff to proof that the deceased knew and approved of the contents of the will. They took on themselves the task of proving, if they could, that not only was that onus not discharged but that the will itself was brought into existence by the undue influence of the plaintiff. That they wholly failed to prove. Having failed, and having failed because they were disbelieved, it seems to me inevitable that an order for costs would be made against them."

17. It follows that in exercising its discretion, the court draws a distinction between litigation reasonably undertaken by a person in order to require the validity of a will to be investigated by the court, and litigation which is fundamentally hostile, where the opposing party takes it upon himself to establish a positive case such as of forgery, fraud or undue influence, with a view to defeating the will and advancing his own claim to the estate over that of the will's proponent. It is of course perfectly open to the will's opponent to adopt such an approach. However, he runs the risk of an adverse costs order if he is unsuccessful.

18. This point was not adequately grasped in the submissions made by Mr Chan. A large part of those submissions involved an endeavour to persuade the Court that Mr **Wang** Snr had a reasonable basis for taking the hostile positions adopted. Even assuming that such was the case, those submissions are not to the point. Each party to a hard-fought piece of litigation is likely, with some justification, to regard his own position to be at least reasonably arguable. If that were not so, the case might have been struck out as an abuse. The losing party is nevertheless generally made to

pay the costs.

C.(iii) Proper inquiries

19. There is a further qualification to the operation of the two exceptions. It has been held that in judging whether the party opposing the will comes within either exception, the court "must look at the facts and view them as they were presented to the unsuccessful party".[9] However, it must be understood that this does not justify an ill-considered and precipitous decision to litigate in opposition to a will. The courts have emphasised that "the opponents must have taken all proper steps to inform themselves as to the facts of the case"[10] before undertaking the proceedings if they are to take themselves out of the general rule of costs following the event.

D. The arguments advanced by Mr **Wang** Snr

20. The primary submission made on behalf of Mr **Wang** Snr is that the first exception applies in that the litigation was caused by the conduct of the testator and/or of Mrs **Wang**. Alternatively, he submits that the case falls within the second exception in that the circumstances led reasonably to an investigation of the matter so that there should be no order as to costs.

D.(i) Is this a case within the first exception?

21. The two exceptions overlap.[11] However, cases falling within the first exception are properly seen as confined to those where the conduct of the testator or of the residual beneficiary is the sole or at least the dominant cause of the litigation. The second exception involves cases where certain circumstances – which may include aspects of the testator's or the residual beneficiary's conduct and which form part of the evidence to be assessed as a whole – reasonably require the will to be investigated by the court.

22. By way of illustration, cases where the litigation was held to have been caused by the conduct of the testator, justifying orders for the parties' costs to be borne by the estate, include cases where :

(a) the testator had left two documents which required the court's ruling as to whether one was intended to revoke the other or whether they were to be read together as the will;[12]

(b) the testator had created a situation which he recognized would give rise to "a confounded row after [his] death", but decided to leave the rival claimants to "fight it out";[13]

(c) the testator's way of life, erratic conduct and violent language gave grounds for thinking that he was of unsound mind;[14]

(d) the testator's repeated oral complaints about having been pressured to change his will (which were found to be "duplicitous") gave rise to litigation concerning undue influence;[15] and,

(e) the testatrix left a will with ambiguous language making it unclear what were the conditions for a particular gift to take effect.[16]

23. Similarly, cases held to have been caused by the conduct of the residual beneficiary generally arise out of situations where that conduct is the pivotal cause of the litigation.

24. Many such cases come within the second rule in *Barry* ***v*** *Butlin*,[17] being cases where "... a party writes or prepares a Will, under which he takes a benefit", constituting "a circumstance that

ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true Will of the deceased."[18] It is not surprising that in such a situation, the court generally directs the costs of investigating the will to come out of the estate where the investigation results in removal of the suspicions and the upholding of the will. Examples where this was done include Worth v Clasohm[19] where the testatrix's nephew, a solicitor who had prepared her will, was a large beneficiary thereunder; and Re Herbert[20] where the residual beneficiary was not a relative of the two brothers concerned, but was described as their "universal assistant, including accountant and financial adviser" who had advised them to make their wills.

25. *Shortman* v *Shortman*[21] presents a different example, the evidence there being that the testator's widow and beneficiary had threatened to leave him (while he was in ill health) just before the will was made. An unsuccessful challenge on the ground of undue influence did not prevent the court from directing that the defendant's costs should be paid out of the estate.

26. Mr Chan submits that the present case should be treated as one falling within the first exception on two main grounds. First, he relies on the fact that the testator did not tell Mr **Wang** Snr that he had made a new will, having told him of the 1968 Will and having taken particular care to safeguard the same. This, he submitted, made the will propounded by Mrs **Wang** highly suspicious, in particular because the testator's conduct "in cutting out his family was so unexpected."

27. I cannot accept this as a basis for triggering the first exception. As indicated in the Judgment,[22] Mrs **Wang** was the natural beneficiary of Mr **Wang**'s estate and the suggestion that it was suspicious for the will to name her as sole beneficiary is wholly untenable. As Lord Scott of Foscote NPJ pointed out:

"The surprise is not that Mr **Wang** changed his will in 1990 making his wife rather than his father his sole beneficiary but that it had taken him so long to get round to doing so."[23]

28. One can well understand that Mr **Wang** Snr was disappointed and may have thought that he had been misled by the testator, but it is clear that this cannot constitute a reason for attributing the litigation to the testator's conduct, especially since the testator's choice of beneficiary was unsurprising. As Hodson LJ stated in *Re Cutliffe's Estate*:

"While it would not be possible to limit the circumstances in which a testator is said to have promoted litigation by leaving his own affairs in confusion, I cannot think it should extend to case where a testator by his words, either written or spoken, has misled other people, and perhaps inspired false hopes in their bosoms that they may benefit after his death."[24]

29. Secondly, Mr Chan argues that the testator's conduct in leaving behind testamentary documents with decidedly odd features brings the case within the first exception.

30. The odd features of the documents were clearly recognized in the Judgment. I noted that "the 1990 documents exhibit unusual and eccentric features and idiosyncratic language which make the documents somewhat bizarre and not readily explicable."[25] The oddities were also discussed by Lord Scott.[26] However, as was pointed out in the Judgment, those oddities tended to cut both ways and were capable of supporting arguments both for and against a forgery conclusion.[27] They had to be viewed in the context of the evidence as a whole, including, not least, the evidence

concerning Mr Tse's signatures, to decide whether at the end of the day, the will was genuine.

31. I would accordingly be prepared to consider the unusual and eccentric features of the will and its idiosyncratic contents a basis for placing this case prima facie within the second, but not the first, exception. To this I shall return.

32. Mr Chan also argued that Mrs **Wang**'s conduct supplied a reason for categorising this as a case within the first exception. He listed among instances of such conduct her allegedly late disclosure of the 1990 Will; her evidence not having been accepted in the swear death proceedings; a sudden change of mind about opening the envelope; the rejection of Dr **Kung**'s evidence about alleged "holiday wills" as a fabrication; and so forth.

33. I do not accept this argument. In the first place, the allegedly suspicious nature of many aspects of Mrs **Wang**'s conduct relied on was not accepted in the Judgment. Thus, for instance, the allegation that there was sinister delay in the filing of her affirmation of testamentary scripts and her lodging of the 1990 Will with the court was rejected as unfounded.[28] Again, the suggestion that her sudden change of mind about opening the envelope was highly suspicious was met by the explanation that this occurred shortly before the application to appoint interim receivers was due to be heard on 23 September 1999, Mrs **Wang** having deposed to her concern at the consequences of such an appointment.[29]

34. As the authorities cited above indicate, where the residual beneficiary's conduct is held to have caused the litigation, that conduct has a specific bearing on the making of the will or on its validity at inception. Thus, in *Barry* ***v*** *Butlin* cases, it is the beneficiary's conduct of getting the testator to make the will under which that beneficiary takes a benefit. And in a case like *Shortman* ***v*** *Shortman*[30], it is the beneficiary's uttering of words which may have pressurized the testator into making the will.

35. The conduct of Mrs **Wang** relied on by Mr Chan is not of that character. The complaints concern her conduct many years after the making of the 1990 Will, in the course of her defence against hostile litigation. Thus, the fact that her evidence was rejected by the Judge in the swear death proceedings does not bear on the making or validity of the will and is not relevant. Nor is the fact that Dr **Kung** fabricated evidence about the "holiday wills". The effect of these issues of credibility has been discussed in the Judgment.[31] They do not provide a basis for treating this as a first exception case.

D.(ii) A case prima facie within the second exception

36. As indicated above, I consider this a case that falls prima facie within the second exception. The unusual and odd features of the will and the accompanying documents reasonably entitled Mr **Wang** Snr to oppose the will and to require an investigation of its validity by the court. However, that is not the end of the matter. Account must be taken of the hostile nature of the litigation undertaken and whether proper inquiries were made before alleging forgery.

D.(iii) Hostile litigation and proper inquiries

37. A challenge could have been mounted within the protective sphere of O 62 r 6(1)(c). Mr **Wang** Snr could have given notice in his pleadings that he would insist upon the 1990 Will being proved in solemn form of law and that he intended to cross-examine the witnesses produced in support of that will. In the exercise of its probate jurisdiction, the court may well have been disposed, whether on the application of the parties or of its own motion, to appoint an independent

handwriting expert to help satisfy itself as to the genuineness or otherwise of the will. If Mr **Wang** Snr had approached the case in that way, he would have been insulated against any adverse order as to costs.

38. But he took a very different path. He had decided even before mention of the 1990 Will, to institute legal proceedings in order to wrest control of the Chinachem group from Mrs **Wang** in reliance on the 1968 Will. Thus, on 12 April 1997, two days after the expiration of seven years from the date of Mr **Wang**'s kidnapping, as Mr Justice Litton NPJ put it: "out of the blue the respondent launched proceedings for leave to swear death".[32] Then, after Mrs **Wang** filed an affirmation of testamentary scripts on 16 January 1998, Mr **Wang** Snr did not wait for the sealed envelope to be opened or for its contents to be examined before alleging in an affirmation dated 26 March 1998, that such will had probably been made up by Mrs **Wang**, adding: "She has, in other words, probably committed a crime."

39. After the envelope was opened, it became evident that the 1990 Will had ostensibly been signed by Mr Tse as a witness. He was known to Mr **Wang** Snr and it must have been obvious that anything Mr Tse might have to say about whether that was indeed his signature and, if so, what were the circumstances in which he signed the documents, would be of cardinal importance to determining whether the will was genuine. Yet, no steps were taken on behalf of Mr **Wang** Snr to ask Mr Tse any of the crucial questions. No move was made to contact or gain access to him, whether directly or through Mrs **Wang**'s solicitors. Of course, no one knew that Mr Tse unfortunately did not have long to live. However, as pointed out in the Judgment,[33] Mr **Wang** Snr's solicitors could have sought an interview with Mr Tse while he was in Hong Kong between the 6th and the 13th or between the 18th and the 23rd of September. And even while he was on the mainland, they could have approached Mrs **Wang**'s solicitors to arrange for a statement to be taken from him, but they never did so.

40. On the contrary, Mr **Wang** Snr amended his pleadings to allege that Mr Tse's signatures were forged along with the purported signatures of Mr **Wang**. At the trial, he called expert evidence on handwriting to establish such forgeries. He also called a purported expert on ink-dating whose evidence turned out to be wholly spurious. He called various witnesses to suggest that Mr Tse was a most unlikely choice of witness on the ground, among other things, of his alleged gregariousness. He also sought to cast doubt on the choice of Mrs **Wang** as the sole beneficiary, even to the point of questioning whether she had in fact ever been married to Mr **Wang**.[34] And when it was discovered that Mr Tse had given statements to two different solicitors confirming his attestation of Mr **Wang**'s signatures on the will, an attack was launched leading to wholly unjustified findings which implied that one of the solicitors was party to a fraudulent conspiracy to promulgate a false will.[35] After the Court of Appeal rejected the finding of forgery of Mr Tse's signature, Mr **Wang** Snr persisted before this Court in putting forward a theory of fraudulent conspiracy involving "the subtle form of forgery".

41. It is unnecessary to expand further on the obviously hostile nature of the litigation launched on Mr **Wang** Snr's behalf. Nor can it be disputed that the litigation to establish forgery was undertaken without any attempt to make elementary inquiries as to the genuineness of the will by contacting the person who had ostensibly attested Mr **Wang**'s signatures. Mr **Wang** Snr had obviously made up his mind that he would fight to obtain control over the estate on the basis of the 1968 Will no matter what. The assertion that the 1990 Will propounded by Mrs **Wang** was a forgery became fixed in his mind and he was determined to do all he could to prove that fact. This was accurately described by Mr Vos as "hostile litigation *par excellence*".

42. In *Twist* ***v*** *Tye*,[36] commenting on litigation similarly based on a fixed preconception held

by executors who were also residual beneficiaries, and rejecting the submission that one of the exceptions ought to govern their costs, Gorell Barnes J stated:

"The truth is, as I said before, they took a view [as to the validity of the will they sought to promulgate] and acted upon it; and when it came to a fight between themselves, on the one side, and the persons interested under an intestacy, on the other side, they stood to win one way and to lose the other. I see, therefore, nothing to warrant a departure from the ordinary rule."

E. Costs to follow the event

43. For the foregoing reasons, I consider that the general rule whereby the costs follow the event is applicable to the present case. The question which next arises is whether any grounds exist for relieving Mr **Wang** Snr from the full rigour of that rule's operation.

E.(i) Allowance for case prima facie falling with second exception

44. In my view, account must be taken of the fact that this case bears features which place it prima facie within the second exception, as discussed in Sections D.(i) and D.(ii) above. It follows that Mr **Wang** Snr would have been reasonably entitled to demand an investigation (within non-hostile boundaries) by the court, justifying an order that both parties should bear their own costs to the extent of such investigation.

45. It is realistic to assume that, due to the size of the estate, such investigation would nonetheless have involved substantial litigation since it would no doubt have been carried out in exacting and meticulous detail. Applying a broad-brush approach, I would treat one-third of Mrs **Wang**'s costs as costs which she would have had to incur in any event given the necessity for such investigation and decline to order that third to be paid by Mr **Wang** Snr. This applies equally to the appeals which have, in the event, proved necessary.

E.(ii) Costs reduced for prolixity at the trial

46. At the trial, Mr Martin Lee SC appeared with Mr Ramesh Sujanani and Mr Erik Shum for Mrs **Wang** in respect of all issues other than those relating to ink-dating. That latter issue was dealt with by Mr Clive Grossman SC, assisted by Mr Ramesh Sujanani and Ms Alice Lee. Nothing said in this section concerns Mr Grossman or the ink-dating issue.[37]

47. Mr Chan submitted that the record shows that the cross-examination conducted by Mr Lee was of such inordinate prolixity as to justify a 50% reduction in any costs that might be ordered in favour of Mrs **Wang**.

48. The facts set out in the following passage taken from Mr Chan's written submissions, with minor adjustments suggested by Mr Vos, are common ground:

"The time taken by [Mr Lee] in the cross-examination of the major witnesses is: [Mr **Wang** Snr] 8 days, Yih 20 days, Teresa 12.5 days, Lesnevich 3.5 days, Patrick Cheng, government handwriting expert, 6.5 days, David Tsui 14 days ... totalling [64.5 days]."

49. Additionally, as I pointed out in relation to Mrs **Wang**'s own expert, Prof Jia:

"... his examination-in-chief, quite extraordinarily, lasted for 17 days as he in effect restructured and rehabilitated the expert evidence relied on by the appellant. He was then cross-examined and re-

examined over a further 19 days. Such a turn of events was regrettable and suggests a deficiency in preparation of the case."[38]

50. The Judge was scathing about the cross-examination conducted by Mr Lee. He pointed out that Mr Yih, who was then 76 years old, was subjected to 20 days of cross-examination which he described as "extremely long, excessively thorough and vigorous, if not downright oppressive."[39] Elsewhere, the Judge referred to the cross-examination as a "very irresponsible, vicious and hostile attack on the evidence of Yih."[40] It was also largely irrelevant:

"He was asked in meticulous details including how much money he brought to Hong Kong in 1951 and how he made his money in Shanghai in those days, as well as how much assets he had when he left Chinachem in 1970. He was then cross-examined in meticulous details on how he made his money in his investment in property at Fung Wong Terrace after he left Chinachem in 1970. Documents of some 30 years old relating to the activities in Taiwan were thrown at him without any warning or prior discovery. The explanation for no discovery was that those documents were only relevant to credibility. This amounted to a direct admission that those documents were not directly relevant to any issue in this case."[41]

51. After repeated criticisms of Mr Yih's treatment at the hands of Mr Lee,[42] the Judge's conclusion was that "All this cross-examination was just a waste of time..."[43]

52. Similarly, Mr **Wang** Snr, then aged over 90, was subjected to seven full days of cross-examination, with many questions having no or only marginal relevance. The Judge stated:

"The area covered by cross-examination was wide and inquisitive including questions as to whether he had ever told a lie and whether he had ever owed any people money. His evidence covered his relationship with his son Teddy and the circumstances leading to the 1968 Will as well. ... [All] sorts of allegations were made against him, such as his being in debt, imprudence in business and womanizing, etc."[44]

53. In relation to Teresa, the Judge pointed out that in a cross-examination that took 12½ days, only three, highly peripheral, points were subjected to challenge.[45] He found that she had been oppressively cross-examined about three documents.[46]

54. The Judges in the Court of Appeal were equally critical. Referring to Mr Lee, Yeung JA stated: "The aggressiveness, oppressiveness, unfairness, and aimlessness of the cross-examinations were exceptional."[47] He added:

"Earlier, I have expressed my sentiments on the length of the trial. I do not think the judge alone should be blamed. Clearly, Mr. Lee's cross-examination of the Father's witnesses and Professor Jia's evidence greatly prolonged the trial.

The Father, Yih, and Teresa were called for the limited purpose of providing background information on **Wang**'s character, his family, and the pre-1970 development of Chinachem. Yet, they were subjected to many days of cross-examination on irrelevant or, at best, peripheral matters based on untrue or unsubstantiated allegations."[48]

55. Yeung JA noted that much of this cross-examination was pointless:

"...the evidence of the Father, Yih, and Teresa took about 50 days, mainly because of the lengthy cross-examinations, which were very often directed at peripheral matters based on untrue and

unsubstantiated allegations. In the end, Mr. Lee chose not to make any submissions on those matters."[49]

56. Yuen JA expressed her dissatisfaction succinctly: "The evidence on virtually every point, as well as every non-point, was pursued to extremes by both sides."[50]

57. In my view, there was undoubtedly a great deal of time wasted at the trial by an inordinately long, and often oppressive, cross-examination by Mr Lee on matters which were peripheral or irrelevant. There was a single central question: whether the 1990 will was genuine. But the cross-examination did not discriminate between evidence which was fundamental to that issue and evidence which could, at best, be only of the remotest circumstantial significance. The trial was taken up with examining the minutiae without any sense of proportionality.

58. I am therefore of the view that Mr Chan has substantial grounds for claiming a reduction in any costs to be ordered against Mr **Wang** Snr in favour of Mrs **Wang**. Again adopting a broad-brush approach, I would treat another third part of her costs of the trial as a further reduction on the grounds of prolixity. No question of prolixity arises either in the Court of Appeal or before this Court.

E.(iii) Conclusion as to the costs of the proceedings

59. It follows that, ordering costs to follow the event but making allowances for the second exception in all three courts and for prolixity in the Court of First Instance, I would direct that Mr **Wang** Snr pay one-third of the costs incurred by Mrs **Wang** at first instance, and two-thirds of her costs in the Court of Appeal and in this Court, to be taxed if not agreed.

E.(iv) Expenses of the administrators pendente lite

60. On 15 March 2000, joint administrators *pendente lite* were appointed by consent of the parties. Such appointments are made pursuant to s 40 of the Probate and Administration Ordinance, Cap 10, to preserve and protect the assets of the estate pending resolution of the dispute. While in office, the administrators *pendente lite* are subject to the immediate control of the court and act under its direction.[51] By s 60 of that Ordinance, the court may allow such an administrator "such remuneration out of the estate of the deceased person as the court thinks fit." The Court was told that the administrators *pendente lite* were indeed remunerated and financed out of the estate in the present case.

61. Such remuneration and other expenses incurred by the administrators *pendente lite* will therefore have diminished the estate. Where, at the conclusion of the litigation in respect of which the administrators were appointed, the losing party is ordered to pay the costs of the winning party who succeeds to the estate, such expenses are in principle recoverable as part of the costs of the proceedings. As the very brief report in *Fisher and Joy* **v** *Fisher & Ors*[52] states:

"PER CURIAM: The appointment of an administrator *pendente lite* was a proceeding in the cause rendered necessary by the litigation; the unsuccessful party must therefore bear the additional costs which have thereby been occasioned to the estate."

62. As indicated by the word "additional" in the foregoing citation, it may be necessary to apportion the expenses of the administration between those additional expenses incurred by the estate in consequence of the litigation and those expenses which would have in any event have had

to be incurred in winding up the estate. Thus, in *Re Howlett*,[53]Ormerod J stated:

"It is clear that the unsuccessful defendant in a case of this kind must bear any additional cost which has been thrown on the estate by his action in instituting the proceedings, or in being responsible for the proceedings; and a part of that additional cost is clearly the costs and the remuneration, or a proportion of it, which have been incurred by the appointment of an administrator. But equally if in the course of his work the administrator does work in the winding up of the estate which must have been done by a professional man, if it was to be done efficiently, I fail to see why the defendant should bear the burden, and why the estate should receive the benefit because of the defendant's action. In these circumstances, if the facts are that the portion of the work for which the administrator has been remunerated is work which must have been done in any event in order to wind up the estate, then I am satisfied that there should be an apportionment of the remuneration so that the estate may bear its proper portion of the cost of the winding up."

63. Approaching the expenses of the administration *pendente lite* in the present case along the lines suggested by the abovementioned cases:

(a) subject to sub-paragraph (b) which follows, it is my view that Mr **Wang** Snr should pay to Mrs **Wang** the expenses incurred by the estate in respect of the administrators *pendente lite* save for any such expenses incurred for work which must have been done in any event in order to wind up the estate; and,

(b) giving a like allowance by reason of the applicability of the second exception as has been given in relation to the other costs of the proceedings, I consider that there should be a one-third reduction in the aforesaid expenses of the administration *pendente lite* ordered to be paid by Mr **Wang** Snr.

64. As no question of prolixity is raised in this context, no deduction from the expenses of the administrators *pendente lite* is called for on that ground. I would accordingly order that Mr **Wang** Snr pay two-thirds of the expenses of the administration *pendente lite* over and above any sums chargeable in any event to the estate for the purpose of its winding-up.

E.(**v**) Mrs **Wang**'s costs out of the estate

65. As indicated above, the Court was asked to make an order that Mrs **Wang** should have her costs out of the estate insofar as they have not already been otherwise paid. I would decline to make such order. The costs in this case have been approached entirely on the basis that the litigation was hostile and that the appropriate order is for costs to follow the event, subject to discretionary adjustments. The order sought is not appropriate in such a context. The Court was told that Mrs **Wang** seeks this order with a view to deducting her litigation costs for the purposes of estate duty. I say nothing about the correctness or otherwise of the suggestion that such a deduction is available. That is a matter to be resolved as between Mrs **Wang** and the Estate Duty Commissioner and does not concern the Court.

E.(vi) Certificate for counsel

66. The parties' respective positions on certificates for counsel have been mentioned. Although Mr Chan did not feel able to argue against the grant of a certificate for four counsel at the appellate stages, the Court must obviously come to its own conclusion as to whether employment of the number of counsel concerned was reasonably necessary in the light of the demands of the case so as to make it fair that the losing party should have to pay those costs. In my view, there should be a certificate limited to three counsel at each stage, three being the number of counsel engaged by Mr

Wang Snr at the trial.

F. As to alleged funders of the litigation

67. The evidence before the Court was that Mr Wang Snr had been in receipt of a living allowance of HK$19,000 per month from Mr Wang out of which he was expected to provide HK$8,000 to Mrs Wang Snr. The Court was told that since 1 October 2005, Mrs Wang has arranged for Mr and Mrs Wang Snr to receive the monthly amount of HK$73,718 to meet their living, medical and other expenses. In an affirmation made by Mr Wang Snr dated 29 August 2006 ("the Affirmation"), he stated:

"… by August 2000 when I made the application for maintenance in 2000 MP No 4157 I had already exhausted my own liquid funds mainly because I had paid my solicitors costs in this and other related proceedings in the sum of about $1 million."

68. It is therefore clear that any orders for costs to be paid by Mr Wang Snr cannot be met by him (subject to his claim to be entitled to 20% of the Chinachem group). It is plainly legitimate to ask how and on what terms Mr Wang Snr's litigation was financed.

69. The sums expended by way of legal costs are enormous. In the Affirmation, Mr Wang Snr deposed to the following facts concerning the costs incurred on his side, namely:

(a) that the costs and disbursements for the whole of the proceedings, but excluding the expenses of the administration, were in the region of $262 million;

(b) that about $42 million had been paid to his solicitors, raised (apart from $1 million paid out of his own resources) "from borrowing" with no agreement for the payment of any interest and with repayment being "completely unrelated to the outcome of these proceedings"; and,

(c) that "in relation to the unpaid balance in the region of $220 million", Mr Wang Snr remains "solely liable to pay the outstanding costs" which he says he has agreed with his solicitors (Messrs K M Chan & Co) "to settle ... as soon as possible" from any amounts ordered to be paid out of the estate "and/or [via] assistance and support from family members and relatives" and/or realization of his or his children's alleged interests in the Chinachem group of companies.

70. Figures for the costs incurred by Mrs Wang are not before the Court but it may be assumed that they are of a like order. The expenses of the administrators *pendente lite* are also very substantial.

F.(i) Orders sought in connection with alleged funders

71. In this context, Mr Vos informs the Court that his client seeks to obtain orders against the persons who are thought to have financed Mr Wang Snr's litigation requiring them to pay her costs, insofar as the Hong Kong court has jurisdiction to make such orders and insofar as the facts relevant to such funding can be established. On the basis of the Affirmation, he submits that he is able to assert that Messrs K M Chan & Co are among the funders and that it is likely that they are able to inform the Court of the identity of any other funders.

72. However, it was accepted that these questions cannot be dealt with at the present hearing primarily because Messrs K M Chan & Co would undoubtedly have to be separately represented and because there are no other alleged funders before the Court to be heard in presumed opposition

against the granting of such orders. Accordingly, Mr Vos presently seeks orders designed to bring the question of relief against the alleged funders before the Court at a future hearing at which the said solicitors can be separately represented and where any other disclosed funders can be joined to be heard on the proposed motion.

73. It is envisaged that the Court should then decide the jurisdictional issue and, if jurisdiction should be held to exist, give directions for the determination (by some other tribunal if appropriate) of any outstanding issues.

74. In accordance with the approach proposed, Mr Vos seeks orders:

(a) giving him liberty to apply to the Court within a stated period in terms of a draft Notice of Motion which he has handed to the Court seeking relief against certain alleged funders; and,

(b) in aid of such motion, requiring Mr **Wang** Snr to make an affirmation answering the following questions, namely:

"(i) Who loaned him the sum of approximately $41 million which he used to pay his solicitors, K M Chan & Co?

(ii) When was the sum of approximately $41 million paid to K M Chan & Co?

(iii) What disbursements have K M Chan & Co incurred in these proceedings on behalf of Mr **Wang** Snr (including each of the Court of First Instance, the Court of Appeal and of the Court of Final Appeal)?

(iv) Which of these disbursements have K M Chan & Co discharged, and who provided the monies to Mr **Wang** Snr/ K M Chan & Co for each of those disbursements to be discharged?

(**v**) Which of these disbursements are outstanding, and what arrangements are there for these sums to be secured or paid?"

75. In my view, a sufficient basis has been made out for the Court to accede to the proposal that it should further re-convene to deal with possible relief against alleged funders if Mrs **Wang** should file the Notice of Motion in question. I would grant the liberty sought.

76. However, in relation to the orders sought against Mr **Wang** Snr, I would only be prepared to direct him to answer question (i), namely, as to the identity of the person or persons who loaned him the sum of approximately $41 million which he used to pay his solicitors, Messrs K M Chan & Co. This would seem clearly to be a matter within his knowledge and which he has already deposed to in the Affirmation, albeit without particulars. I do not consider the other questions appropriate for Mr **Wang** Snr. They are all better directed at Messrs K M Chan & Co. If jurisdiction is held to exist and if an arguable case can be made out that the solicitors are pursuable funders, it would be possible for orders to be sought requiring them to answer such questions, always subject to hearing any submissions to the contrary.

G. Orders

77. I would accordingly make the following Orders, namely, that:

1) Mr **Wang** Snr do pay to Mrs **Wang** one-third of her costs of the proceedings before the

Court of First Instance and two-thirds of her costs before the Court of Appeal and before the Court of Final Appeal on a party and party basis to be taxed if not agreed; and two-thirds of the Administration Expenses as defined in paragraph 2 of this Order (together "Mrs Wang's costs").

2) The Administration Expenses referred to in this Order shall mean all those additional expenses incurred by the Administrators *pendente lite* appointed by the Letters of Administration Pending Suit (Grant No. HCAG005364/2000) issued on 17 July 2000 (amended on 12 June 2001 and further amended on 9 November 2001), over and above those expenses which would have been incurred in any event in the winding-up of the Estate of Mr Wang Teh Huei.

3) Mrs Wang do have liberty to apply to the Court of Final Appeal in terms of the draft Notice of Motion (set out in the paragraph which follows hereunder) within one month of the date hereof or such further period as a single Permanent Judge of the Court of Final Appeal may allow, for an order that Mrs Wang's Costs shall be paid by any person or persons found to have funded Mr Wang Snr's costs of the action.

4) Mr Wang Snr do inform Mrs Wang, by delivering to her solicitors Messrs Johnson Stokes & Master within 14 days from the date hereof an affirmation stating the identity of the person or persons who loaned him all or any part of the sum of approximately $41 million which he used to pay his solicitors, Messrs K M Chan & Co.

5) There be liberty to the parties to apply in writing to a single Permanent Judge for further directions in relation to the Administration Expenses or in relation to any persons alleged to be additional funders of the litigation intended to be dealt with upon the hearing of the proposed Notice of Motion.

6) There be a certificate for three Counsel for the proceedings before the Court of First Instance and before the Court of Appeal and before the Court of Final Appeal.

7) There be an order nisi that Mrs Wang have the costs of this application to be taxed if not agreed, any submissions resisting such order to be made in writing within 14 days from the date hereof and any written submissions in reply to be made within 14 days thereafter.

78. The draft Notice of Motion referred to in paragraph 3 of the proposed Order seeks:

1. An Order that the Respondent(s) to the Motion, K M Chan & Co, and [.....] shall pay and discharge such of the Appellant's costs in these proceedings (including those before the Court of First Instance, the Court of Appeal and the Court of Final Appeal, and the expenses of the administrators pendente lite) (the "Litigation") as the Court of Final Appeal ordered the Respondent, Wang Din Shin (Mr Wang senior) to pay by its Order dated [...].

2. Directions be given for the determination of (a) whether the Court of Final Appeal has jurisdiction to make the Order in paragraph (1) hereof and (b) whether such an order should be made if jurisdiction exists to make it.

3. An Order that the Respondent to the Motion, K M Chan & Co, file evidence on oath disclosing with fully particularity the arrangements and means by which Mr Wang senior's costs of the Litigation were funded, and in particular stating (supported by copies of all relevant documents):-

(1) Whether Mr Wang senior or anyone else has entered into any agreement or arrangement or understanding, whether legally binding or not, with any person or persons to fund the Litigation or

any part thereof;

(2) The names of any such person or persons;

(3) The amount of any monies paid, and the dates of all such payments made, by such person or persons to K M Chan & Co or to any person providing services to Mr **Wang** senior or K M Chan & Co, in respect of the Litigation (including, by way of example only, counsel, expert witnesses, costs draftsmen, and transcript writers);

(4) The terms of any such agreement or arrangement or understanding as is mentioned in (1) above.

4. Further or other relief.

5. Costs.

Mr Justice Litton NPJ:

79. I agree with the judgment of Mr Justice Ribeiro PJ.

Sir Noel Power NPJ:

80. I agree with the judgment of Mr Justice Ribeiro PJ.

Lord Scott of Foscote NPJ:

81. I am in full agreement with the reasons given by Mr Justice Ribeiro PJ for the Order which he has proposed. I would make the same Order.

Mr Justice Chan PJ:

82. The Court accordingly unanimously makes the Orders set forth in paragraph 77 of the judgment of Mr Justice Ribeiro PJ.

(Patrick Chan) Permanent Judge	(R A **V** Ribeiro) Permanent Judge	(Henry Litton) Non-Permanent Judge

(Sir Noel Power)
Non-Permanent Judge

(Lord Scott of Foscote)
Non-Permanent Judge

Mr Geoffrey Vos QC, Mr Benjamin Yu SC and Mr Ramesh K Sujanani (instructed by Messrs Johnson, Stokes & Master) for the appellant

Mr Edward Chan SC, Mr Albert Tsang and Mr Victor Luk (instructed by Messrs K M Chan & Co) for the respondent

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[1] See the Judgment of this Court reported at (2005) 8 HKCFAR 387 ("Judgment").
[2] Judgment §§191-192.
[3] Section 52A(1) of the High Court Ordinance (Cap 4) provides: "Subject to the provisions of rules of court, the costs of and incidental to all proceedings in the Court of Appeal in its civil jurisdiction and in the Court of First Instance, including the administration of estates and trusts, shall be in the discretion of the Court, and the Court shall have full power to determine by whom and to what extent the costs are to be paid." By s 17 of the Hong Kong Court of Final Appeal Ordinance (Cap 484) "The Court may confirm, reverse or vary the decision of the court from which the appeal lies or may remit the matter with its opinion thereon to that court, or may make such other order in the matter, including any order as to costs, as it thinks fit."
[4] [1907] P 122 at 123.
[5] [1959] P 6 at 17.
[6] *Wong Oi King* v *Lai Lok Yee*, Unreported, HCAP 1/2000, 26 November 2002, Deputy High Court Judge A Cheung; upheld by the Court of Appeal without discussion of costs: [2003] 4 HKC 438.
[7] *Mitchell* v *Gard* (1863) 3 SW & TR 275 at 279.
[8] [1959] P 6 (CA) at 21.
[9] *Twist* v *Tye* [1902] P 92 at 94.
[10] *Davies* v *Gregory* (1873) LR 3 P&D 28 at 33. In *Page* v *Williamson* [1902] 87 LT 146, it was said even in relation to an executor that : "It is his duty to make proper and adequate inquiries before acting", that is, propounding a will. Where reasonable inquiries would have revealed that the testatrix was of unsound mind, propounding a will without making such inquiries exposed the executors to costs.
[11] As was recognized by the New South Wales Court of Appeal in *Perpetual Trustee* v *Baker* [1999] NSWCA 244 at §14.
[12] *Lemage* v *Goodban* (1865) LR 1 P&D 57.
[13] *Hooton* v *Dennet* (1868) 17 LT 670.
[14] *Davies* v *Gregory* (1873) LR 3 P&D 28.
[15] *Cousins* v *Tubb* (1891) 65 LT 716.
[16] *Re Hall-Dare, Le Marchant* v *Lee Warner* [1916] 1 Ch 272.
[17] (1838) 2 Moo PC 480; see discussion of the rule in Judgment §§204-222.
[18] At 482-483.
[19] (1952) 86 CLR 439.
[20] [1990] 101 FLR 279.
[21] (1892) 67 LT 717.
[22] Judgment §§373-382.
[23] Judgment §646(1).
[24] [1959] P 6 at 19.
[25] Judgment §387.
[26] Judgment §646(2).
[27] Judgment §§389-391. Or as Lord Scott puts it: "The features relied on as inconsistent with genuineness are equally incomprehensible if the signatures were forged." (Judgment §646(5)).
[28] Judgment §§328-334.
[29] Judgment §341.
[30] (1892) 67 LT 717.
[31] Judgment §§328-370.
[32] Judgment §498.

[33] Judgment §313.
[34] Judgment §302(a).
[35] Judgment §§282-285.
[36] [1902] P 92 at 98.
[37] Mr Grossman's handling of the issue having received the Judge's accolade: Yam J §32.12.
[38] Judgment §399.
[39] Yam J §3.98.
[40] Yam J §3.95.
[41] Yam J §3.98.
[42] Eg at Yam J §§2.31, 3.5, 3.7, 3.14, 3.95.
[43] Yam J §3.112.
[44] Yam J §§3.132-3.133.
[45] Yam J §2.36.
[46] Yam J §33.17.
[47] CA §145.
[48] CA §§296-297.
[49] CA §360.
[50] CA §901.
[51] Probate and Administration Ordinance, Cap 10, s 40(3).
[52] (1878) 4 PD 231.
[53] [1950] P 177 at 181-182.