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ONASSIS AND CALOGEROPOULOS v. VERGOTTIS

Before Viscount DILHORNE, Lord MORRIS OF BORTH-Y-GEST, Lord GUEST, Lord PEARCE* and Lord WILBERFORCE*

Practice—Appeal—New trial ordered by Court of Appeal on appeal from Judge alone—Appeal to House of Lords. Order 59, r. 11 (2).

Contract—Option—Shares in ship—Whether party provided money by way of loan or for purchase of shares in ship.

First and second plaintiffs claimed against defendant for specific performance of contract or order for transfer of shares in motor vessel *Artemision II*, alleging that under agreement between parties for purchase of vessel, second plaintiff had paid £60,000 for 25 shares in vessel, or that £60,000 was to be treated as loan with option to take up shares. Defendant denied that money was paid for shares and contended that it was a loan. Plaintiffs contended that second plaintiff had exercised option to take up shares. Whether option was too vague to be enforceable.

——*Held*, by ROSKILL, J., (1) that parties had agreed to purchase vessel and divide shares in certain proportions; that that agreement as to division of shares was intended to be, and was, a binding and enforceable contract; (2) that terms of option were not too vague to be enforceable; that second plaintiff had exercised that option and was, therefore, entitled to order against defendant that shares should be transferred to second plaintiff.

——Appeal by defendant.

——*Held*, by C.A. (Lord DENNING, M.R., SALMON and EDMUND DAVIES, L.JJ.), that there was a misdirection by the Judge (i) in finding that motive of greed or avarice pervaded the defendant; and that there was no evidence of any such motive; (ii) in failing to deal with factors in defendant's favour in judgment; and that, therefore, a new trial would be ordered. Appeal allowed.

——Plaintiffs appealed; defendant cross-appealed.

——*Held*, by H.L. (Viscount DILHORNE, Lord MORRIS OF BORTH-Y-GEST and Lord GUEST), that Judge made no finding on motive, and, therefore, could not have misdirected himself as to motive; that if there was insufficient mention of points in defendant's favour it could not be assumed that Judge ignored them; and that there was not a governing fact which in relation to others had created a "wrong impression" in the mind of the Judge; and it could not be said that his judgment occasioned a "substantial wrong or miscarriage". Appeal allowed. Cross-appeal dismissed.

——*Hontestroom* (*Owners*) *v. Sagaporack* (*Owners*), [1927] A.C. 37; (1926) 25 Ll.L.Rep. 377; and *Watt or Thomas v. Thomas*, [1947] A.C. 484, applied.

——*Held*, by Lord PEARCE and Lord WILBERFORCE (*dissenting*), that it was not possible to arrive at a fair conclusion on the case without consciously and expressly putting into the scales many weighty points in defendant's favour; which the Judge had failed to do.

Per Lord MORRIS OF BORTH-Y-GEST (at p. 420): Though [Order 59, r. 11] is largely concerned with Jury trials the result of it is that where there has been a trial before a Judge alone a new trial on the ground of misdirection ought only to be ordered if in the opinion of the Court of Appeal some substantial wrong or miscarriage has, by reason of the misdirection, been occasioned. If, therefore a Judge misdirected himself but if the result of the case would have been no different had there been no misdirection, then clearly no new trial should be ordered. If there has

* Dissenting.

been some misdirection and the Court of Appeal can say that on a proper direction there ought to have been judgment for an appellant, then there would be a situation calling not for a new trial but for the entry of judgment. Only if there was a misdirection of such seriousness and consequence that it could properly be said that as a result of it an appellant was denied an appreciable chance of success at the trial and only if the Court of Appeal is not able to come to a conclusion in regard to the case could a new trial on such ground of misdirection be ordered. Such a situation is likely to be rare.

The following cases were referred to:

Benmax v. Austin Motor Company, Ltd., [1955] A.C. 370;

Clarke v. Edinburgh Tramways Company, [1919] S.C. (H.L.) 35;

Dunn v. Dunn's Trustees, [1930] S.C. 131;

Hontestroom (Owners) *v. Sagaporack* (Owners), [1927] A.C. 37; (1926) 25 Ll.L.Rep. 377;

Hvalfangerselskapet Polaris A/S. v. Unilever, Ltd., Lever Bros., Ltd., and Another, (1933) 46 Ll.L.Rep. 29;

Jones and Others v. Hough and Others, (1879) 5 Ex. D. 115;

Powell and Wife v. Streatham Manor Nursing Home, [1935] A.C. 243;

Sir Robert Peel, (1880) 4 Asp. Mar. Law Cas. 321;

Watt or Thomas v. Thomas, [1947] A.C. 484;

Yuill v. Yuill, [1945] P. 15.

This was an appeal by the first plaintiff, Mr. Aristotle Socrates Onassis, and the second plaintiff, Mme Maria Calogeropoulos, from a decision of the Court of Appeal ([1968] 1 Lloyd's Rep. 294) allowing an appeal by the defendant, Mr. Panaghis Vergottis, from a judgment of Mr. Justice Roskill ([1967] 1 Lloyd's Rep. 607) holding that the plaintiffs were entitled to a claim for specific performance of an oral agreement made between the parties in September and October, 1964, relating to the ownership of interest in the motor bulk carrier *Artemision II*.

His Lordship had ordered that the defendant should transfer 25 shares in Overseas Bulk Carriers Corporation, a Liberian company owning the ship, to the second plaintiff.

The Court of Appeal (Lord Denning, M.R., Lord Justice Salmon and Lord Justice Edmund Davies) held that there was a misdirection by the Judge (i) in finding that a motive of greed or avarice pervaded the defendant; and that there was no evidence of any such motive; (ii) in failing to deal with factors in the defendant's favour in the judgment; and that, therefore, a new trial would be ordered.

The plaintiffs appealed to the House of Lords, contending that the decision of the Court of Appeal should be set aside for the following reasons:

(1) Because there were no grounds upon which a new trial should have been ordered.

(2) Because the Court of Appeal wrongly considered that it was entitled to reconsider the issues of fact decided at the trial of the action, and to apply its own views of the probabilities without having seen and heard the witnesses.

(3) Because the Court of Appeal applied the wrong tests in considering whether there should be a new trial.

(4) Because the Court of Appeal acted contrary to existing principles of law in granting a new trial.

(5) Because there were no misdirections by the trial Judge upon any material question of fact.

(6) Because the decision of the Court of Appeal deprived the plaintiffs of the benefit of a judgment in their favour, contrary to well-established principles.

(7) Because the defendant suffered no substantial miscarriage of justice from the judgment of Mr. Justice Roskill.

(8) Because the Court of Appeal was right in refusing to reverse the decision of Mr. Justice Roskill and enter judgment for the respondent.

The defendant cross-appealed contending that the appeal should be dismissed for the following reasons:

(1) Because the learned Judge was wrong and misdirected himself in holding that the determination of the case depended on demeanour alone, alternatively he placed too much reliance upon demeanour.

(2) Because the learned Judge was wrong and misdirected himself in holding that a letter of Dec. 21, 1964, was part of a fraud on the part of the defendant.

(3) Because the learned Judge failed to consider and/or deal with the case for the defendant on the main issues either fully or, in some case, at all.

(4) Because the learned Judge failed to test adequately or at all the evidence by reference to either the documents or the probabilities of the case.

(5) Because the learned Judge did not take proper advantage from having seen and heard the witnesses before him.

(6) Because the learned Judge misdirected himself on the question of the defendant's alleged motive for the dishonest and fraudulent conduct alleged against him.

(7) Because the learned Judge failed to appreciate that the contemporary documents and the probabilities of the case made it highly unlikely that the defendant was guilty of the dishonesty and fraud alleged against him.

(8) Because in all the circumstances the defendant should have judgment entered for him or for a new trial.

Sir Edward Milner Holland, Q.C., and Mr. Mervyn Heald (instructed by Messrs. Ince & Co.) represented the appellant plaintiffs; Mr. Desmond Ackner, Q.C., Mr. J. W. Miskin, Q.C., and Mr. Andrew Bateson (instructed by Messrs. Theodore Goddard & Co.) appeared for the respondent defendant.

Judgment was reserved.

Thursday, Oct. 31, 1968

JUDGMENT

Viscount DILHORNE: My Lords, on this action Mr. Aristotle Onassis and Mme Maria Calogeropoulos, known as Mme Callas, sought specific performance of an agreement which they alleged had been entered into between them and Mr. Vergottis under which in return for the payment of £60,000 by Mme Callas, Mr. Vergottis agreed that she would be entitled to receive 25 bearer shares in a company called Overseas Bulk Carriers Corporation. In the alternative the plaintiffs alleged that the agreement had been varied and that the agreement so varied had been that the £60,000 paid by Mme Callas should be treated as a loan to Overseas Bulk Carriers Corporation at 6½ per cent. with an option to call for the delivery to her of 25 shares in that corporation exercisable within two years. The plaintiffs claimed specific performance of the agreement so varied.

Mr. Vergottis denied that there had ever been any such agreement. He said that the £60,000 paid by Mme Callas had simply been a loan to the company at 6½ per cent. and that she had never had any right or option to have any shares in the company.

The action was tried by Mr. Justice Roskill, who after a 10-day hearing found in favour of the plaintiffs and made an order that Mr. Vergottis should transfer or cause to be transferred to Mme Callas 25 shares in the company.

From this decision Mr. Vergottis successfully appealed to the Court of Appeal (Lord Denning, M.R., Lord Justice Salmon and Lord Justice Edmund Davies). A new trial was ordered.

Mr. Onassis and Mme Callas now appeal with the leave of the House.

Counsel were unable to cite any reported case in which an order for a new trial had been made on an appeal from a High Court Judge sitting without a Jury but it was not disputed that the Court of Appeal had jurisdiction to make such an order.

Order 59, r. 11 (2) of the Rules of the Supreme Court, reads as follows:

> (2) A new trial shall not be ordered on the ground of misdirection, or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to them, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage has been thereby occasioned.

The Court of Appeal was satisfied that a substantial wrong or miscarriage had been occasioned by Mr. Justice Roskill misdirecting himself and failing to take account of factors in Mr. Vergottis's favour.

Usually the power to order a new trial is only exercised where a trial has been with a Jury and the usual consequence of a successful appeal from a Judge sitting alone is that the judgment is reversed or altered. It must, however, be recognized that in some cases, and it is said that this is one, although there may have been error in the course of the trial or in the

judgment sufficient to give rise to a substantial wrong or miscarriage, it is not possible to do justice by reversing or amending the judgment. In such a case the only possible order is an order for a new trial (see *Jones and Others v. Hough and Others*, (1879) 5 Ex. D. 115, per Lord Justice Cotton, at p. 125).

The observations made in *Hontestroom (Owners) v. Sagaporack (Owners)*, [1927] A.C. 37; (1926) 25 Ll.L.Rep. 377, and in *Watt or Thomas v. Thomas*, [1947] A.C. 484, where the question at issue was whether the judgment of the trial Judge should be reversed, as to the matters to be borne in mind are in my opinion equally applicable where the question is whether or not a new trial should be ordered on an appeal in a case tried without a Jury.

In the former case Lord Sumner, with whose opinion Viscount Dunedin and Lord Carson agreed, said (*sup.*, at pp. 47 and 381 of the respective reports):

> What then is the real effect on the hearing in a Court of Appeal of the fact that the trial judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course, there is jurisdiction to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute: Order LXVIII., r. 1 [—now Order 59—]. It is not, however, a mere matter of discretion to remember and take account of this fact; it is a matter of justice and of judicial obligation. None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. . . . If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone. . . .

and (*sup.*, at pp. 48 and 382 of the respective reports):

> . . . James L.J. thus laid down the practice in *The Sir Robert Peel* ((1880) 4 Asp. Mar. Law Cas. 321, at p. 322):
>
> "The Court will not depart from the rule it has laid down that it will not overrule the decision of the Court below on a question of fact in which the judge has had the advantage of seeing the witnesses and observing their demeanour, unless they find some governing fact which in relation to others has created a wrong impression."

in the latter case Viscount Simon said ([1947] A.C., at p. 486):

> . . . if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact . . .

He also said that he agreed with Lord President Clyde in *Dunn v. Dunn's Trustees*, [1930] S.C. 131, that the true rule was that a Court of Appeal should:

> . . . attach the greatest weight to the opinion of the judge who saw the witnesses and heard their evidence . . .

and consequently should not disturb a judgment of fact unless they are satisfied that it is unsound.

In the same case Lord Thankerton said (*sup.*, at p. 487) that the principles to be applied might be stated as follows:

> . . . I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either

> because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. . . .

Lord Macmillan whose opinion was to the same effect said (*sup.*, at p. 490):

> . . . The appellate court has before it only the printed record of the evidence. Were that the whole evidence it might be said that the appellate judges were entitled and qualified to reach their own conclusion upon the case. But it is only part of the evidence. What is lacking is evidence of the demeanour of the witnesses, their candour or their partisanship, and all the incidental elements so difficult to describe which make up the atmosphere of an actual trial. This assistance the trial judge possesses in reaching his conclusion but it is not available to the appellate court. So far as the case stands on paper, it not infrequently happens that a decision either way may seem equally open. When this is so . . . then the decision of the trial judge, who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a court of appeal on questions of fact. The judgment of the trial judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong. . . .

To these observations great weight must be attached. They and Order 59, r. 11 (2) show that those who seek to disturb the decision of a trial Judge who has seen and heard the witnesses on a question of fact face a heavy task.

The evidence in this case covered a considerable period of time and on almost every point there was a serious conflict. Mr. Justice Roskill said at the commencement of his judgment that it was rare in the Commercial Court to encounter a case where there was "so stark a conflict of evidence" and that the question he had to decide was who was telling the truth, Mr. Onassis and Mme Callas or Mr. Vergottis: "Which do I believe?".

I think that in this he was right. The decision in the case depended, and the decision, if there is a new trial, will depend, on the view taken by the Judge of the credibility of the witnesses. In determining whose evidence to accept, a Judge will have regard to the probabilities and to the documentary evidence. It cannot, in my view, be said that Mr. Justice Roskill failed to do so but in the opinion of the Court of Appeal he misdirected himself in certain respects and failed to take "sufficiently into account the weight of contemporary documents".

Mr. Ackner, for Mr. Vergottis, submitted that Mr. Justice Roskill's judgment showed that he had failed to give proper consideration to the defendant's case in that he had failed to take account of the serious and formidable points relevant to the documents in the case and to probabilities which strongly supported the defendant's case; and in that he had introduced material which he thought weighed in favour of the plaintiffs when it did not and that he had overweighted factors in favour of the plaintiffs.

Consideration of these arguments necessitates careful examination of the judgment and of the evidence.

Mr. Onassis gave evidence that he became a shipowner in about 1931 and that since the middle of the 1930's until their quarrel in 1965 Mr. Vergottis, another Greek shipowner, had been a very close friend of his. At the time of the trial Mr. Onassis was 61 and Mr. Vergottis 77. Despite their close friendship they had never jointly engaged in business or entered into partnership in relation to a ship. Mr. Onassis said that he had introduced Mme Callas to Mr. Vergottis in 1959 and that from then until their quarrel they were all close friends.

Prior to September, 1964, according to Mr. Onassis he and Mr. Vergottis had discussed the possibility of Mme Callas acquiring an interest in a ship, to be managed by Mr. Vergottis, and in which, in order to protect her should Mr. Vergottis or Mr. Onassis or both of them die, she should have a 51 per cent. controlling interest. They were concerned to make provision for her when the time came for her to retire from her profession.

Mme Callas did not recollect any such discussion before 1964.

Mr. Vergottis said that although they had discussed various ships in the presence of Mme Callas, they had never discussed her coming into shipping.

In the autumn of 1964 a 27,760 ton bulk carrier, being built at El Ferrol in Spain, came upon the market. On Sept. 2, 1964, H. Clarkson & Co., Ltd., brokers, suggested to Vergottis, Ltd., that they should offer £1,225,000 for the vessel on the terms that 25 per cent. would be paid in cash and the balance over eight years with interest at 6½ per cent. secured on a mortgage on the vessel. Before he left London to go to Greece that evening, Mr. Vergottis authorized an offer of this amount on the terms stated.

On Sept. 3, H. Clarkson & Co., Ltd., wrote to Vergottis, Ltd., thanking them for authorizing the offer for the account of Vergottis, Ltd. "as brokers for others". The same day Mr. Vergottis in Athens received a cable from Vergottis, Ltd., telling him, among other things, that it was believed that three offers had been made for the ship.

That day Mr. Vergottis sent from Athens a telegram to Mr. Onassis who was then on his yacht *Christina* by the island of Scorpios, asking him to telephone to him the next morning. Mr. Onassis did so. His account of the telephone conversation was that Mr. Vergottis then told him about the ship and said that it was a good thing for what they both had in mind. Mr. Onassis said that his first response was to say that it was "too much of a ship" and then, in view of the loan terms offered, that it might be a good idea. He said in chief that nothing was said then about Mme Callas having a 51 per cent. interest.

Mr. Vergottis's account was entirely different. He said that he sent the telegram to Mr. Onassis just to get him to telephone the next morning so that he could tell Mr. Onassis that he was going to his home in Cephalonia. He denied in cross-examination that the purpose of the telegram was to enable him to have a talk with Mr. Onassis about the ship.

Mr. Justice Roskill described the telegram as "exceedingly important". He said in his judgment that the cable from Vergottis, Ltd., would have reached Athens in the afternoon of Sept. 3. The telegram was dispatched from Athens at 6 50 p.m. local time.

The only importance that telegram appears to me to have, is in relation to the credibility of Mr. Onassis and Mr. Vergottis. It seems improbable that Mr. Vergottis would have asked Mr. Onassis to telephone to him from his yacht just to give him information that might easily have been contained in the telegram.

On Sept. 5 Mr. Vergottis joined Mr. Onassis and Mme Callas on the yacht. He stayed there until Sept. 8 and, according to Mr. Onassis, during his visit they discussed the acquisition of the ship. Mr. Onassis's account was as follows ([1967] 1 Lloyd's Rep., at p. 619):

> . . . A.: The discussion was, "Are we going to make an offer?" You do not repeat these things all the time because the 51 per cent. was because of Mme. Callas. This is in our mind as a foundation, the fundamental thing, otherwise Mr. Vergottis and I would never have thought of a ship in partnership. . . . the purpose and the attention from the origin, from the inception, which was to facilitate and help Mme. Callas to invest—she could have invested 10 per cent. or 20 per cent., never mind—or invest substantially but in the event of investing substantially she must have the controlling interest to protect her when of the two people who are advising her and are making it possible for her, one is in his second seventies, and the other one is in his early sixties.

He also said that it was Mr. Vergottis's idea that Mme Callas should have 51 per cent.

On Sept. 7, 1964, Vergottis, Ltd., sent a radiogram to Mr. Vergottis on board the *Christina* recommending that the offer made for the ship should be increased by £25,000 to £1,250,000.

Mr. Vergottis denied that there had been any discussion of the kind described by Mr. Onassis. He said that nothing had been said about the ship to Mr. Onassis until after the receipt of this radiogram. He received that, so he said, on the yacht by the swimming pool shortly before they left the yacht to dine with someone on the island. He said that he passed this telegram to a Mr. Graves, saying: "My offer has been rejected" as he took the telegram to mean that. Mr. Onassis said: "What is this about?" and he then told him about the ship and showed him the plan of it. After looking at the plan for a while, according to Mr. Vergottis, Mr. Onassis suddenly said:

. . . She looks a fine ship. Let's buy together 50-50.

Mr. Vergottis says that he hesitated for at least a couple of minutes and then said:

Well, if you wish it, let it be so. Right. But all the negotiations must be carried out by me . . .

to which Mr. Onassis replied: "Do anything you like".

The next morning before he left the yacht Mr. Vergottis cabled Vergottis, Ltd., and in that cable he said:

. . . NEW BUILDING CASE NEED OFFER 1,250,000 POUNDS BUT SUBJECT APPROVAL INSPECTION.

Reviewing the position at this point Mr. Onassis's account appears the more credible of the two for it is unlikely that Mr. Vergottis asked Mr. Onassis to telephone him just to tell him that he was going to Cephalonia. Having offered for the ship just before he left London, it does not seem likely that he said nothing to his close friend Mr. Onassis about the ship until the eve of his departure or likely that Mr. Onassis having just been told about the ship then and shown a plan of it, would have suddenly said: "Let's buy together 50-50", particularly as he had never had a joint business venture with Mr. Vergottis before.

At the trial Mr. Bristow, for Mr. Vergottis, drew attention to a number of discrepancies in the evidence of Mr. Onassis and that of Mme Callas as to events on the *Christina* at this time. Mr. Justice Roskill recognized the existence of the discrepancies and said ([1967] 1 Lloyd's Rep., at p. 622) that the case to his mind did not

> . . . turn upon minor discrepancies, even when you add them all up together: it turns upon a single major question of credibility. As I have said, the first question is: Was there an agreement to buy the ship with Mme Callas ultimately having a 51 per cent. interest, or is Mr. Vergottis right that the only agreement then reached was that they would buy her 50/50, going into partnership for the first time in the lives of each of them, an agreement made on the spur of the moment on the receipt of [the telegram], a sudden snap decision?

Having stated the first issue to be decided clearly and, in my opinion, correctly, Mr. Justice Roskill did not give his decision on it until the end of his judgment.

Vergottis, Ltd., then advised Mr. Vergottis to offer £1,300,000 to which Mr. Vergottis replied from his home in Cephalonia ([1967] 1 Lloyd's Rep., at p. 622):

> SP[A]NISH NEW OFFER 1.250 000 WAS IN ASSOCIATION WITH ONASSIS MU[S]T CONSULT HIM TOMORROW WHEN WILL TELEGRAF . . .

On Sept. 16, Mr. Vergottis cabled Vergottis, Ltd. as follows:

> CONFIRMING CONVERSATION SPANISH NEW ONASSIS NOW HESITANT EVEN 1.250000 AND ONLY FIRM OFFER FROM SELLERS 1250000 OUR ORIGINAL TERMS WILL PERSUADE ONASSIS PARTICIPATE . . .

Then Mr. Vergottis reduced his offer to £1,000,000 in which the vendors were not interested and the negotiations ended for the time being.

On Oct. 14 Mr. Onassis came to London and met Mr. Vergottis. He says that Mr. Vergottis told him that the ship was still on the market and that they agreed to make another attempt to buy her. He said that he authorized Mr. Vergottis to offer £1,200,000.

Mr. Vergottis's account is entirely different. He said that one day at this time when he was lunching at Claridges, Mr. Onassis came over to his table and asked: "What has happened to the ship?" to which he replied: "Well, the ship has been sold" at which Mr. Onassis said: "Oh, you missed her, you missed her".

On Oct. 22 Mr. Vergottis offered £1,200,000 for the ship and after further negotiation the ship was bought for that sum. On Oct. 27, H. Clarkson & Co., Ltd., wrote to Vergottis, Ltd., confirming the sale to Vergottis, Ltd., "as Agents for Onassis" and stating the terms, 10 per cent. to be paid on the signing of the contract, 10 per cent. on delivery and the balance of 80 per cent. to be paid over eight years with interest at 6½ per cent. against first mortgage of the vessel. The sale was to be subject to inspection not later than Oct. 31, and trials.

The same day H. Clarkson & Co., Ltd., wrote correcting the statement that the sale was to Vergottis, Ltd., "as Agents for Onassis" to "as agents for others" after their error had been drawn to their attention by Vergottis, Ltd.

If Mr. Vergottis's account of the conversation at Claridges is true, he must have led Mr. Onassis to believe that there

was no longer any possibility of buying the ship, and then according to him, without any further consultation with Mr. Onassis, he offered the figure which Mr. Onassis said he authorized for the vessel.

Again Mr. Justice Roskill had to decide which version was correct. Again he had to decide whether Mr. Onassis or Mr. Vergottis was telling the truth.

By Oct. 31 the ship was accepted. According to Mr. Onassis who was in Paris, Mr. Vergottis telephoned and suggested that they should dine together that evening to celebrate. Mme Callas was also in Paris and all three dined together in the evening of that day. Mr. Onassis said that at the dinner it was confirmed that Mme Callas was to have a 51 per cent. interest and that he and Mr. Vergottis should have the remaining 49 per cent. The amount due on the signing of the contract, £120,000 was paid by Mr. Onassis on the following Monday, Oct. 31 being a Saturday.

Mr. Onassis said that he told Mr. Vergottis to allot 26 shares to Mme Callas out of the 50 to which he became entitled on payment of the £120,000 and that the arrangement was that Mme Callas would get 25 shares for her £60,000 and thus she would obtain a 51 per cent. interest. He said that he told Mme Callas to send her £60,000 but that Mr. Vergottis said she need not as the further £120,000 would not be due until delivery of the ship.

Later in November, according to Mme Callas, at Mr. Onassis's instigation, she telephoned from Athens to Mr. Vergottis in London to ask where she should send the money. She said that Mr. Vergottis then told her that it was not necessary for her to do so as no further money was required then. She replied that Mr. Onassis had told her to send it whereupon he told her to send it to Barclays Bank, Ltd., in London for Vergottis, Ltd.'s foreign account.

On Nov. 13 the £60,000 was sent and on Nov. 23 Mr. Vergottis paid £120,000 to Vergottis, Ltd. Both these payments were attributed to the ship which was named *Artemision II.*

Mr. Vergottis's account of the conversations that led up to this payment by Mme Callas was that he had spoken to Mr. Onassis and had suggested to him that Mme Callas should make a loan to the company Overseas Bulk Carriers Corporation which would be used to reduce the sum on mortgage so that she and not the Spanish mortgagees would receive 6½ per cent. interest. Mr. Onassis, according to Mr. Vergottis, said that he thought that it was a good idea, and, according to Mr. Vergottis, the next day he telephoned and said that Mme Callas was remitting £60,000.

Mr. Vergottis also said that he had telephoned to Mme Callas and told her: "Your money is given as a loan to the company" and that she had answered that she understood. This conversation was not put to Mme Callas in cross-examination. Her evidence was that the money was sent to pay for 25 shares and not as a loan.

Mr. Vergottis said that he thought that Mme Callas would loan about £150,000 which would have been applied to reduce the mortgage on the ship but when only £60,000 was remitted, he gave instructions that it should be used as working capital.

Mr. Justice Roskill regarded the way in which the money was in fact used as extraordinary. If it was, it does not throw any light on what was arranged before the money was sent. He said ([1967] 1 Lloyd's Rep., at p. 626) also that it seemed a strange story

> . . . that this lady should have been invited to put up this substantial sum of money wholly unsecured, as a loan to this Liberian company whose sole asset was a heavily mortgaged bulk carrier.

Mr. Vergottis said that although asked to do so, he had always refused to advise Mme Callas as to her investments in case she lost money. She was getting a low rate of interest on her money which was in a Swiss bank. Mr. Justice Roskill, looking, he said, at it as a matter of commercial probability, found it ([1967] 1 Lloyd's Rep., at p. 625)

> . . . an astonishing suggestion, that two wealthy men, buying this ship in partnership, should borrow £150,000 [—the sum Mr. Vergottis thought Mme Callas would probably lend—] unsecured from a lady . . . and thus quite obviously improve the value of their equity in the ship at her expense. . . .

While it is true that any reduction in the balance due on the ship would increase the value of Mr. Onassis's and Mr. Vergottis's equity in her, that does not

seem to me to have much significance as the indebtedness of the company would remain the same.

Lord Denning, M.R., did not regard the loan of £60,000 as a commercial improbability. He pointed out that although it was unsecured, the personal relations of the parties were so close that Mr. Onassis and Mr. Vergottis would not let Mme Callas down. He said that the suggestion of commercial probability could be put the other way round ([1968] I Lloyd's Rep., at p. 298):

> . . . Why should Mr. Vergottis put up £120,000, an equal amount to Mr. Onassis, and only get 25 shares for it: whereas Mr. Onassis was getting 50 shares? . . .

The test of commercial probability in his view weighed equally one way or the other.

The question posed by Lord Denning, M.R., assumes that Mr. Vergottis was obliged to put up £120,000. He was only bound to do so after Mr. Onassis had paid £120,000 if the agreement was that he and Mr. Onassis should be partners on a 50-50 basis. On the plaintiffs' case, Mr. Onassis would only have 24 shares and Mr. Vergottis 25: 26 paid for by Mr. Onassis were a present by him to Mme Callas and the balance of 25 to be bought by Mme Callas for £60,000.

On the plaintiffs' case, after Mme Callas had paid the £60,000, only £60,000 and not £120,000 required to be provided by Mr. Vergottis to complete the payment due on delivery of the vessel.

I doubt whether any useful purpose is served by considering commercial probabilities in view of the relationship of the parties. Mr. Vergottis agreed that "in a proper business way" such a loan by Mme Callas did "not sound feasible". But it does seem to me odd that Mr. Vergottis should have suggested, as he says he did, that the lady whom he had always refused to advise on investments, should loan her money at 6¼ per cent. to this Liberian company without any security.

Mr. Vergottis's payment of £120,000 after Mme Callas's £60,000 had been received is entirely consistent with his case but he was only obliged to put up £120,000 if his version was true. If it is not, there does not seem to be any explanation for his contributing more than was required to be paid on the delivery of the ship.

Up to this point there is no document which throws a light on which version is correct. The fact that Mr. Vergottis paid £120,000, only due from him if his version is correct, is in his favour. Apart from this, on the printed evidence the probabilities up to this point appear to me to be in the appellants' favour.

On Dec. 21, 1964, a letter was sent by Overseas Bulk Carriers Corporation signed by Mr. Vergottis to Mme Callas. It was in the following terms:

> Dear Madame,
>
> We acknowledge receipt on 17th November, 1964 of payment of £60,000 representing unsecured loan which will be repaid within twelve or twenty-four months at your option plus interest at the rate of 6½% per annum. Any additional loans which you may advance to this Company will be subject to the same terms.

This was the first acknowledgment sent to Mme Callas of the payment made by her, sent some five weeks or so after its receipt. Mr. Vergottis when asked why this letter was sent, said that at that date the freight for the charter of the ship had been collected and that it amounted to £240,000 to £250,000. He said that he then gave instructions that Mme Callas's payment should be acknowledged, that he gave the substance of what he wanted to say and that the letter was written and brought to him for signature.

It was suggested by Counsel for the appellants that this letter had been written later than Dec. 21 and had been back-dated. This attack failed. It was proved that the letter had been posted on Dec. 21 to Mme Callas in Paris. She went to Greece for a holiday about Dec. 22 and did not return to Paris until Jan. 6, 1965. She opened all her business letters herself. Mr. Justice Roskill said he would not have found it in the least surprising if she did open this letter that it should not convey much to her mind. Mme Callas saw Mr. Vergottis in Paris on Jan. 8 and she said that if she had seen the letter before her conversation then with Mr. Vergottis, she would have reacted differently. In the light of that statement, I see no ground for supposing that Mme Callas would have failed to appreciate the meaning and importance of this letter.

Mme Callas said that on Jan. 8 Mr. Vergottis told her that he had found a way to benefit her by treating the £60,000

as a loan with interest at 6½ per cent. for one or two years so that she should get interest on her money before she would get income from her shares. According to her he said:

> I have found this way in the meantime, as I can manage in my office to put it as a loan, not needing for the time being to use it, and doing you a favour on top of everything, to give you 6½ per cent. for one or two years. . . .
>
> In one or two years, of course, you have your shares.

Mme Callas said that she thanked him for this proposal and told him to tell Mr. Onassis about it as they were both advising her. She said that she spoke to Mr. Onassis about it on the telephone and that he said that he thought it was useless and that she said to him:

> Never mind, Mr. Onassis, let us not hurt Mr. Vergottis's feelings. He is doing his best for me. On top of everything I gain the 6½ per cent. . . . When you come over you talk to him about it.

She told Mr. Vergottis of this conversation and he said:

> Never mind, never mind, I will take care of Mr. Onassis.

Mr. Onassis said that the idea communicated to him by Mme Callas was that in view of the bad luck of the ship (there had been a minor breakdown) for her to assume the risk of 51 per cent. was too much of a risk and that the £60,000 should begin as a loan at 6½ per cent.:

> . . . and within a year or two, which are the most dangerous years of a venture like that, if the ship turned out to do well then she would have her 25 shares. If, on the other hand, the ship turned out to do badly, and she was already performing badly, the loss could be absorbed by him and me and she could still have her £60,000 plus interest.

He said he did not like it but consented to the proposal.

Mr. Onassis arrived in Paris on Jan. 11. He said he asked Mr. Vergottis:

> Why do you change things? What is the point when we have told everybody she has 51% of the shares?

and that Mr. Vergottis replied:

> Oh no, you keep quiet. I know what I am doing. It is the best thing for her.

Mr. Vergottis denied that any such conversations had taken place.

Some time earlier Mr. Onassis had asked that certificates for 24 shares should be issued to his nephew and two certificates dated Dec. 22, 1964, were issued. Mr. Vergottis said that during this visit to Paris he asked Mr. Onassis what he wanted done with the balance of 26 shares and that Mr. Onassis had told him to issue a certificate for 26 shares and that he would let him know what to do with it.

A certificate was written out by Mr. Vergottis for 26 shares and dated by him Jan. 10, 1965, though it is clear that it was written out after that date.

On Feb. 23, 1965, Mr. Onassis wrote the following letter to Vergottis, Ltd. ([1968] 1 Lloyd's Rep., at p. 296):

> Re Remittance £120,000 m/s *Artemision* for the credit of my account with you.
>
> Please deliver out of a total of one hundred shares covering the ownership of this vessel 26 Twenty six shares to Miss Maria Callas and 24 Twenty four shares to Mr. Mario Konialidis debiting my account with you.

Mr. Onassis said that in February, 1965, Mr. Vergottis asked him to give confirmation of the instructions he had already given and that Mr. Vergottis produced a typewritten document for him to sign. He said he did not like its wording so he wrote out the letter himself and gave it to Mr. Vergottis.

Mr. Vergottis said that the day before, when the three of them were lunching at a restaurant in Paris, Mme Callas was annoyed as she had discovered the gift of the shares to the nephew and that Mr. Onassis had turned to him and said:

> Well, I have given her 26 shares. Won't you give her another 25 shares,

and that thinking that the whole thing was a joke, he said ([1967] 1 Lloyd's Rep., at p. 615):

> . . . "Maria, I will give you anything you like—I will give you an option on 25 shares, I will give you the entire ship, I will let you have everything I posses[s] in the world". . . .

Mr. Vergottis said that this was when he learnt of the gift of the 26 shares to Mme Callas.

Mr. Onassis denied that he had asked Mr. Vergottis to give Mme Callas any shares.

On Sept. 1, 1965, Mme Callas received six months' interest on the £60,000. Later that month there was the quarrel with Mr. Vergottis over matters not related to this case as a result of which their friendship terminated.

On Nov. 19 the second instalment of interest was paid.

On Nov. 25 Mme Callas sent the following telegram to Vergottis, Ltd.:

> THIS IS TO NOTIFY YOU THAT I HAVE TODAY DECIDED TO REQUEST YOU TO CONVERT MY UNSECURED LOAN TO YOU OF 60.000 POUNDS INTO 25/100 SHARES OF THE M/S ARTEMISION IN ACCORDANCE WITH THE OPTION GIVEN TO ME VERBALLY BY YOUR PRESIDENT MR. P. VERGOT[T]IS IN CONSIDERATION OF GRANTING YOU THIS LOAN STOP PLEASE ISSUE THE CORRESPONDING CERTIFICATE OF THESE TWENTYFIVE SHARES AND MAIL IT TO ME 44 AVENUE FOCH PARIS—

She notified Mr. Vergottis of this and his reply by telegram was:

> REFERENCE YOUR TELEGRAM REFUTE YOUR CLAIM AS TOTALLY UNFOUNDED

Lord Denning, M.R., said that on Nov. 25, 1965, "Mme Callas for the first time took exception to this £60,000 being a loan."

It does not appear to me that she did so. She sought to exercise the option she claimed to have. Until that option was exercised, on her case she was entitled to interest at 6½ per cent. on the £60,000. I do not think that any significance is to be attached to the fact that she raised no objection to the receipt of interest by her.

It will be seen from what I have said that on almost every, if not every, material issue of fact there was a conflict of evidence. Lord Denning, M.R., expressed the view ([1968] 1 Lloyd's Rep., at p. 296) with regard to the documents:

> . . . [—that—] on the face of them, particularly in the letter of Dec. 21, they support the view that this £60,000 put up by Mme Callas was a loan and not a subscription for shares. . . .

The only document which in my opinion supports that view is the letter of Dec. 21. The letter of Feb. 23, 1965, only dealt with the allocation of shares to which Mr. Onassis was entitled.

It cannot, I think, be said that Mr. Justice Roskill failed to appreciate the importance of that letter. He referred to it no less than 10 times in the course of his judgment. He said ([1967] 1 Lloyd's Rep., at p. 613):

> . . . if that letter is to be taken at its face value and without explanation, it strongly supports the defendant's case here against the plaintiffs. . . .

and that the letter ([1967] 1 Lloyd's Rep., at p. 615):

> . . . taken at its face value, beyond all possibility of argument supports the defendant's case and goes to disprove the plaintiffs' case. . . .

and ([1967] 1 Lloyd's Rep., at p. 631):

> . . . The harsh fact has to be faced that the plaintiffs' case cannot be right if the letter of Dec. 21 is taken at its face value. . . .

Lord Denning, M.R.'s view was that it was almost incredible that Mr. Vergottis should have sent that letter to Mme Callas if the £60,000 was not in fact a loan. He said ([1968] 1 Lloyd's Rep., at p. 297):

> . . . [Mr. Vergottis] had no reason to suppose that she would not read it as soon as she received it. If the letter was part of a deliberate fraud, he was running the risk of immediate exposure and the shattering of a life long friendship. That is so improbable a state of mind, so improbable a letter to send if it were untrue, that it is a factor which should have been weighed by the Judge. But so far as I can see, he did not mention it.

There are it seems to me three possibilities in relation to this letter: first, that it truly stated the position in which case the evidence of Mr. Onassis and Mme Callas was concocted and false and they were parties to a wicked conspiracy to deprive Mr. Vergottis of shares in Overseas Bulk Carriers, Ltd., and of the majority interest in the vessel; secondly, that the letter was false and dishonest on the part of Mr. Vergottis and a fraudulent attempt by him to deprive Mme Callas of her right to the shares and, thirdly, that the letter was not intended to state what had been agreed but that it formed part of the plan which according to Mme Callas he communicated to her on Jan. 8.

According to Mme Callas he told her then that it was his idea that the money should be treated as a loan for a year or two years, and, as I have said, she said he

told her that "he could manage in his office to put it as a loan". If Mr. Vergottis in fact thought of this plan, one does not know when he first did so. Was he, if he had this plan, running the risk of exposure and the shattering of a lifelong friendship? If Mme Callas had reacted swiftly to the letter and immediately on its receipt got in touch with him, he could then have told her of his idea. Such was the extent of the friendship of all three of them at that time that it surely is to be doubted whether the communication of his proposal before Jan. 8 would have had such disastrous consequences. If he did tell Mme Callas what she says he did on Jan. 8 and his proposal was agreed to, the letter of Dec. 21 would then have little significance to either Mr. Onassis and Mme Callas until after the quarrel.

So, it seems to me that the significance of the letter of Dec. 21 largely depends on whose version of the conversation on Jan. 8 is accepted. If Mr. Vergottis's account is preferred, then there does not appear to be any reason why the letter should not be given its face value. If his account is accepted, then there was no reaction at all by Mme Callas to the letter and she never suggested that she was entitled to the shares or agreed to take an option on them.

If her account is accepted—and it is not without interest that she says that Mr. Vergottis said that the loan would be for one or two years and the letter speaks of a loan for 12 or 24 months—the writing of the letter might well in my view not have had the consequences envisaged by Lord Denning, M.R. If her account be true, the letter though untrue in the sense that it did not represent what had been agreed, might not be fraudulent but written in anticipation of and as part of the plan Mr. Vergottis was to put before her.

While it is true that Mr. Justice Roskill did not in his judgment discuss the improbability of Mr. Vergottis having written the letter if it was fraudulent, I do not myself consider that his omission to do so necessarily means that he did not take full account of all relevant factors in relation to that letter. He had to decide whether that letter was to be taken at its face value. If he accepted Mme Callas's account of the conversation on Jan. 8 then that had a bearing on the value to be attached to the letter. If he rejected her evidence about that, I do not see that there was any ground for not giving it its face value in which case, as Mr. Justice Roskill said ([1967] 1 Lloyd's Rep., at p. 631), "the plaintiffs' case cannot be right".

Mr. Justice Roskill's judgment contained the following important passage ([1967] 1 Lloyd's Rep., at pp. 615 and 616):

> . . . It has been pressed upon me that there is no motive here for the defendant to have acted with dishonesty. . . . If one has to look for motive here, it can, I suppose, be said against the plaintiffs to be a desire to have their revenge upon Mr. Vergottis for the events of the autumn of 1965. It can be said against Mr. Vergottis, I suppose, that in the event this ship did better in her early trading period than had been expected and thus he had a motive for trying to slide out of the bargain which he had made, hardly had the words creating the bargain passed his lips.
>
> It is a curious feature of this case that if Mr. Vergottis has acted with dishonesty towards the plaintiffs he started to act with dishonesty certainly as early as Dec. 21, 1964, by writing the letter . . . indeed, it may be that, if there were dishonesty, it began to germinate in his mind in a matter almost of days, if not hours, after he received the £60,000 from Mme Callas which reached the London office of Vergottis, Ltd., on Nov. 16 or 17, 1964, on which latter date—this may not be without significance—this large bulk carrier . . . was fixed on an extremely valuable charter . . . But ultimately, as I have said, this case turns not on consideration of motive but on consideration of personal credibility and upon whom I believe, having seen these two gentlemen and this lady in the witness-box and seen them closely and exhaustively cross-examined.

Mr. Justice Roskill was criticized in the Court of Appeal for saying that the vessel was fixed on an extremely valuable charter. It was said that there was no evidence that it was, and that the statement was based on an answer given by Mr. Vergottis to a question by the Judge put to him at the very end of his evidence.

I do not think Mr. Justice Roskill should be criticized for linking the charter of the vessel with the treatment of the £60,000 as a loan, for Mr. Vergottis himself when asked why the letter of Dec. 21 was sent, as I have said, replied that at that date the freight for the charter had been

collected amounting to £240,000 to £250,000 and that he then gave instructions for that letter to be written.

There was, however, no evidence that it was an extremely valuable charter apart from the fact that the freight was in the region of a quarter of a million pounds.

The important fact is, in my opinion, that in his judgment Mr. Justice Roskill did not hold that there was a motive for dishonesty on the part of Mr. Vergottis. He stated the motives which he supposed might be said to have actuated both the appellants and the respondent and he referred to the argument of Sir Milner Holland for the appellants that by reason "of greed or avarice" Mr. Vergottis had sought to prevent Mme Callas from getting the 25 shares, but he made no finding as to motive.

Lord Denning, M.R., said that the motive found by the Judge did not exist and that Mr. Justice Roskill had indicated that Mr. Vergottis realized that this ship was likely to be more profitable than had originally been anticipated and that from greed or avarice he determined to use the £60,000 as a loan. Lord Justice Salmon said that the Judge had said that the first fix of the vessel was extremely profitable. Lord Justice Edmund Davies said that on the question of motive there had been misdirection of so grave a character that the judgment ought not to be allowed to stand. He treated Mr. Justice Roskill as "apparently accepting" the submission of Sir Milner Holland that Mr. Vergottis had acted wrongly for reasons of greed or avarice.

I regret I cannot agree with these observations. I cannot find in Mr. Justice Roskill's judgment any attribution by him of a motive to Mr. Vergottis. He did not indicate that Mr. Vergottis was actuated by greed or avarice and I see nothing in his judgment to support the view that he accepted the submission made by Sir Milner to which he made reference in the judgment. It would have been easy for him to say so, if he agreed with it. He did not do so, and I can see no ground on which it can be inferred from his judgment that he did. He said that in his view the case did not turn on considerations of motive.

Where a motive for dishonesty is established, it assists in determining whether there has been dishonesty in fact, but seldom, if ever, is the proof of motive essential to establish dishonesty or fraud.

If I understand the judgments of the Court of Appeal correctly, the main reason for the conclusion that there must be a new trial was that Mr. Justice Roskill misdirected himself as to motive. As in my opinion he made no finding on that, I cannot agree with this conclusion.

The other main criticism in the Court of Appeal was that Mr. Justice Roskill did not in the course of his judgment deal with "any of the really important factors" in the respondent's favour. I agree that it would have been better if Mr. Justice Roskill had dealt with them as fully as he referred to points in the appellants' favour and, if I felt that Mr. Justice Roskill had ignored them, I should not hesitate to agree with the decision of the Court of Appeal.

The factors in the respondent's favour were obvious. Mr. Justice Roskill is, as Lord Justice Salmon said: "an extremely able and experienced Judge". He did not reserve his judgment but delivered it late on a Friday evening. It shows that he fully appreciated the importance of the letter of Dec. 21 and I cannot conclude that he overlooked or ignored the relevant and obvious points in Mr. Vergottis's favour to which his attention must have been drawn by Mr. Vergottis's Counsel. Unless it can be assumed that he ignored them, I do not think that a new trial should be ordered because of insufficient mention of them in his judgment.

In my view, Mr. Justice Roskill was right in saying that the decision in this case turned on the credibility of the witnesses. He was faced, as the case was presented, with having to decide whether Mr. Onassis and Mme Callas, persons of high repute, had given false evidence and had presented a false claim, or whether Mr. Vergottis, also of high repute, had given untrue evidence and had presented a dishonest defence.

He clearly approached his task with great care and anxiety. In the end he accepted Mr. Onassis's and Mme Callas's account and rejected that of Mr. Vergottis.

Applying the observations cited at the beginning of this opinion, there was not, in my opinion, "a governing fact which in relation to others" had created "a wrong impression" in the mind of the Judge. I cannot conclude that he failed to take proper advantage of having seen and heard the witnesses, and it is clear that his estimate of the witnesses formed a

substantial part of his reasons for his judgment. I am unable to reach the conclusion that his judgment occasioned a "substantial wrong or miscarriage".

In these circumstances, and bearing in mind that the greatest weight has to be attached to the findings of the Judge who saw and heard the witnesses, in my opinion this appeal should be allowed, the judgment of Mr. Justice Roskill restored, and the cross-appeal dismissed.

Lord **MORRIS OF BORTH-Y-GEST:** My Lords, the questions which the parties to this litigation presented for the decision of the learned Judge were questions of fact. Very largely they raised issues of credibility. Central among them was the question whether an oral agreement was made in 1964 and varied in January, 1965, under which the second plaintiff, Mme Callas, became entitled to call for the issue to her of certain shares. It was her case that an agreement was made between Mr. Onassis, Mr. Vergottis and herself under one part of which she was to provide a quarter of the initial cost of acquisition of a certain vessel and was to be allocated one quarter of the shares in a company which would be formed to own the vessel. The over-all agreement and the primary purpose in making an agreement was that she was to become the owner of a 51 per cent. interest in the vessel to be acquired: the remaining 49 per cent. interest was to be shared between Mr. Onassis and Mr. Vergottis. Mr. Vergottis denied that there was any such agreement. After the vessel had been acquired and a company formed Mme Callas undoubtedly provided a sum of £60,000. That sum (which was provided in November, 1965), did represent one quarter of the initial cost of acquisition of the vessel which was acquired. Her case was that in January, 1965, she varied the agreement and agreed that, instead of then taking her 25 per cent. of the shares for which she had subscribed her £60,000, that sum should be treated as being a loan at interest to the company with an option in her to call, within a period of two years, for the issue to her, in respect of her £60,000, of 25 per cent. of the shares. Mr. Vergottis denied all this. His case was that the £60,000 always had been and remained a loan from Mme Callas to the company. In support of his case great reliance was placed upon the terms of a letter which he himself wrote on Dec. 21, 1964.

The evidence in the case related to the period between September, 1964, and the closing part of 1965. At the start of the period the three parties were close friends. By the end of the period Mr. Vergottis was no longer on terms of friendship with the other two. Within the period, and more particularly during its early part, there were many occasions when the parties met. Much detailed evidence was given in regard to what took place and what was said on these occasions. Sharp conflicts of recollection were revealed at the trial (in April, 1967), as to the events and the discussions of 1964 and 1965.

As the case proceeded it became more and more manifest, and all the parties came to recognize and to accept that decision must ultimately rest where credence could be reposed. The case fell, as the learned Judge appositely remarked, within "no recognized pattern". Its features were unique. Its setting was within its own special facts. On either side probabilities were in competition with improbabilities. The telling power of written words and of documents did not point irresistibly to any one conclusion. The case was one in which it became essential to decide where the truth lay. The Judge had to decide whom he believed.

It is of some importance to have in mind the course which the trial took. Though the evidence quite unavoidably was much swollen with much detail the issue was one which in essence lacked complication. In the end the question was: Had the plaintiffs, upon whom rested the onus of proof, established to the satisfaction of the Judge that the oral agreements that they alleged were made? But the determination of this question inevitably involved that recollections as to many events at many stages in the story should be searchingly examined and tested. No one could, therefore, legitimately suggest (and no one has suggested) that because the trial occupied 10 days an excessive amount of time was expended. The case was an important one for the parties. It was appropriate that they should be allowed every latitude in the presentation of their evidence and in the deployment of their contentions. Evidence was heard on Apr. 17, 18, 19, 20, 21, 24, 25 and on Wednesday, April 26. After the evidence was concluded on that last-mentioned date learned Counsel for Mr. Vergottis began his address to the Judge. That address

continued during the Wednesday afternoon, Apr. 26 and during practically the whole of the day following—Thursday, Apr. 27. The address of learned Counsel for Mr. Onassis and Mme Callas followed. It continued until the mid-day adjournment on Friday, Apr. 28. After an interval the learned Judge gave judgment. He began it in the later part of the afternoon of Friday, Apr. 28. The chronicle of these facts and dates is not without importance in a case in which the complaint of the loser is not founded upon any suggestion that the proceedings at the trial went amiss but upon contentions which are largely built upon a closely analytical examination of the judgment itself.

By the notice of appeal to the Court of Appeal judgment for the defendant was sought or in the alternative an order for a new trial. The grounds of appeal were expressed as follows:

> (1) That the decision of the Learned Judge was against alternatively against the weight of the evidence alternatively the Learned Judge misdirected himself as to the evidence.
>
> (2) That the Judge misdirected himself
>
> (a) In holding that the alleged agreement was intended to have legal force and effect.
>
> (b) In holding that the alleged option was not too vague and uncertain to be capable of legal enforcement.
>
> (c) In not deciding that the option proved (even if precise enough to have contractual effect) was an option exercisable on condition that the ship was doing well at the time the option was exercised and such an option was not pleaded nor the condition aforesaid proved.

Little reflection of the possible contentions there denoted is to be found in the judgments in the Court of Appeal. Rather were the judgments founded considerably upon the reasoning that many arguments were not detailed in the judgment of the learned Judge and that in some respects there was misdirection.

Before proceeding to consider whether that reasoning was well founded it is desirable to have in mind the powers and procedure of the Court of Appeal in cases where a trial has not been a trial with a Jury but has been by a Judge alone. Such a case was *Powell and Wife v. Streatham Manor Nursing Home*, [1935] A.C. 243. In that case the Judge at the trial believed the female plaintiff and it was upon her evidence that he decided the case. The Court of Appeal allowed the appeal and gave judgment for the defendants. They placed great reliance on a passage from the judgment of Lord Justice James in *The Sir Robert Peel*, (1880) 4 Asp. Mar. Law Cas. 321, at p. 322 (referred to by Lord Sumner in *Hontestroom (Owners) v. Sagaporack (Owners)*, [1927] A.C. 37; (1926) 25 Ll.L.Rep. 377):

> . . . the court will not depart from the rule it has laid down that it will not overrule the decision of the court below on a question of fact in which the judge has had the advantage of seeing the witnesses and observing their demeanour, unless they find some governing fact which in relation to others has created a wrong impression . . .

In this House the judgment of the learned Judge was restored. In his speech Viscount Sankey, L.C. ([1935] A.C., at p. 249) said:

> . . . It is perfectly true that an appeal is by way of rehearing, but it must not be forgotten that the Court of Appeal does not rehear the witnesses. It only reads the evidence and rehears the counsel. Neither is it a reseeing Court. There are different meanings to be attached to the word "rehearing." For example, the rehearing at Quarter Sessions is a perfect rehearing because, although it may be the defendant who is appealing, the complainant starts again and has to make out his case and call his witnesses. The matter is rather different in the case of an appeal to the Court of Appeal. There the onus is upon the appellant to satisfy the Court that his appeal should be allowed. There have been a very large number of cases in which the law on this subject has been canvassed and laid down. There is a difference between the manner in which the Court of Appeal deals with a judgment after a trial before a judge alone and a verdict after a trial before a judge and jury. On an appeal against a judgment of a judge sitting alone, the Court of Appeal will not set aside the judgment unless the appellant satisfies the Court that the judge was wrong and that his decision ought to have been the other way. . . .

It is right to point out, however, that in that case it would not appear that there was any question of ordering a new trial. The Lord Chancellor proceeded to quote

the eloquent words of Lord Shaw in *Clarke v. Edinburgh Tramways Company*, [1919] S.C.(H.L.) 35, in regard to the advantages enjoyed by a Judge who sees and hears witnesses. The quoted passage ended with the words:

> ". . . In my opinion, the duty of an appellate Court in those circumstances is for each Judge of it to put to himself, as I now do in this case, the question, Am I—who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case—in a position, not having those privileges, to come to a clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment."

In his speech Lord Atkin pointed out that the case at the trial had resolved itself into an issue between the credibility of the patient and the surgeon, on the one hand, and nurses on the other, and that the Judge who saw the witnesses believed the former. He proceeded:

> I venture to think that such a finding in such a case precluded any successful appeal. I wish to express my concurrence in the view that on appeals from the decision of a judge sitting without a jury the jurisdiction of the Court of Appeal is free and unrestricted. The Court has to rehear, in other words has the same right to come to decisions on the issues of fact as well as law as the trial judge. But the Court is still a Court of Appeal, and in exercising its functions is subject to the inevitable qualifications of that position. It must recognize the onus upon the appellant to satisfy it that the decision below is wrong: it must recognize the essential advantage of the trial judge in seeing the witnesses and watching their demeanour. In cases which turn on the conflicting testimony of witnesses and the belief to be reposed in them an appellate Court can never recapture the initial advantage of the judge who saw and believed. And in no cases should this advantage be more readily recognized than in cases which involve character and reputation.

He later added:

> . . . I have already said that the Court of Appeal are unrestricted in their jurisdiction in appeals, and it seems to me unfortunate that they should be entangled by any formula as to their powers. But if any formula were adopted I cannot imagine any more unsatisfactory or of so limited a scope as that adopted from James L.J. in *The Sir Robert Peel* ((1880) 4 Asp. Mar. Law Cas. 321).

Lord Wright referred to the speech of Lord Sumner in *Hontestroom (Owners) v. Sagaporack (Owners)*, [1927] A.C. 37; (1926) 25 Ll.L.Rep. 377. Lord Sumner had said (*sup.*, at pp. 47 and 382 of the respective reports) that not to have seen the witnesses puts appellate Judges in a permanent position of disadvantage as against the trial Judge and that

> . . . unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. . . .

Lord Wright said ([1935] A.C., at p. 266) that the Court of Appeal had

> . . . no right to ignore what facts the judge has found on his impression of the credibility of the witnesses and proceed to try the case on paper on its own view of the probabilities as if there had been no oral hearing. . . .

After citing further from the speech of Lord Sumner, Lord Wright proceeded to say:

> . . . I do not understand that Lord Sumner is laying down any precise rules of universal application. I think that it is difficult, if not impossible, to seek to lay down any precise rule to solve the problem which faces the Court of Appeal when it has to act as a judge of fact on the rehearing, but finds itself "in a permanent position of disadvantage as against the trial judge." In truth, it is not desirable, in my opinion, to do more than state, as I think Lord Sumner was stating, principles which will guide the appellate Court in the majority of such cases. The problem in truth only arises in cases where the judge has found crucial facts on his impression of the

witnesses: many, perhaps most cases, turn on inferences from facts which are not in doubt, or on documents: in all such cases the appellate Court is in as good a position to decide as the trial judge. But where the evidence is conflicting and the issue is one of fact depending on evidence, any judge who has had experience of trying cases with witnesses cannot fail to realize the truth of what Lord Sumner says: as the evidence proceeds through examination, cross-examination and re-examination the judge is gradually imbibing almost instinctively, but in fact as a result of close attention and of long experience, an impression of the personality of the witness and of his trustworthiness and of the accuracy of his observation and memory or the reverse. . . .

Lord Wright added (*sup.*, at p. 267):

. . . Yet even where the judge decides on conflicting evidence, it must not be forgotten that there may be cases in which his findings may be falsified, as for instance by some objective fact; thus in a collision case by land or sea the precise nature of the damage sustained by the colliding objects or their relative or final positions may be determinant and indisputable facts, and the same may be true of some conclusive document or documents which constitute positive evidence refuting the oral evidence of the witness; such cases have occurred in the experience of most judges and are covered by the third question propounded by Lord Sumner.

The reference was to three questions which Lord Sumner had posed in the *Hontestroom case*, *sup.*, in considering whether in that case the Court of Appeal had been justified in reversing a decision of the President in an Admiralty case arising out of a collision. Lord Sumner had said ([1927] A.C., at p. 50):

. . . The material questions to my mind are: (1.) Does it appear from the President's judgment that he made full judicial use of the opportunity given him by hearing the viva voce evidence? (2.) Was there evidence before him, affecting the relative credibility of the witnesses, which would make the exercise of his critical faculties in judging the demeanour of the witnesses a useful and necessary operation? (3.) Is there any glaring improbability about the story accepted, sufficient in itself to constitute "a governing fact, which in relation to others has created a wrong impression", or any specific misunderstanding or disregard of a material fact, or any "extreme and overwhelming pressure" that has had the same effect? . . .

In addition to the cases referred to by Lord Wright in which the findings of a Judge (after hearing conflicting evidence) could be falsified by some objective fact, it is to be remembered that there can be cases in which it would be open to an appellate Court to find that the view of a trial Judge as to the demeanour of a witness was ill-founded. This was pointed out by Lord Greene, M.R., in his judgment in *Yuill v. Yuill*, [1945] P. 15, at p. 20. After referring to the case of *Hvalfangerselskapet Polaris A/S. v. Unilever, Ltd., Lever Bros., Ltd., and Another*, (1933) 46 Ll.L.Rep. 29, Lord Greene, M.R., indicated that there could be cases in which it could be shown that a Judge had not checked his impression on the subject of demeanour by a critical examination of the whole of the evidence.

My Lords, I have ventured to refer to the above passages because of the importance of the principles which are there laid down. Very many other citations could be made in which recognition has been given of the unique advantages enjoyed by a trial Judge who sees and hears witnesses. In regard to the position of appellate Courts the well-known passage from the speech of Lord Thankerton in *Watt or Thomas v. Thomas*, [1947] A.C. 484, at p. 487, must also be had in mind:

I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus: I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it

> unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. . . .

When in the present case the defendant appealed to the Court of Appeal he sought an order that judgment should be entered for him or, alternatively, that there should be a new trial. It is important to observe that the Court of Appeal were quite unable to say that the judgment of the learned Judge was wrong. Had they been of that opinion they would have entered judgment for the defendant. They were unable to do so. They said in effect that they did not know where the truth lay. But the learned Judge who saw and heard the witnesses had decided where the truth lay. The case would seem, therefore, to have fallen under the second of the three propositions of Lord Thankerton quoted above. In *Watt v. Thomas, sup.*, Lord Thankerton (at p. 490) said that that case fell within the second of his three propositions: the decision of the trial Judge was restored. Without having seen or heard the witnesses the Court of Appeal in this case did not find it possible to come to any satisfactory conclusion on the printed evidence. It is to be observed also that in this House there was a cross-appeal. Mr. Vergottis asked that there should be judgment in his favour and a dismissal of the claims against him. That cross-appeal could not be supported and was expressly abandoned.

It is necessary to consider, however, whether the present case comes within the third of the above quoted propositions and whether there was any misdirection. Without seeking to denote the possible circumstances in which a Court of Appeal may decide to order a new trial, it will suffice to say that there is no suggestion in the present case of the discovery of new evidence. Nor is it suggested that there was any irregularity of any kind at the trial. Nor is it suggested that there was any rejection or wrongful rejection of evidence. The suggestions which appear from the judgments in the Court of Appeal are that the learned Judge misdirected himself. These suggestions call, therefore, for examination. The Court of Appeal recognize, however, that if there were a retrial (at which presumably the same witnesses as before would give evidence) the same conclusion as before might again be reached.

In this connection the provisions of Order 59, r. 11, become relevant. Though that rule is largely concerned with Jury trials the result of it is that where there has been a trial before a Judge alone a new trial on the ground of misdirection ought only to be ordered if in the opinion of the Court of Appeal some substantial wrong or miscarriage has, by reason of the misdirection, been occasioned. If, therefore, a Judge misdirected himself but if the result of the case would have been no different had there been no misdirection, then clearly no new trial should be ordered. If there has been some misdirection and the Court of Appeal can say that on a proper direction there ought to have been judgment for an appellant, then there would be a situation calling not for a new trial but for the entry of judgment. Only if there was a misdirection of such seriousness and consequence that it could properly be said that as a result of it an appellant was denied an appreciable chance of success at the trial and only if the Court of Appeal is not able to come to a conclusion in regard to the case could a new trial on such ground of misdirection be ordered. Such a situation is likely to be rare.

If criticism of a judgment is founded upon the fact that omissions from it may be pointed out it is apposite to have in mind a passage from the speech of Lord Simonds in *Watt v. Thomas, sup.* He said ([1947] A.C., at p. 492):

> There I should be content to leave this case but for certain criticisms made by counsel for the respondent in his able and candid address. Relying on the testimony of certain witnesses called on behalf of the respondent (whom I need not name) he said that the learned Lord Ordinary had come to a conclusion which was diametrically opposed to that testimony, yet he had not explicitly stated that he did not accept them as witnesses of truth nor indeed, made any adverse comment upon them. Your Lordships were therefore invited to find that the learned judge had forgotten or ignored this evidence and to hold that his judgment was thereby vitiated. I believe this to be fundamentally unsound criticism. The trial judge has come to certain conclusions of fact; your Lordships are entitled and bound, unless there is compelling reason to the contrary, to assume that he has taken the whole of the evidence into his consideration. . . .

In the same way it would, I think, be unsound to assume that some arguments have been ignored merely because they may not be fully recited in a judgment.

The case being one in which there was in this House an abandonment as hopeless of any endeavour to establish that judgment should be entered for Mr. Vergottis, it becomes necessary to consider the reasons which have been assigned or have been advanced for ordering a new trial. The attractive and painstaking argument in support of such an order was directed to the submission that the case had not been properly considered. The argument was developed along two main lines of approach. The first consisted of a detailed analysis of the judgment of the learned Judge: it involved an exegetical exercise of a quality that could have earned the approval of those whose skill lies in the fields of higher literary criticism. Thus, in examining the language used by the learned Judge when exploring the possibility of there having been dishonourable conduct on the one side or on the other, it was pointed out that in relation to one side the learned Judge had used the words "absolutely incredible" and in relation to the other side the words "difficult to conceive". It was contended that the former words possessed a potency not to be found in the other words and that this gave indication that the learned Judge had not held the scales of justice properly poised. The second line of approach consisted of a careful and full-scale review of all the evidence and all the features of the case in support of a contention that in the balancing operation, which is of the very essence of the judicial function, the learned Judge had at this and that point and in reference to this or that factor assigned either inadequate or excessive weight. As I listened—with ever-continuing admiration—to the development of the argument, the thought kept constantly recurring that the emergent issues in the case could really only be resolved by someone who over a period of many days had the advantage of hearing words spoken by persons who could constantly be observed.

The extent to which argument succeeded in the Court of Appeal can be gauged from reading the judgments in that Court. As I have remarked, the reasons assigned for ordering a new trial bear little relation to the grounds of appeal which were lodged. The argument must have taken a somewhat broad sweep. It becomes essential to appreciate what the reasons were. The main one was that there had been misdirection. In the first place, the misdirection was said to be positive: it related to the question of motive. In the second place, it was said to take the form of non-direction in that it was submitted that certain arguments were not considered by the learned Judge: the fact that they were not considered was to be assumed from the fact that they were not specifically referred to in the judgment. But some other reasons must be noted. They include the following: that the learned Judge was wrong in regarding it as a commercial improbability that Mme Callas would make an unsecured loan of £60,000; that the learned Judge relied over-much on the demeanour of the witnesses before him without taking sufficiently into account the weight of the contemporary documents and the improbability that Mr. Vergottis should have sent the letter of Dec. 21, 1964, unless its terms were in accord with what had been agreed; that whereas the learned Judge mentioned the factors which, in his view, made it likely that such letter was false, he did not mention the formidable factors which made it likely that the letter was genuine; that a failure to deal in the judgment with the latter factors amounted to misdirection; that the learned Judge did not balance demeanour against the rest of the evidence, including more particularly the documents and the probabilities; that the mistaken view taken by the learned Judge as to motive coloured his final approach to the issue of credibility; that in the light of the documentary and other evidence the learned Judge had not taken proper advantage of having seen and heard the witnesses. All these matters call for careful examination. One suggestion put forward in the Court of Appeal was that it is possible that the whole truth has not yet been revealed by either side. If that were so, it is not the fault of the Court: all parties had the fullest opportunity to lay all the facts before the Court: decision had to be reached upon the available material. It must be added, however, that the suggestion was not advanced as a ground for ordering a new trial.

It will be seen that considerations concerning the writing and sending of the letter of Dec. 21, 1964, compose the major part of the reasoning which led to the ordering of a new trial. Indeed, it is apparent that at all stages in this litigation that letter not only assumes a dominance over all other documents but attracts

priority of attention in every reflective process of surveying the case as a whole. Before turning to the issues in relation to it I pass to the question as to whether the learned Judge misdirected himself in considering the question of motive.

It was but natural that he should have been invited to consider whether there was some motive which could have prompted either side. On behalf of Mr. Onassis and Mme Callas it had been suggested that the motives of "greed and avarice" must have inspired Mr. Vergottis's actions. But as I read the judgment of the learned Judge he came to the conclusion that he ought not to decide the case on considerations of motive. It may well be that monetary matters would little influence the two male parties: their circumstances were those of affluence. But whether this would be so or not, it was the view of the learned Judge that questions of motive were not going to assist decision. He said ([1967] 1 Lloyd's Rep., at p. 615):

> . . . When feelings become passionately aroused in the circumstances in which they have become passionately aroused in this case questions of motive do not always afford a clear guide to the truth. Undoubtedly bitter hatred and resentment has been aroused by the events of the autumn of 1965. . . .

In the passages that followed, the learned Judge did consider what might be said on either side if motive were being looked for. In stating the possible motive that could have operated in the case of Mr. Vergottis he did say that the ship had done better in her early trading period than had been expected and, indeed, that an extremely valuable charter had been fixed at so significant a time as just after the date when the payment of £60,000 made by Mme Callas had been received. The evidence did not support the view that the ship had done better than had been expected: it was not shown that the November charter was exceptionally profitable. But the learned Judge expressly stated that, in his view, motive was not the determining factor. He said ([1967] 1 Lloyd's Rep., at p. 616):

> . . . But ultimately, as I have said, this case turns not on consideration of motive but on consideration of personal credibility and upon whom I believe, having seen these two gentlemen and this lady in the witness-box and seen them closely and exhaustively cross-examined.

If, therefore, the question of motive was being deliberately set aside as possessing no significance in the process of reaching a determination of the case any error in the formulation of what could possibly have been motive is of little account: in my view, any such error is insubstantial as a basis for ordering a new trial.

I would regard as of more significance an alternative contention which was that any assistance to be derived from the presence or absence of motive was abjured for a wrong reason. By the end of 1964 the parties were all still on terms of friendship. Feelings had not then "become passionately aroused". What motive, it was asked, could there be for Mr. Vergottis at that time to send a letter whose terms were not correct? A possible motive as found by the learned Judge had no support in the evidence. If, however, the case is approached on the assumption that no motive as against Mr. Vergottis was proved, the question would then have to be asked whether any motive was proved which would be likely to cause Mr. Onassis and Mme Callas (who seem to have been disposed to repair the breach in the former friendship) to put forward claims in 1965 which they knew to be false and to give detailed testimony that things were said on numerous occasions in 1964 which were never said at all and which were a complete fabrication. It would seem, therefore, that questions as to motive would not yield secure foothold for conclusion.

I turn, then, to the question as to whether the learned Judge failed to deal in his judgment with factors that told in favour of Mr. Vergottis. What is said is that certain arguments are not recounted and dealt with in the judgment. It is said that this amounts to misdirection. The implication is that because arguments are not mentioned they must have been overlooked and cannot have received consideration. The arguments principally referred to are those in reference to the letter written by Mr. Vergottis on Dec. 21, 1964, and posted on that date. The briefest study of this case would make it apparent to anyone that all the circumstances in connection with that letter are of outstanding relevance. No one could live with the case for days without giving recurrent thought to the fact that the writing and the sending of that letter would seem to be a telling pointer in favour of Mr. Vergottis. Yet it is not asserted that the finding that the letter was sent should

have compelled a rejection of the claim. Nor is it denied that on a retrial, if there were one, the claim as made might, in spite of the existence of the letter, again succeed. What is said is that the learned Judge entirely failed to consider many of the arguments in relation to the letter or, alternatively, wrongly concluded that the arguments lacked substance.

The writing and sending of the letter undoubtedly prompt a number of questions. Why, at a time when friendship between the three persons continued, should the letter have been written unless its terms accurately set out what had been agreed? If the letter did not do that, would not Mr. Vergottis have expected that Mme Callas would at once protest? If the letter was contrary to what had been agreed, would not Mr. Vergottis expect that the letter would be shown to Mr. Onassis and be challenged by him? If the letter was part of a plan to describe as a loan what had been a subscription for shares, would not some other documents have been brought into existence? If there had been a subscription for shares, is it likely that anyone would put into writing an assertion that it was a loan? If, however, a letter wrongly asserting a loan was received without protest, would it be likely that Mr. Vergottis would have initiated the oral variation which it was alleged was made in January, 1965, by which the subscription for shares was converted into a loan with an option to take shares? If there had been the variation agreement in January, 1965, and if Mme Callas only subsequently received the letter, would she not have raised questions as to the date of the letter, as to the lack of any reference in it to an option, as to mention of further loans and would she not then have shown the letter to Mr. Onassis? Do not these questions make the case for Mr. Onassis and Mme Callas improbable? If there was an option agreement in January, 1965, would it not be likely that Mr. Vergottis's request on Feb. 23 for a written confirmation by Mr. Onassis of the disposal of his shares would have been met by a request that Mr. Vergottis should, in the interests of Mme Callas, confirm the option agreement? Does not the failure of Mme Callas to show the letter to Mr. Onassis until a late date in the story suggest that she did not do so for the reason that its terms were correct?

My Lords, the points which these questions suggest are formidable ones. Indeed, it would be idle to pretend that the case is not one of great difficulty and one which any appellate tribunal must examine with feelings of anxiety. But the question remains whether the learned Judge failed to give full and due consideration to the questions arising out of and connected with the sending of the letter. It is no disrespect to those who on appeal have marshalled the points that arise, and to those who presented them to the learned Judge, to say that many of them would, even without skilled assistance, occur to anyone giving thought to the evidence in this difficult case. The learned Judge paid tribute to a speech of outstanding ability in which Counsel appearing for Mr. Vergottis had made an "analysis of the complex evidence" in the case: it was a speech of the duration that I have mentioned. I cannot credit that the learned Judge thereafter failed to consider the points that were made. It has, however, been forcibly stressed that no express recital of the questions to which I have referred or of kindred points is to be found in the judgment. Reference is made to the following sentences in the judgment ([1967] 1 Lloyd's Rep., at p. 631):

> I have taken, I am afraid, a long time, but I have tried to review the evidence and arguments on both sides as fairly and dispassionately as I am capable of doing. I have already indicated the major points which have been submitted to me by learned Counsel on one side or on the other. . . .

If, it is contended, there are in the judgment the omissions of some of the questions above noted from "the major points" submitted, then it is shown that the learned Judge ignored or for some reason wholly failed to consider the arguments or points that told in Mr. Vergottis's favour. My Lords, I am not persuaded by this reasoning. It involves that the learned Judge, who quite manifestly retained a full grasp of all the many details of a considerable mass of evidence (and in regard to which the challenges to his accuracy have really been minimal), allowed his grasp of the arguments to relax so that some of them entirely escaped from being submitted to any process of critical and analytical thought. That I consider is inherently unlikely. What I think is much more likely is that whenever the learned Judge referred to the letter and the reliance

placed upon it by Mr. Vergottis he was intending to refer and would be understood to refer to the various points and arguments which centred upon and revolved around the letter. I imagine that whenever in the case the letter was referred to, the reference must essentially have involved, or included, its significance in diverse ways as a pointer in Mr. Vergottis's favour. There would be no need each time to summarize the features (many of them being obvious and clear) which yielded that significance. It may be also that a result of starting what had to be a very long judgment at a late hour in the day was that, while in its early part the references were full, in its later part they were relatively somewhat compressed.

In his judgment the learned Judge made constant reference to the letter. He examined the evidence concerning the sending of it and found that it was posted in London on Dec. 21. In the early part of the judgment he pointed out that if the letter was "to be taken at its face value and without any explanation, it strongly supports" Mr. Vergottis's case. He later reiterated that if taken at its face value the letter "beyond all possibility of argument" supported Mr. Vergottis's case and went to disprove the case of Mr. Onassis and Mme Callas. In these and other references to the fact that if the letter were taken at its face value the case for Mr. Onassis and Mme Callas could not be right, I think that the learned Judge must have had in mind the many and various ways in which arguments based on the writing and the sending of the letter could be expressed. Mention of the letter (and the learned Judge mentioned it over and over again) and stress upon its significance involved both an appreciation of and consideration of the arguments in relation to it. The recurring references to it would seem to suggest that the relevant implications (which must have been stressed in argument) were always in mind. It must be recognized that in the result the learned Judge while impliedly finding that the letter was not to be taken at its "face value" does not venture to state a positive conclusion (which the early part of the judgment had rather suggested would be vouchsafed) as to the explanation of the writing of it. He mentioned, but neither accepted nor rejected, the theory that had been put to him that the letter had been written in order to pave the way for a variation of the original arrangement. Nor was any view expressed as to whether the letter (which was a letter written on behalf of the company) was written so as to bring about a result (a result which might have been in Mme Callas's interests) that she should get from the company an immediate income from her money so that she would have that income during the period while the company was getting into its stride. I doubt, however, whether it was incumbent on the learned Judge to form and to state a precise view as to why the letter came to be written and expressed as it was. Once the learned Judge decided that there had been the oral agreements relied upon by Mr. Onassis and Mme Callas there was an end of the matter. The letter was something that had constantly to be in mind in the process of and before reaching decision. In spite of it and in spite of all its significance the learned Judge had "no hesitation in holding" that the story of Mr. Onassis and Mme Callas was true. It is not contended that the existence of the letter must involve that their story was untrue. I, therefore, see no reason at all for thinking that the learned Judge failed to take proper advantage of his having seen and heard the witnesses. It was, indeed, because he enjoyed that advantage and because he made complete use of it that he arrived at his decision.

The more I have studied this case the more does it appear to me that its result depended upon coming to a decision as to which oral evidence to accept. If probabilities are considered there are many which point one way and many which point another. I see no purpose in recounting them. Complaint is made of the fact that the learned Judge regarded it as commercially improbable that the only transaction should have been one under which Mme Callas made an unsecured loan in connection with the purchase of the ship by two wealthy men who, according to the case for the plaintiffs, were buying it under a partnership arrangement of a kind which they had never previously contemplated. Whether or not this was commercially improbable must be a matter of individual opinion, but as I read the judgment the learned Judge considered that in the end his conclusion must depend rather upon an assessment of the witnesses than upon an assessment of probabilities. When all the documents and all the probabilities and improbabilities and all questions of motive or lack of motive are considered the case remains one in which without seeing and

hearing the witnesses it is not possible to form a conclusion. Without having had that experience I would not feel able to express a view as to whether the learned Judge did or did not arrive at a correct conclusion. As an example of the sharp divergence of the testimony, it is to be noted that in sharp contrast to all the evidence of Mr. Onassis and Mme Callas, it was Mr. Vergottis's case and evidence that there was not on the *Christina* in the period between Sept. 3 and Sept. 8, nor in London between Oct. 14 and Oct. 16, nor at Maxims on Oct. 31, any discussion from beginning to end or any word whatsoever as to Mme Callas having any participation or any interest at all. That was made abundantly clear. During the cross-examination of Mr. Onassis (Day 2, p. 23) the learned Judge addressed the following question and received the following answer:

> Mr. JUSTICE ROSKILL: Just before you pass to that, am I right in my understanding of what you have been putting to Mr. Onassis: that in respect of period one on the *Christina* about the 3rd to the 8th September, in respect of what I will call period 2, which is the interviews, lunches, whatever they were, in London between the 14th and 16th of October, and in respect of what one might call period 2 (B), which is the evening at Maxim's on the 31st, that on Mr. Vergottis's case there was never any discussion from the beginning to the end of Mme. Callas's participation.
>
> Mr. BRISTOW: Or of her having any interest at all.
>
> Mr. JUSTICE ROSKILL: Or having any interest at all in this.
>
> Mr. BRISTOW: My Lord, not a word.

As another example (and many could be cited) there was a complete conflict of evidence between Mr. Onassis and Mr. Vergottis as to whether in the telephone conversation on Sept. 4, 1964, Mr. Vergottis spoke about the possibility of acquiring the ship. There was, of course, a complete and sharp conflict as to how it came about that Mme Callas sent the sum of £60,000. The case for Mr. Vergottis involves that the main and essential parts of the evidence of Mr. Onassis and Mme Callas were completely untrue and wholly devoid of foundation. The divergence of recollection was as complete as it could be. The learned Judge had the unenviable task of deciding which evidence to accept. Again, in regard to the conversations which took place between Mme Callas and Mr. Vergottis in Paris in January, 1965, it was totally in issue whether anything was said about an option or on the lines that the arrangement should be treated as a loan with an option to convert into shares. It was Mr. Vergottis's evidence that they had no conversation at all about the ship. There was, furthermore, a complete conflict between Mr. Onassis and Mr. Vergottis as to the latter's state of knowledge in regard to the 26 shares given by Mr. Onassis to Mme Callas and also as to the events in connection with the writing of the letter of Feb. 23, 1965. These are but illustrative of the very many sharp conflicts of evidence in regard to what was said, not merely on one, but on a number of different occasions. The case had to be decided by reaching a conclusion on those matters. The case was not one in which an appellate Court on a consideration of probabilities and of documents but without seeing and hearing the witnesses could say that the learned Judge had reached a wrong conclusion. Nor is it suggested that an appellate Court could say this. I am not persuaded that the learned Judge in coming to a conclusion relied overmuch on his assessment of the witnesses. He considered whether the question of motive could guide him: he considered whether probabilities and improbabilities could point to a conclusion: he considered whether the documents (including all the points discussed in relation to the share certificates) could direct him to a result. After considering, rather than ignoring, all these possible aids to a conclusion he held that decision had ultimately to depend upon forming a view as to the evidence given by the witnesses. There were pure issues of fact as to what had been said and agreed on many different occasions. Wherever the truth may lie in this perplexing case, I do not consider that there are sufficient reasons for displacing the decision of the learned Judge.

I would allow the appeal and dismiss the cross-appeal.

Lord GUEST: My Lords, the question of fact which the learned Judge had to try on the pleadings was whether there was an agreement made on board the *Christina* in September or October, 1964, between the plaintiffs and the defendant whereby the second plaintiff in consideration of the payment by her of £60.000 was to receive 25 shares in a Liberian company to be formed in order to acquire a bulk carrier to be known as *Artemision II* which the

first plaintiff and the defendant were to buy largely if not entirely for the benefit of the second plaintiff. Mr. Justice Roskill found that the plaintiffs had established their case and gave judgment in accordance with the claim for specific performance of the agreement. This issue was a question of fact which depended very largely on the credibility of the plaintiffs and of the defendant. The Court of Appeal allowed the appeal, set aside the judgment of the trial Judge and ordered a new trial. The plaintiffs have appealed to this House against the order of the Court of Appeal and the defendant cross-appealed asking that judgment should be entered in his favour.

It is important at the outset to appreciate the distinction between an order for a new trial and an order that judgment should be entered for the defendant. Different considerations, in my view, apply to an appeal against these two orders. At a late stage in his argument for the respondent, Mr. Ackner abandoned the cross-appeal. This had, in my view, an important effect on the result of the appeal by the plaintiffs. By abandoning his cross-appeal the respondent accepted that he was unable to contend that the judgment of Mr. Justice Roskill was wrong or that the learned Judge was not entitled to accept the evidence of the plaintiffs. In these circumstances the contention for the respondent was limited to upholding the judgment of the Court of Appeal. This, in my view, placed a very heavy onus on the defendant in his attack on the trial Judge's judgment.

Order 59, r. 11 (2), is in the following terms:

> A new trial shall not be ordered on the ground of misdirection, or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the Judge at the trial was not asked to leave to them, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage has been thereby occasioned.

It was accepted that the Court of Appeal had jurisdiction to grant a new trial where the trial was by a Judge alone if the requirements of the rule were otherwise satisfied. The terms of the rule are certainly more appropriate to an application for a new trial where the trial has taken place before a Judge and Jury. The word "misdirection" and the provision regarding "admission or rejection of evidence" would be more suitably applied to what had happened at a Jury trial than at a trial by a Judge alone. But what is clear is that for an order for a new trial to succeed there must not only be misdirection, but also substantial wrong or miscarriage must have been occasioned thereby. The rule is expressed negatively—"A new trial shall not be ordered unless . . .". The onus is the obverse to that in the case of the operation of the proviso under the Criminal Appeal Act, 1907. The onus is upon the person asking for a new trial to show that a substantial wrong or miscarriage has been occasioned by the misdirection. The provisions of the rule are stringent and, in my view, rightly so. To make the rule work in a trial by Judge alone the misdirection must be by the Judge himself (see *Watt or Thomas v. Thomas*, [1947] A.C. 484, Lord Thankerton at pp. 487 to 488). Where parties have submitted their disputes on pleadings to a Judge and where the Judge has not misconducted himself during the trial then, unless the appellant can show that his judgment is wrong, his judgment ought to stand. There is an obvious distinction between what happens during a trial and a criticism of the contents of the learned Judge's judgment. There is in this case no complaint as to the conduct of the trial itself but only to the terms of the judgment. The misdirection resulting in substantial wrong or miscarriage of justice must appear from the terms of the judgment itself. Misdirection suggests some error of law but I suppose there can be a misdirection on fact. I should have thought, although I have no experience of English practice in this matter, that it was only on very rare occasions that the Court of Appeal would direct a new trial on these grounds where the trial had been before a High Court Judge and where there was no complaint of the conduct of the trial itself. It is significant that the only reference in the authorities which could be found was an *obiter dictum* of Lord Justice Cotton in *Jones and Others v. Hough and Others*, (1880) 5 Ex. D. 115, at p. 125, to the following effect:

> . . . But when the appeal comes before us the Court of Appeal has the full right, if it thinks necessary, although there is no motion for a new trial, to say that the conclusion of fact arrived at is not satisfactory, and as they have not the materials before them to arrive at a

> proper conclusion, the Court will order a new trial, and I can instance a case where this would be done; where the question turns on the credibility of witnesses who had been heard vivâ voce, and seen by the judge who himself had tried the case. In such a case, even although the Court had thought the conclusion was not a correct one, they might direct that the case should go back for a new trial. . . .

It is to be noted that the subsumption of the order for a new trial is that the conclusion was not a correct one and also that it was many years before *Watt v. Thomas, sup.*, at p. 484. No case was referred to where a new trial had been granted in circumstances remotely resembling the present. This absence of authority is, in my view, significant and makes the task of the respondent in upholding the judgment of the Court of Appeal all the more difficult. I take it to be clear, however, that a new trial is not a sort of "half-way house" between dismissing an appeal and entering judgment for the defendant. It is not a remedy where, although it cannot be said that the decision of the trial Judge was wrong, there is some doubt as to the soundness of his judgment.

The facts have been fully stated by my noble and learned friend on the Woolsack and I do not propose to rehearse them. I agree with your Lordships in thinking that the judgment is not satisfactory. This may be due to it having been given *ex tempore* at the end of a long trial and during the concluding stages of the ninth day. It is unfortunate that the trial Judge in the circumstances where serious issues were involved did not give a reserved judgment; allowances must be made for this fact in any criticism of his judgment. In the end of the day, however, possible criticisms of his judgment lie, in my view, in a very limited field.

I dismiss at once as a ground for misdirection the suggestion that the learned Judge over-weighted considerations in favour of the plaintiffs and under-weighted considerations in favour of the defendant. I reject also suggestions that the plaintiffs' evidence was inconsistent with some of the pleadings and documents and that at times their evidence was inconsistent with each other's. This balancing of probabilities and weighing of the evidence is a matter for the Judge and not an appellate Court. In my view, he approached the matter entirely correctly when he said at the outset of his judgment that a heavy onus was placed on the plaintiffs to establish their case upon a balance of probabilities, particularly in view of the gravity of the allegations made against the defendant. In these circumstances it was for the Judge to evaluate the weight of the evidence on either side and having regard to these matters to decide where the truth lay. He has found that the plaintiffs were reliable and honest witnesses and he has rejected the defendant's evidence as unworthy of credit. It is not, in my view, for an appellate Court in these circumstances to retry the case.

There are, however, two points which require consideration on the learned Judge's judgment. These were pressed on us by the defendant's Counsel as evidence of misdirection. The first point was that the Judge failed to deal with the improbability of the defendant dishonestly making up the letter of Dec. 21, 1964, at p. 80 of the documents when it did not truly represent the agreement between the parties. This letter, dated Dec. 21, 1964, was an acknowledgment to Mme Callas by Overseas Bulk Carriers Corporation of the receipt of £60,000 which Mme Callas had sent to the defendant without a covering letter. The acknowledgment stated that it was an unsecured loan bearing interest at the rate of 6½ per cent. and added that "any additional loans would be on the same terms". It is said that there was a "glaring improbability" of the defendant having sent a letter in these terms unless it represented the true facts. It is to be noticed that this was the defendant's document signed by him. I could have understood if a point could have been made that the conduct of Mme Callas on receipt of the letter was inconsistent with her evidence. This might adversely have affected her credibility, but the learned Judge has accepted that the letter was not received by her until at least Jan. 6, 1965, and he makes no adverse comment on her reaction to the letter. However, it is quite impossible to say that the Judge has not considered the improbability of this letter having been a fabrication on the part of the defendant. The letter is referred to no less than 10 times in the course of the judgment and referred to in such a way as to make it clear beyond a doubt that the learned Judge regarded this letter as of crucial importance. He says more than once that if the letter is to be taken at its face value without any explanation it strongly supports

the defendant's case and goes to disprove the plaintiffs' case. There are other significant references to this letter in the course of the judgment. The implications of this letter, to quote a popular expression, "stand out a mile" and the learned Judge refers to the powerful arguments made by Mr. Bristow on behalf of the defendant. Mr. Bristow cannot have failed to put before the Judge all the implications which flowed from the terms and date of this letter. In estimating the credibility of the defendant the learned Judge must have had in view the terms of this letter and the improbability that he would write such a letter if the facts were not in accordance with its terms. He must also have had regard to the forceful cross-examination of the plaintiffs in regard to this letter. He recognizes the stark choice between believing the plaintiffs and the defendant. Nevertheless, having had regard to all these factors, which I must assume he did, the Judge decided that this was not an honest letter. If the complaint is that the trial Judge has not sufficiently explained this letter in the context in which it was written, his explanation as spelled out from his judgment must be that it is a false and dishonest letter. Beyond that he was not, in my view, bound to go. In *Watt or Thomas v. Thomas*, [1947] A.C. 484, at p. 492, Lord Simonds said:

> There I should be content to leave this case but for certain criticisms made by counsel for the respondent in his able and candid address. Relying on the testimony of certain witnesses called on behalf of the respondent . . . he said that the learned Lord Ordinary had come to a conclusion which was diametrically opposed to that testimony, yet he had not explicitly stated that he did not accept them as witnesses of truth nor indeed, made any adverse comment upon them. Your Lordships were therefore invited to find that the learned judge had forgotten or ignored this evidence and to hold that his judgment was thereby vitiated. I believe this to be fundamentally unsound criticism. The trial judge has come to certain conclusions of fact; your Lordships are entitled and bound, unless there is compelling reason to the contrary, to assume that he has taken the whole of the evidence into his consideration. If his conclusion is inconsistent with the evidence of certain of the witnesses but he does not, in terms, stigmatize them as false witnesses, it is not the proper or necessary inference that he has forgotten or ignored them; of this the present case is a cogent example, for I can well understand why the Lord Ordinary, while not accepting his evidence, did not think fit to comment unkindly on one at least of the witnesses in question. . . .

That passage, in my view, is very apposite to the argument for the defendant and is *a fortiori* in a case where the plea is only for a new trial. In my view, questions of principle are here involved. If failure to deal with each and every argument or to mention them in the judgment is to be a ground for a new trial, it would strike at the very roots upon which the appellate jurisdiction of our Courts is founded. In *Hontestroom (Owners) v. Sagaporack (Owners)*, [1927] A.C. 37; (1926) 25 Ll.L.Rep. Rep. 377, Lord Sumner, at pp. 47 and 381 of the respective reports, is to the following effect:

> What then is the real effect on the hearing in a Court of Appeal of the fact that the trial judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course, there is jurisdiction to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute: Order LXVIII., r. 1. It is not, however, a mere matter of discretion to remember and take account of this fact; it is a matter of justice and of judicial obligation. None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone. . . .

Again at p. 49:

> . . . At least we should not make further difficulties for ourselves by assuming that the trial judge has not understood the case, if his views do not agree with our own, or by overruling his estimate of the witnesses on a paper review of their words, stripped of the material colour, which hesitation or promptitude, shiftiness or candour may well have given them. It is, of course, true that the trial judge may have been imposed upon, but I think it is more useful, that we should be on our guard against imposing on ourselves.

Turning to the judgments in the Court of Appeal, I find that the majority did not really rely on this aspect of the case, but preferred to place their judgments on the other ground presently to be considered. It is true that the Master of the Rolls complains that the learned Judge does not weigh the improbability of the defendant having written the letter of Dec. 21, 1964. I have already dealt with this point. Lord Justice Salmon seems to base his judgment upon the footing that the trial Judge had failed to deal with the arguments, but he added that if the Judge had stated the arguments and rejected them he would not have interfered with the judgment. It was on this that I think the learned Lord Justice fell into error. It is an insult to the intelligence of the trial Judge to assume that he did not consider all the arguments which were put before him by learned Counsel for the defendant. It is noteworthy that Lord Justice Salmon ([1968] 1 Lloyd's Rep., at p. 299) states that the learned Judge fully realized that the letter dated Dec. 21, 1964, was vital. He says if it was genuine there was an end of the plaintiffs' case; if it was a fraudulent fabrication there was an end of the defendant's case. I find difficulty in appreciating how, if this was the Lord Justice's view, it can be said that the trial Judge failed to deal with this aspect of the case. Later, on p. 301, the Lord Justice expressed the view that the trial was unsatisfactory. This, in my view, was not, in the circumstances, a ground for granting a new trial.

The second point of materiality in the argument for the defendant was that the Judge has found there was a motive for the dishonesty of the defendant in writing the letter of Dec. 21, 1964, and that there was no evidence to justify such a finding. All the members of the Court of Appeal based their judgment on this ground. Two questions require to be considered. First, has the Judge found that the letter was dishonest and second, if he has, has he found a motive for the dishonesty? On the question whether the letter was dishonest, it appears to be plain that the Judge has found against the defendant. In a passage at the top of p. 616 ([1967] 1 Lloyd's Rep.) he quite clearly expresses the view that the letter was dishonest and he repeats it on p. 631. He states that both Counsel accepted that in the end of the day he had to make a stark choice between the plaintiffs and the defendant as to which was telling the truth and "There is no half-way house" he added. He further states that if the plaintiffs' story is true the defendant must have lied and lied again. If parties choose at the trial to pit one against the other on a question of perjury and dishonesty on one side or the other, they cannot complain if the Judge takes them at their word. This question of dishonesty was a question of fact for the trial Judge. He has found against the defendant and it cannot be suggested that there was no material upon which he could so decide. The second question which properly arises on the question of motive is, has the learned Judge found that there was a motive for the dishonesty? It is suggested that by certain observations at pp. 615, 616 and 631 the Judge has found that the motive for writing the letter of Dec. 21, 1964, was that the ship did better on her early trading period than had been expected and that from motives of greed or avarice the defendant was determined to use Mme Callas's £60,000 as if it were a loan so that he could prevent her getting a 51 per cent. interest in the ship. I have carefully considered all these passages and although the Judge's findings are not *luce clarius* I am not prepared to say that he positively did find that this was a motive for the defendant's writing this letter. He says expressly at p. 616, having dealt with the question of dishonesty, that

> . . . this case turns not on consideration of motive but on consideration of personal credibility and upon whom I believe . . .

In face of this disclaimer I am not prepared to say that there was a finding of motive on inadequate evidence. Motive

imports a consideration of the purpose for which an individual acts and of what was the motivating factor in his mind. The purpose of the defendant writing the letter of Dec. 21, 1964, if the plaintiffs' evidence is believed, as the learned Judge did, is clear; it was to prevent Mme Callas obtaining a 51 per cent. share in the ship. What his motive was is not really explained on the evidence. The Judge speculates upon what considerations, might have prompted him to take this course, but ultimately he is unable to find what was the motive. But this does not invalidate his judgment; it was not necessary for the plaintiffs to show what motive the defendant had in writing that letter, although it would have strengthened their case if they had been able to do so. To ascertain motive it is necessary to enter into a man's mind and, as has been said before, the state of a man's mind is like the state of his digestion.

I recognize the powerful arguments advanced to justify a conclusion that the Judge has been misled in his view of this aspect of the case, nevertheless I am not prepared to say that upon this or any other matter there has been a misdirection by the trial Judge whereby substantial wrong or a miscarriage has been occasioned.

Upon the whole matter I would allow the appeal, dismiss the cross-appeal and restore the judgment of Mr. Justice Roskill.

Lord PEARCE: My Lords, this is a difficult and unusual case. Conflicting considerations have been set out in the judgments of the learned trial Judge and the Court of Appeal. They have been fully canvassed in persuasive arguments by Counsel on both sides.

The solution is not to be found in any principle of law. Indeed, Counsel on both sides, except on a matter of emphasis, were in substantial accord as to the law. The Court of Appeal had the power to set aside the judgment and order a new trial. The question is whether they should have done so in the unusual circumstances of this case. It is impossible (and indeed undesirable) to lay down

> . . . anything in the nature of a code as to the circumstances in which an appellate court should interfere either by reversing the trial judge or ordering a new trial. . . .

(see per Lord Somervell of Harrow in the *Benmax v. Austin Motor Company, Ltd.*, [1955] A.C. 370, at p. 377). Viscount Simonds, in commenting on the powers of the Court of Appeal to draw any inferences of fact (see Order 59, r. 10 (3)), said (*ibid.*, at p. 373):

> . . . This does not mean that an appellate court should lightly differ from the finding of a trial judge on a question of fact, and I would say that it would be difficult for it to do so where the finding turned solely on the credibility of a witness. . . .

In such a case the task of an appellant who seeks to upset the judgment has always rightly been a very uphill and laborious struggle. But that does not mean that he is inevitably doomed, like Sisyphus, to fail in every set of circumstances.

The difference between reversing a judgment and ordering a new trial is a difference of remedy, not a difference of principle. The function of a Court of Appeal is to set aside a judgment that should not be allowed to stand because it occasions a substantial wrong or a miscarriage of justice. That wrong or miscarriage of justice may consist of a judgment in favour of the wrong party. It may also consist of a failure in the judicial process to which both parties are entitled as of right, namely, the weighing of their respective cases and contentions. Such failure may constitute a wrong or miscarriage of justice even though it may appear that the appellant may in the end fail to secure a judgment in his favour. But the fact that the right party seems to have succeeded in the Court below will naturally make a Court of Appeal extremely reluctant to interfere, and it would only do so in the rarest cases. Such matters are questions of degree.

Where a Court of Appeal is satisfied that a judgment ought not to stand, there comes the question what it should do. Wherever it feels able in justice to the parties to reverse the judgment and bring finality it does so. But there are cases where this is not possible. Lord Justice Cotton said in *Jones and Others v. Hough and Others*, (1879) 5 Ex. D. 115, at p. 125 (an appeal from a Judge alone):

> . . . But when the appeal comes before us the Court of Appeal has the full right, if it thinks necessary, although there is no motion for a new trial, to say that the conclusion of fact . . . is not satisfactory, and as they have not the materials before them to arrive at a proper conclusion,

> the Court will order a new trial, and I can instance a case where this would be done; where the question turns on the credibility of witnesses who had been heard vivâ voce, and seen by the judge who himself had tried the case. In such a case, even although the Court had thought the conclusion was not a correct one, they might direct that the case should go back for a new trial. . . .

The Court is rightly deterred from ordering a new trial by the thought that litigation will be thereby prolonged, that rights will be frozen, and above all that costs will be incurred which may be out of proportion to the amount involved and which may be ruinous to the ultimate loser. It may even be that a party or witness may have died, so that a retrial may not be a practical possibility. These are matters which may in a particular case force the Court to choose between two courses, both of which seem unsatisfactory to it, namely, to reverse the judgment or to let it stand as it is. In the present case, however, these particular difficulties have no compelling weight.

It is not surprising that there is a dearth of authority on this. The considerations which I have lightly adumbrated are part of the daily fare of a Court of Appeal in its task of deciding whether there is enough in an appeal to call for its duty to interfere, or whether there is not quite enough. Reported cases would not greatly help, since each case depends on its particular circumstances. The matters that should be considered have been well phrased in such cases as the *Benmax case, sup.*, in *Powell and Wife v. Streatham Manor Nursing Home*, [1935] A.C. 243, and in *Watt or Thomas v. Thomas*, [1947] A.C. 484. The latter was a case concerned with cruelty which raises additional problems, since in such cases the interaction of the personalities of the parties, their sensitivity and capacity for suffering and the like are relevant factors.

One thing is clear, not so much as a rule of law but rather as a working rule of common sense. A trial Judge has, except on rare occasions, a very great advantage over an appellate Court; evidence of a witness heard and seen has a very great advantage over a transcript of that evidence; and a Court of Appeal should not interfere unless it is satisfied both that the judgment ought not to stand and that the divergence of view between the trial Judge and the Court of Appeal has not been occasioned by any demeanour of the witnesses or truer atmosphere of the trial (which may have eluded an appellate Court) or by any other of those advantages which the trial Judge undoubtedly possesses.

"Credibility" involves wider problems than mere "demeanour" which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person, telling something less than the truth on this issue, or, though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so, has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by overmuch discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part.

In the present case the advantage possessed by a trial Judge in being able to absorb the atmosphere of the case was an advantage which had its dangers. The case was presented to him in an atmosphere of high drama. It was tried

in storm and tempest of the emotions between old friends who had become bitter enemies; and in the thunder echoed such words as frame-up, dishonesty, fraud, and concocted perjury. There was little that either side was not prepared to say of the other by the time the case came to be tried. This was certainly not the fault of the able Judge who tried the case. Nor was it the fault of Counsel. The parties who were all forceful and successful personalities had quarrelled bitterly, for reasons which were (quite rightly) never fully explored, and the trial was a focus of this enmity. That was how they saw the trial. Counsel could not reduce it to a lower key without undesirably forfeiting the confidence of their clients, and producing in the loser, whoever he might be, the feeling that he had been betrayed and that his true case had never been presented. This class of case, where love has turned to hate, where old friends have each suddenly discovered how abominable the other is and wonder in amazement that they could ever have been friends, presents its own particular difficulties for the trial Judge. In the use of probability as a touchstone on bygone events, he has to free his mind of the parties in their present enmity, and put in their place the old friends that they once were.

The relevant events in this case occurred, not in storm or tempest, but in sunshine.

The story starts on a pleasant tranquil note with comfortable conversation between three trusted and successful friends, all admittedly dear to one another, on a luxury yacht in the eastern Mediterranean in early September, 1964. One, a Greek shipowner, was enormously wealthy; another, also a Greek shipowner, was wealthy; and the lady, also Greek, was a famous singer and very well to do. Mr. Onassis and Mr. Vergottis had known one another for 30 years and found one another trustworthy. Mme Callas had been in very close friendship with them for over five years. Mr. Vergottis had recently made an offer to £1,225,000 for a ship, 25 per cent. cash. While he was staying on the yacht he received a cable from his agent reporting that his offer had been rejected. There was nothing of importance about the ship, nor any particular reason to buy her unless at the price she was good value for money. There seems no reason to suppose that she was a particular bargain. The evidence seems to show that plenty of ships were available and that if either man had said to the other in such a case: "I would like to have that ship" the other would have said: "Of course you may". Neither man would have any difficulty in producing the money to buy the ship.

The two competing versions of what happened on the yacht were both perfectly possible. The appellants' version (omitting minor details which may tell this way or that) is that both men had previously discussed a project of giving the lady an interest whether 10 per cent., or 20 per cent., or 51 per cent. in a ship according to her size, that Mr. Vergottis had suggested this ship for the project, that Mr. Onassis thought her rather big at first but that finally it was agreed that Mr. Vergottis should make a new offer of £1,250,000, 25 per cent. cash, and that Mme Callas should have 51 per cent. of the shares. An unusual story; but then the circumstances were unusual.

The version of Mr. Vergottis was that he showed the telegram of refusal to and discussed it with Mr. Onassis, who suggested coming in 50-50 on the deal. Mr. Vergottis agreed. It was arranged that he should make a further offer of £1,250,000. Nothing was said about Mme Callas having any share in it. This does not in any way preclude an understanding between Mr. Onassis and Mme Callas (or an informed or uninformed hope on her part or a suspicion by Mr. Vergottis) that Mr. Onassis would give his share or part of his share of the ship, when bought, to Mme Callas. Again, a perfectly possible story. It was a very small matter to Mr. Onassis. He could give away his share if he wished; or, the ship being presumably good value for money, he could sell his share.

Consistently with either version Mr. Vergottis made another offer which was again refused.

Thereafter according to Mr. Onassis's version he saw Mr. Vergottis in mid-October and it was agreed that Mr. Vergottis should make a further offer of £1,200,000. The Vergottis version is that he made no move during the greater part of October, nor discussed it with Mr. Onassis, but that he, Mr. Vergottis, was stirred up by his own agent at the end of October to make another offer and did so, taking the view that should Mr. Onassis not wish to come in on the deal,

if the new offer was accepted, he need not do so. The contemporary documents tend to confirm the Vergottis version. But this is not a determining factor on the main dispute.

Admittedly at the end of October the ship was bought by Mr. Vergottis through Vergottis, Ltd., who were to manage her, "for himself and others". The price was £1,200,000 of which £240,000 was payable in cash and the balance left on mortgage.

Within a day or two of the purchase they all had dinner at Maxims in Paris. According to the appellants they discussed the payment of the 20 per cent. cash price, namely £240,000; Mme Callas's 51 per cent. shareholding was discussed; Mr. Onassis was to give her 26 per cent.; and she was eager to pay her £60,000, being her 25 per cent. contribution, but was restrained from so doing. According to Mr. Vergottis, nothing was discussed save the flag under which the ship should sail, since the ships of Mr. Vergottis sailed under the British flag and those of Mr. Onassis under the Liberian flag.

Thereafter Mr. Onassis paid £120,000 to Vergottis, Ltd.; Mr. Vergottis contributed a similar sum himself and with these sums paid the cash price of £240,000. Between receiving the contribution from Mr. Onassis and the payment of Mr. Vergottis's contribution, Vergottis, Ltd., received a contribution of £60,000 from Mme Callas. Was this a loan or payment for shares? It was used as working capital. But its use is no clue to its nature, since whether it was a capital contribution or a loan it was available to the company to use either for purchase of the ship or as working capital for the ship's expenses.

On the appellants' version the £60,000 paid by Mme Callas was her payment (according to the arrangements on the yacht) for 25 per cent. of the venture, for 25 shares out of the 100 shares to be issued by the new company.

The Vergottis version of the £60,000 is more complicated. He told Mr. Onassis that Mme Callas had quite a lot of money in Switzerland and that it would be a good idea if she lent it to the company to pay off some of the money which would otherwise be left on mortgage, so that she, instead of the mortgagees, could get the 6½ per cent. interest. Mr. Onassis approved and telephoned next day to say that she was sending £60,000. Mr. Vergottis telephoned to her to explain that it was a loan at 6½ per cent. and she agreed. He had thought she would send about £150,000 which would be used to repay part of the mortgage, but as it was only £60,000 it was not worth repaying part of the mortgage and he therefore simply kept it to use as working capital.

The learned Judge was strongly impressed by the improbability of the Vergottis version on this point. He said ([1967] 1 Lloyd's Rep., at p. 625):

> . . . I am bound to say, looking at it as a matter of commercial probability, that I find this an astonishing suggestion, that two wealthy men, buying this ship in partnership, should borrow £150,000 unsecured from a lady to whom each was devoted and thus quite obviously improve the value of their equity . . . at her expense. . . .

I think with all respect that the learned Judge was putting the matter too highly. Her loan did not improve the value of their equity if by that is meant the value of their shares, which is the only relevant factor. Since they had the mortgage (and it seems likely that either of them could produce the money if they had to do so) it made little difference to them that she produced it and received the interest instead of the mortgagees. I doubt if the shares would be improved by a conversion of £150,000 worth of so large a mortgage into an unsecured loan. On the other hand, it is a point that commercially it was not desirable for her to have that unsecured loan and its risks without any advantage from an interest in the equity. As against this, however, one must remember that this was a domestic arrangement by which she obtained a good rate of interest (better than she was then getting on her money) on a loan which her two wealthy friends must obviously honour if the company did not prosper. She ran no real risk of not getting repaid. And although Mr. Vergottis denied that Mme Callas had been mentioned as having any rights in the shares, which had their risks as well as their potentialities, it must have been fairly apparent to all that her production of a substantial loan put Mme Callas in a very strong position as a potential beneficiary if Mr. Onassis felt like giving away some or all of his share in the venture. So viewed the point does not present a glaring improbability and, though it has some validity, it is not cogent.

Admittedly, on Dec. 21 Mr. Vergottis caused a formal letter to be sent to Mme Callas from which it was quite clear beyond dispute that this was a loan, and the letter referred to the possibility of additional loans. This was never repudiated in writing. If this letter was a true letter, and is accepted on its face value, the appellants' case as presented fails. The appellants denied that it was posted at the date it purported to bear but independent evidence established that it was. The appellants also contended that it was a dishonest letter, concocted by Mr. Vergottis to cheat Mme Callas out of her right to the shares. Their case is that at Maxims in Paris on Jan. 8 Mr. Vergottis suggested to Mme Callas that she should lend the money in the early days of the company, so that she would get a good rate of interest on it for one or two years before the equity began to yield any fruit, and should have an option to convert the loan into the 25 shares to which she was entitled. She agreed and thanked him. She told Mr. Onassis later and he reluctantly agreed. Both the letter and the oral suggestion were, they contend, intended to cheat her, since Mr. Vergottis never intended to honour the option agreement.

Mr. Vergottis denied this conversation but he was seeing Mme Callas in Paris. She had expressed herself as content with the terms of the loan and nothing was said of an option. He spoke of a meeting in February of the three of them at the Coq Hardi in Paris at which Mme Callas was sulky because Mr. Onassis had given 24 of his 50 shares to a nephew, whereas he had promised her to give them all to her. Mr. Onassis said to him: "Well I have given her 26 shares. Won't you give her another 25 shares". Treating the whole thing as a joke Mr. Vergottis patted her back and said ([1967] 1 Lloyd's Rep., at p. 615):

> ". . . I will give you anything you like—I will give you an option on 25 shares, I will give you the entire ship, I will let you have everything . . . in the world". . . .

The next day he asked Mr. Onassis to confirm in writing his disposal of his shares; Mr. Onassis wrote in his own hand ([1968] 1 Lloyd's Rep. 296):

> Messrs Vergottis Ltd
> London
>
> Re Remittance £120,000 m/s *Artemision* for the credit of my account with you.
>
> Please deliver out of a total of one hundred shares covering the ownership of this vessel 26 . . . shares to Miss Maria Callas and 24 . . . shares to Mr Mario Konialidis debiting my account with you.

Nothing was said in that document about the 25 shares for which (according to Mr. Onassis) Mme Callas had paid and on which she now had an option, nor did Mr. Onassis suggest to Mr. Vergottis that he should confirm the option in writing. In May Mme Callas received interest on her loan. *After* the quarrel she claimed to exercise her alleged option and Mr. Vergottis denied that she had any option.

This was plainly a very difficult case to try. There was a great deal of further detail on which points could be made this way and that. The learned Judge took the view suggested by Counsel that either the appellants or the respondent were deliberately lying. He formed an unfavourable view of the respondent. He came apparently to the conclusion suggested by Counsel for the appellants that Mr. Vergottis had sent the letter of Dec. 21 ([1967] 1 Lloyd's Rep., at p. 631): "solely for the purpose . . . of paving the way . . . to put forward . . . the suggestion of a loan" and that he "was motivated by greed" because he realized that this ship was likely to be more profitable than had originally been anticipated. It was never suggested to Mr. Vergottis that the first fix of the ship was exceptionally profitable or that it excited his greed. There was no evidence to show that it was exceptionally profitable or any evidence on which a charge of greed could be launched. In the view of the Court of Appeal there was a misdirection in the Judge finding that the respondent had any motive of greed or avarice at the time in question. But in addition to improperly putting that element into the appellants' scales, the Court of Appeal found that the Judge never put into the respondent's scale the full weight of all the probabilities against Mr. Vergottis having dishonestly and treacherously set out to cheat Mme Callas of her shares.

There was, indeed, a glaring improbability against Mr. Vergottis having sought to cheat Mme Callas in late 1964 or early 1965. He was *then* an old and dear friend and on the appellants' case he had initiated the whole enterprise out of affection for her. Nothing had *then* occurred to change their relationship. It would, indeed, be madness for him to set out to cheat her openly and thus inevitably

lose her friendship and that of Mr. Onassis who had trusted him for 30 years. The financial side of the matter was not important, since the shares were not, so far as the evidence shows, worth more than their price. It was not a case where a successful fraud could bring a valuable gain or could pass unnoticed. Those whom he cheated must know that they had been cheated. The most therefore that his fraud could obtain for him would be equal co-ownership of the ship at about her proper value with persons who would now detest him and know him for a cheat. He was dealing with old friends, but he must have realized what powerful and forceful enemies they would become if he cheated them. Not only is there no rational motive for such behaviour but there are the clear motives of common sense and friendship *against* such behaviour. But even assuming that for some irrational motive he desired to embark on so hazardous and ridiculous a course, what of the letter of Dec. 21? Why send it at all, and why underline the matter by referring to additional loans? And why not enter the sum as a loan in the books of the company to "dress the window" instead of leaving the entries neutral? And why not enter it as a loan in the minutes of a meeting on Dec. 21, the date of the letter, at which the allocation of 24 shares to Mr. Onassis's nephew was minuted? Why, when the letter of Dec. 21 had gone through without protest, make the oral suggestion of an option which he did not intend to honour? And why, when the appellants had agreed orally to an option, should Mr. Vergottis ask Mr. Onassis in February for written confirmation of his instructions about shares —a request which was very likely to result in his suggesting a written confirmation of the option which would be fatal to Mr. Vergottis's scheming? All these and some less weighty points make the suggestion of fraud by Mr. Vergottis glaringly improbable. Yet none of these points is mentioned by the Judge although he had expressly reviewed the evidence and arguments on both sides.

In my opinion, it is not possible to arrive at a fair conclusion on this case without consciously and expressly putting into the scales the many weighty points which tell against Mr. Vergottis having concocted the letter of Dec. 21 with fraudulent intent.

But is the mere fact that a Judge has not mentioned points that are inevitable in a just weighing of a case a sufficient reason for disturbing a judgment? It would be most undesirable if a judgment could be thus scrutinized for possible omissions, and the omission used to overturn it. The general answer to the question must be no. But this, like so many questions in an appellate Court, is a question of degree. Where from the whole tenor of a judgment it seems that a matter of such very great or decisive weight has not been put into the scale, and that if put in the scale it should have tipped the balance, and the result of the weighing casts a very serious slur on the defendant's character, a Court of Appeal has a duty to intervene.

It is, I think, impossible to assume that the points were adequately put into the scale. It is only when they are expressly set out that one realizes how formidable they are and how difficult it is to find an answer to them. Yet some answer must be found before the documents can be brushed aside. The answers hitherto given both in the judgment and in the arguments on appeal are quite inadequate. They are really little more than that Mr. Onassis and Mme Callas appeared to be telling the truth, and Mr. Vergottis appeared not to be telling the truth. The minor arguments tell at least as much in favour of the defendant as of the plaintiffs. In a highly emotional case where there is bitter enmity the demeanour of the witnesses is not a very sure guide on which to contradict contemporary documents written three years previously before the enmity arose.

There are three possible explanations which in any event would seem to me preferable to ascribing a dishonest origin to the letter of Dec. 21. The first is that up to December there was a muddle and though each party thought they had made clear their intentions, the parties were not *ad idem*. This could easily happen in an informal arrangement between rich friends. This would make sense of the documents. In the light of that, one would have to take another look at the competing versions from January and February, 1965, onwards. Mr. Vergottis's account of what happened at the Coq Hardi in February would then become quite a likely story. In that case the appellants would be likely to fail. The second possible explanation is that Mr. Vergottis had a bright idea that an initial loan plus an option would suit Mme Callas better and that he wrote the letter in good faith on the assumption that she would agree when it was explained to her.

This would entail that the appellants are telling the truth and not Mr. Vergottis but would absolve him from trickery while they were still friends. This was not fully explored, however, since both the parties chose to put their cases very high. And its difficulty is that one would certainly have expected the letter to contain the suggested option. What reason is there why it should not do so? And the reference to future loans becomes rather inexplicable. A third possible explanation is that Mr. Vergottis *did* suggest at the Coq Hardi (whether seriously or not) giving shares to Mme Callas, and that after the quarrel the plaintiffs came to believe that it was the intention all along that she should have 51 per cent., while Mr. Vergottis after the quarrel resiled from the suggestion whether made seriously or not. Like the Master of the Rolls I feel a possibility that the germ of the case may be in the conversation at the Coq Hardi.

But whatever may be the truth of the case, I do not feel that the demeanour of these highly-strung forceful personalities after bitter enmity befell them can lightly dispose of documents written while they were still friends until one has first fully investigated and found an answer to the improbabilities of such documents not being honest.

I would dismiss the appeal.

Lord WILBERFORCE: My Lords, since writing my own opinion in the appeal, I have had the privilege of reading in advance that of my noble and learned friend, Lord Pearce. With that opinion I find myself so broadly in agreement that, this being a case in which the issues are essentially factual, I do not think that any benefit would be derived from presenting a further dissection of them. I concur in his opinion that this appeal ought to be dismissed.

COURT OF APPEAL

Wednesday, July 24, 1968

N.V. BUREAU WIJSMULLER v. THE "TOJO MARU" (OWNERS, CARGO AND FREIGHT)

Before Lord DENNING, M.R., and Lord Justice WINN

Practice—Procedure—Division of High Court—Assignment of matter—Whether special case stated by Lloyd's salvage arbitrator should be tried in Queen's Bench Division (Commercial Court) or Admiralty Division—Administration of Justice Act, 1956, Sect. 1—R.S.C., Order 72, r. 1; Order 75, rr. 1 and 2.

Special case was stated by Lloyd's salvage arbitrator in arbitration of claim by plaintiff salvors against defendant owners of motor tanker *Tojo Maru* for salvage services rendered. Defendants had counterclaimed for additional damage allegedly caused by negligence of salvors. Arbitrator held that owners could set off additional repairs against their liability for salvage remuneration; *further* that salvors could limit their liability by reference to tonnage of tug. Donaldson, J., ordered case stated to be transferred to Commercial List. Plaintiffs appealed, contending that case should be heard in Admiralty Division.

———*Held*, by C.A. (Lord DENNING, M.R., and Lord Justice WINN), that, although issues were largely issues of law and did not involve any particular knowledge of ships or skill of seafaring men, natural place for their determination was the Admiralty Division. Appeal allowed.

This was an appeal by the plaintiffs, N.V. Bureau Wijsmuller, professional salvors based in Holland, from so much of an order made by Mr. Justice Donaldson dated July 1, 1968, which directed that a special case stated by an arbitrator should be transferred to the Commercial Court and refused the plaintiffs' claim that the case be transferred to the Admiralty Court. The special case was stated by Mr. J. V. Naisby, Q.C., appointed by the Committee of Lloyd's, in an arbitration between the salvors and the respondents, owners of the motor tanker *Tojo Maru*, a Japanese vessel, which was damaged in a collision off Kuwait in February, 1965, reported in [1968] 1 Lloyd's Rep. 365.