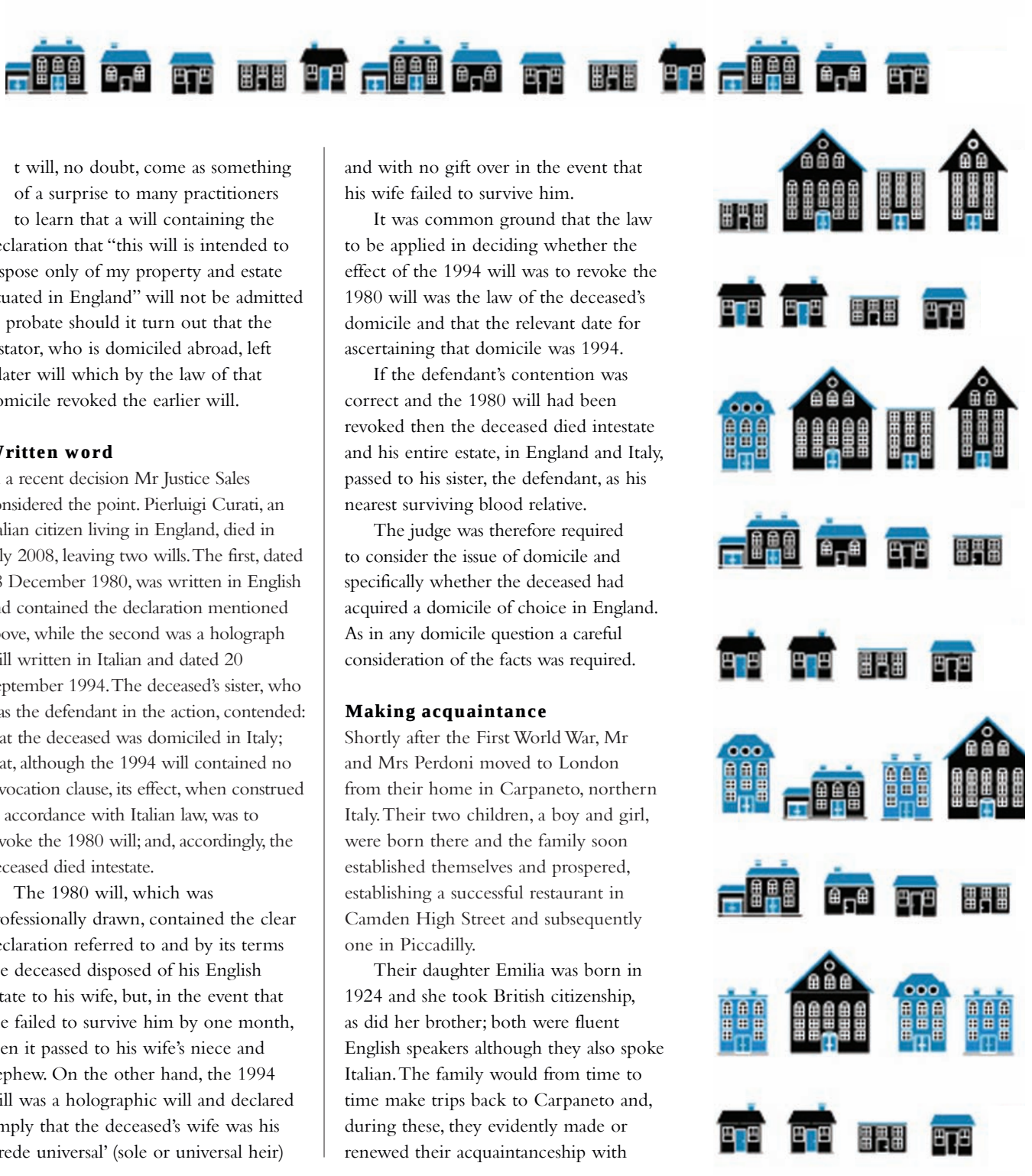
Tale of two cities

Perdoni v Curati reinforces to practitioners the importance of establishing domicile, advises *Nigel Thomas*



It will, no doubt, come as something of a surprise to many practitioners to learn that a will containing the declaration that "this will is intended to dispose only of my property and estate situated in England" will not be admitted to probate should it turn out that the testator, who is domiciled abroad, left a later will which by the law of that domicile revoked the earlier will.

Written word

In a recent decision Mr Justice Sales considered the point. Pierluigi Curati, an Italian citizen living in England, died in July 2008, leaving two wills. The first, dated 18 December 1980, was written in English and contained the declaration mentioned above, while the second was a holograph will written in Italian and dated 20 September 1994. The deceased's sister, who was the defendant in the action, contended: that the deceased was domiciled in Italy; that, although the 1994 will contained no revocation clause, its effect, when construed in accordance with Italian law, was to revoke the 1980 will; and, accordingly, the deceased died intestate.

The 1980 will, which was professionally drawn, contained the clear declaration referred to and by its terms the deceased disposed of his English estate to his wife, but, in the event that she failed to survive him by one month, then it passed to his wife's niece and nephew. On the other hand, the 1994 will was a holographic will and declared simply that the deceased's wife was his 'erede universal' (sole or universal heir) and with no gift over in the event that his wife failed to survive him.

It was common ground that the law to be applied in deciding whether the effect of the 1994 will was to revoke the 1980 will was the law of the deceased's domicile and that the relevant date for ascertaining that domicile was 1994.

If the defendant's contention was correct and the 1980 will had been revoked then the deceased died intestate and his entire estate, in England and Italy, passed to his sister, the defendant, as his nearest surviving blood relative.

The judge was therefore required to consider the issue of domicile and specifically whether the deceased had acquired a domicile of choice in England. As in any domicile question a careful consideration of the facts was required.

Making acquaintance

Shortly after the First World War, Mr and Mrs Perdoni moved to London from their home in Carpaneto, northern Italy. Their two children, a boy and girl, were born there and the family soon established themselves and prospered, establishing a successful restaurant in Camden High Street and subsequently one in Piccadilly.

Their daughter Emilia was born in 1924 and she took British citizenship, as did her brother; both were fluent English speakers although they also spoke Italian. The family would from time to time make trips back to Carpaneto and, during these, they evidently made or renewed their acquaintanceship with

the Curati family who ran a hotel and restaurant in the town.

There were three Curati children, namely the deceased, Carmen (the defendant), and Paolo, who was killed in 1944 fighting the partisans. The deceased was born in 1927 and remained throughout his life an Italian citizen who spoke only halting English and preferred to converse in an Italian dialect peculiar to the area around Carpaneto.

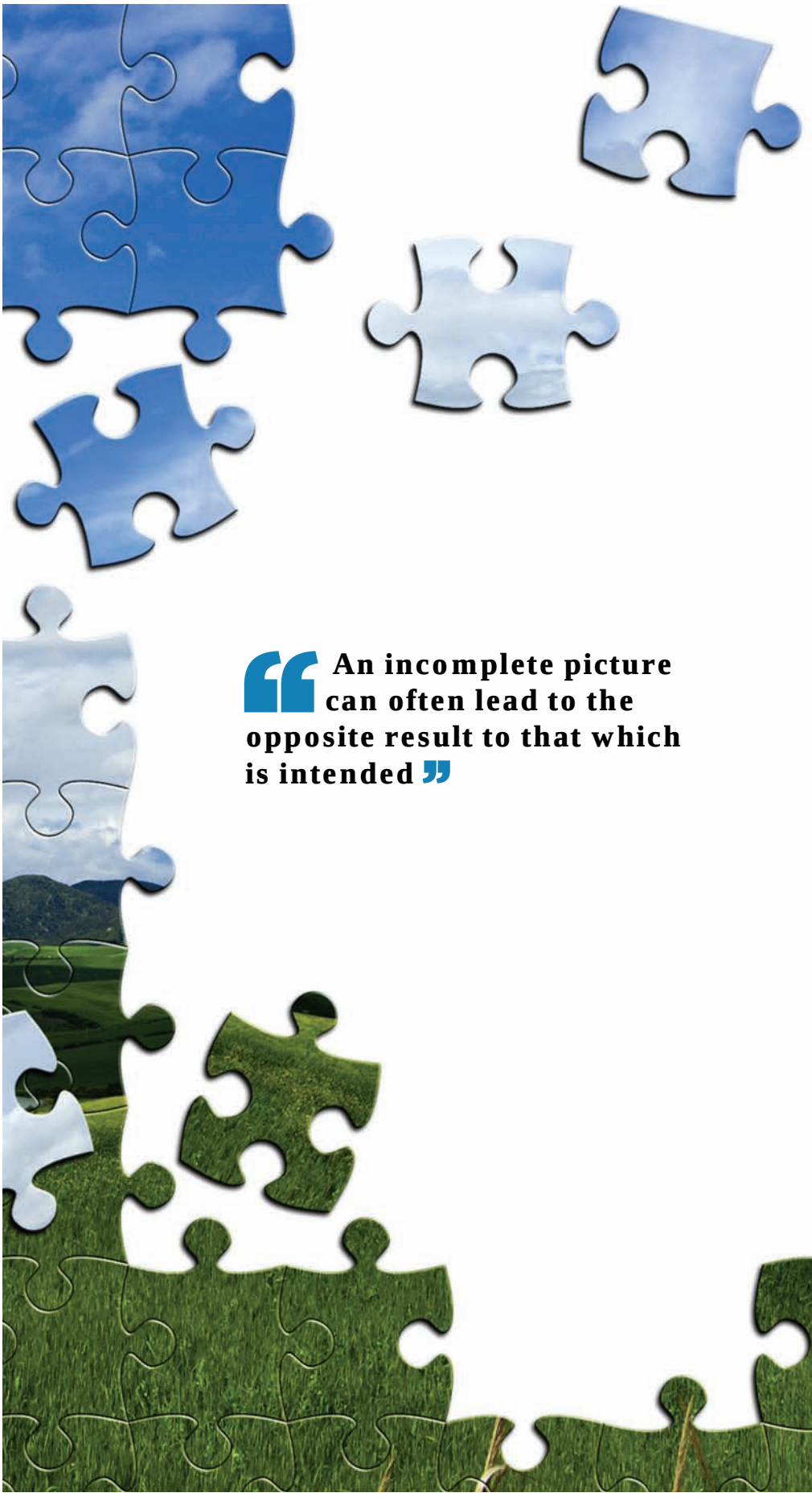
In 1954 the deceased moved to London and in 1955 he and Emilia were married there. The deceased and Emilia worked at the family restaurant in Camden High Street, which was given to them by Emilia's parents, where they continued to work until the 1970s when it was sold. They then invested in property. During this time it appeared that they made frequent visits to Carpaneto. Emilia's parents had retired there and she eventually inherited their property (or some of it) in the town. They also acquired other property within the area.

Emilia had made a mirror will in 1980 in which she, like her husband, expressed the wish to be buried in Carpaneto where there was a family vault. Likewise, she had made a 1994 will in Italian appointing him 'erede universale'.

In 1992 Emilia fell ill with cancer from which she was never totally free thereafter and declared her intention of remaining in England for the rest of her life (or until completely cured) as she wished to be cared for by the NHS. The unchallenged evidence from the claimants was that the deceased and Emilia were a devoted couple who were inseparable and that consequently the deceased intended to remain in England with his wife indefinitely, although the judge accepted that he did develop a house in Carpaneto in 2002/03 where he and Emilia might live in retirement should she be cured, or where he could go to live if she died.

From 2000 onwards the deceased's health deteriorated, particularly his mental health, and by 2006 he was living in a care home. Around that time he became incapable of looking after his affairs and eventually a deputy was appointed.

Emilia made another will in 2007 dealing with her English estate whereby



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she revoked the 1980 will. She told her solicitor at the time that she had an "Italian will". She died in July 2007.

Main intention

The judge found that the deceased had acquired by no later than 1994 a domicile of choice in England. In doing so he listed eight matters that indicated to him that the deceased had formed the requisite intention to reside indefinitely in England. He considered the deceased's home circumstances, business activities, expressed views (that he considered himself to be British and that England was his home), and his marriage, with particular reference to Emilia's refusal to contemplate any return to Italy to live permanently after being diagnosed with cancer.

The judge based his reasoning upon a consideration of all the relevant authorities including several recent Court of Appeal decisions including *Agulian & another v Cyganik* [2006] EWCA Civ 129; *Gaines-Cooper v Revenue and Customs Commissioners* [2008] EWCA Civ 1502; and *Barlow Clowes International Ltd and others v Henwood* [2008] EWCA Civ 577. The relevant chapter of *Dicey, Morris & Collins* was also before the court.

For the purposes of his judgment, however, he relied primarily upon the

first instance case of *In the Estate of Fuld decd [No3]* [1968] P675, quoting an extract from Scarman J's (as he then was) judgment (pages 684F-686D) which was expressly approved in *Agulian*. He particularly noted Scarman J's observation that: "The intention with which the law is concerned is an intention as to residence, and nothing else." Having found that the deceased was domiciled in England, then English law applied in deciding whether the 1994 will revoked the 1980 will.

As the 1994 will contained no express revocation clause, the question therefore was whether the 1980 will had been revoked by implication; that is whether it was the deceased's intention by the 1994 will to revoke the 1980 will which was to be deduced from its terms. The judge noted the presumption against implied revocation (*Halsbury's Laws* vol 102). He found that the 1994 will did not wholly revoke the 1980 will and there was no material or logical inconsistency between them, as all the 1994 will did was to make Emilia the deceased's universal or sole heir with no gift over, whereas the 1980 will provided for a gift over to the claimants in the event Emilia did not survive the deceased. The effect of the 1994 will was to render redundant the 1980 will in the event that Emilia survived the deceased: there was thus no inconsistency or incompatibility (*Lemage v Goodhan* (1865-69) LR P&D 57).

Dangerous ground

So, what is the practical impact of the decision? Primarily it is a warning to practitioners: first, of the dangers of an unintended revocation of a previous will. It was clear from the evidence given by Emilia's solicitor who took instructions for and drafted a new 'English' will for her in 2007 that she and the deceased had not intended to revoke the 1980 will when they made their 1994 wills. That evidence was not admissible, although of course it was relevant in explaining what they thought they were doing in 1994.

Sales J found that, had he determined that the deceased retained his Italian domicile of origin, then the effect of the relevant Italian law would have been to revoke the 1980 will in its entirety. Had Emilia's solicitor been shown the 1994 will she would have realised that there was a potential problem. By 2007, however, the deceased lacked testamentary capacity.

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Second, it proves yet again the need for an adviser to have all relevant testamentary documents before him or her. An incomplete picture can often lead to the opposite result to that which is intended. Of course, in this case the 1994 will was a holograph, apparently made without professional advice, and the danger was therefore all the greater that they unintentionally might have revoked the 1980 will.

Specific to the issue of non-English and Welsh testators is the question of domicile. The inclusion of appropriate declarations is advisable, e.g. that the will disposes of the testator's English estate and must be construed in accordance with English law. Careful enquiry as to the existence of any other wills and a warning of the danger of making a foreign will which might unintentionally revoke an earlier English will is good practice.

In the case of doubt, however, it is unlikely that a practitioner can with complete confidence advise on where the testator is domiciled, although there is no reason why helpful guidance cannot be given to a testator in seeking to establish his/her domicile.

The simple lesson to be derived from the decision is that where any factor points to the possibility of a domicile abroad then extra care is required in drafting an English will, and where possible all, including foreign, testamentary documents should be to hand. ■

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