In The Supreme Court of Bermuda

CIVIL JURISDICTION

2020: No. 198

In the matter of the Estate of Howard Caisey (Deceased)

BETWEEN:

DOLETA BEAN

Plaintiff

- and -

ANTHONY CAISEY
(As Executor of the Deceased's Estate)

1st Defendant

and

KEITH WAYNE CAISEY
(As Sole Beneficiary of the Deceased's Estate)

2nd Defendant

JUDGMENT

Wills, testamentary capacity, dementia, undue influence, sound disposing mind, coercion, fraudulent calumny

Date of Hearing: **18, 19 October, 17, 21, 22 November 2022**
Date of Judgment: **22 February 2023**

Appearances: **Jaymo Durham, Keiva Maronie-Durham, Amicus Law Chambers, for Plaintiff**

Paul Harshaw, Canterbury Law Limited, for Second Defendant

JUDGMENT of Mussenden J

Introduction

1. The Plaintiff ("**Doleta**") is the daughter of the now deceased Barbara Clair Caisey, also known as Julie Caisey ("**Julie**") and Howard Frederick Caisey ("**Father**") (together the "**Deceased Parents**").

2. The First Defendant ("**Anthony**") is the eldest son of the Father. By two Wills executed on 21 December 2010 and 9 August 2012, described below, the Father appointed Anthony as the Executor and Trustee of his estate. Anthony has not participated in these proceedings. On 21 April 2022 attorney Mr. Valdon Caesar was granted leave to appear as *amicus curiae* when he informed the Court that Anthony was unable to participate in the proceedings due to medical circumstances.

3. The Second Defendant ("**Keith**") is the second eldest son of the Father.

4. The property situated at #3 Riviera Road, Warwick (the "**Property**") is the subject matter of this case.

The Children

5. The Father had children with three mothers as follows:
    a. Joulanda Brown-Robinson ("**Joulanda**") with her mother;
    b. Anthony and Keith (together the "**Defendants**"), Andre, Craig and Karen with their mother; and

c. Doleta, Maria Caisey (deceased in as she died in 2018) ("**Maria**"), Damina Caisey ("**Damina**") and Julian Caisey ("**Julian**") (together "**Julie's Children**") with their mother Julie Caisey.

The Wills and the Vesting Deed

6. Julie executed a Will on 23 February 1992 ("**Julie's 1992 Will**"). In essence, the beneficiaries of Julie's 1992 Will were husband, and if he did not survive her, then her children. Julie died on 24 February 2003 leaving the Father surviving and entitled to the Property.

7. The Father executed several Wills as set out below. He died on 5 August 2018.

8. The "**1992 Will**" - a Will executed on 23 February 1992 (with the backsheet stating 1993). Similar to Julie's 1992 Will executed on the same date, in essence the beneficiaries of the 1992 Will were his wife, and if she did not survive him, then Julie's Children.

9. The "**2006 Will**" – a Will executed on 10 November 2006. The Father revoked all prior Wills and Testamentary dispositions and declared the 2006 Will as his Last Will and Testament. The beneficiaries of the 2006 Will were Julie's Children and Keith.

10. The "**2010 Will**" – a Will executed on 21 December 2010. The Father revoked all prior Wills and Testamentary dispositions and declared the 2010 Will as his Last Will and Testament. The sole beneficiary of the 2010 Will was Keith.

11. The "**2012 Will**" – a Will executed on 9 August 2012 which was similar in all respects to the 2010 Will. The Father revoked all prior Wills and Testamentary dispositions and declared the 2012 Will as his Last Will and Testament. The sole beneficiary of the 2012 Will was Keith.

12. By a Vesting Deed dated 19 November 2019 (the "**Vesting Deed**") the Property was vested in the name of Keith.

Background and Pleadings

The Writ and Statement of Claim

13. By a Specially Indorsed Writ of Summons issued on 24 June 2020 and subsequently amended, the Plaintiff commenced the present action for: (a) a declaration that the 2012 Will is void in that the Father lacked the requisite testamentary capacity at the time of drafting the 2012 Will; and (b) a declaration that the 2012 Will is void as having being procured by the undue influence of the Anthony and Keith.

14. At the start of the trial I granted leave to amend for: (a) a declaration that the 2010 Will is also void in that the Father lacked the requisite testamentary capacity at the time of drafting the 2010 Will; and (b) a declaration that the 2010 Will is void as having being procured by the undue influence of the Anthony and Keith.

15. The Particulars of Claim (for lack of testamentary capacity) set out that the Father had a lack of testamentary capacity as he was suffering from dementia. Additionally, the father was under a delusion in relation to potential beneficiaries, including Doleta, at the material time in making the 2010 Will and the 2012 Will in that his mind was poisoned against them by Anthony's and Keith's dishonest aspersions on their character. Consequently, he was unduly influenced to wrongly believe that they had intentions of taking the Property that he owned from him.

16. The Particulars of Claim (for Undue influence) set out that Anthony and Keith exercised a relationship of trust and confidence with the Father in that they are his sons and assisted the Father with his financial affairs and in particular, on 10 November 2006 (the "**2006 POA**") the Father appointed Anthony as his power of attorney ("**POA**"). Thus, there was an ascendancy between Anthony and Keith and the Father as the father was an elderly man, mentally and physically frail and vulnerable to the Defendants, in his mid-80s at the time of the purported execution of the 2012 Will. Further, Keith, being of a dominant character, exhibited influence over the Father, as it related to decisions affecting Doleta and her

siblings' occupation of the Property. Also, Anthony and Keith exerted undue influence over the Father by either coercion or by fraud to the extent that his will was overborne and he did not act as a free agent in making his last testamentary disposition. Further, or in the alternative, the Defendants poisoned the Father's mind against Doleta and Julie's Children in that they cast dishonest aspersions on their character (that they had defamed the Father to the neighbors, lied about him to the police, that they had intentions of taking the Property from him) having known those aspersions were not true or having not cared as to the truthfulness of the aspersions, and thereby committed fraudulent calumny in regard to the Father.

Relief Sought

17. Thus Doleta sought declarations that:
    a. The 2010 Will and 2012 Wills were void as the Father lacked testamentary capacity and the Defendants had exerted undue influence over the Father in making those Wills;
    b. The 2006 Will is affirmed; and
    c. The Vesting Deed be set aside.

The Defence and Counterclaim

18. After a request for Further and Better Particulars were answered, a Defence and Counterclaim dated 2 December 2020, subsequently amended, was filed by Keith. He generally denied the claims and in respect of the time period and execution of the 2012 Will: (a) denied being aware of any cognitive deficit on the part of the Father; (b) denied that the Father had a cognitive deficit; (c) denied being aware of any undue influence being exerted on the Father; and (d) denied exerting any undue influence on the Father. Further: (a) he did not admit that a relationship of a father and son creates an ascendancy or dependency; (b) denied that the making of a will six years after making a previous one calls for an explanation; or (c) that preferring one child over other children in a will calls for an explanation.

19. The Counterclaim set out that by an Originating Summons in the Supreme Court (2020: No. 44) (the "**2020 Possession Action**"), Keith sought to have Doleta removed from the Property. It was only in relation to the 2020 Possession Action that this action was commenced some six months later. Therefore, the present action was an abuse and was brought for a collateral purpose such that this action should be dismissed and Doleta should be condemned in indemnity costs. Thus, Keith counterclaimed in this action for: (a) possession of such portions of the Property Doleta occupied at the date of the trial; (b) damages against Doleta for trespass in the amount of $1,000 per month from 1 December 2019 and continuing until trial; and (c) costs on an indemnity basis.

The Defence to the Counterclaim

20. Doleta denied the claims in the Counterclaim. She stated that she sought in the Supreme Court proceedings 2012 No. 313 (the "**2012 Equitable Interest Action**"), an equitable interest in the Property against the Father. In the current proceedings she seeks an interest by way of testamentary disposition, but for the undue influence exerted by the Defendants. She averred that she is entitled to a beneficial interest in the Property and denies the relief claimed by Keith.

Ruling to exclude the purported medical expert evidence

21. During the trial, I ruled that the purported 'expert evidence' of Dr. Harries in respect of whether the Father was suffering from dementia at the material time of executing the 2012 Will – and possibly the 2010 Will - was to be excluded.

22. Black's Medical Dictionary describes dementia as "*An acquired and irreversible deterioration in intellectual function. ... The disorder is due to progressive brain disease. It appears gradually as a disturbance in problem solving and agility of thought which may be considered to be due to tiredness, boredom or depression.*"

23. The Particulars of Claim in respect of the purported lack of testamentary capacity is set out above. Dr. Harries' report dated 11 December 2014 (the "**2014 Medical Report**")

concluded as follows: "*From what I gathered in today's assessment Mr. Caisey would not have the mental capacity to make complex legal and or financial decisions especially in the context of a convoluted dispute.*" When queried as to whether that statement meant that the Father lacked mental capacity in August 2012, when he executed the 2012 Will and whether he intended to convey that impression, Dr. Harries stated "*I can neither agree nor disagree with the assertion that Mr. Caisey lacked testamentary capacity in August 2012, my assessment related only to his condition as I found it to be on 11 December 2014. ... I do not believe that my letter of 11 December 2014 conveyed any impression of his mental incapacity in August 2012, nor was it intended to do so.*" Dr. Harries produced another medical report dated 28 July 2022 (the "**2022 Medical Report**") which contained questions put to him, based on what the Father's actions may have been if he was diagnosed with dementia around 2010. Dr. Harries stated that he was not aware that the Father had a diagnosis in 2010.

Analysis

24. I refused to allow the evidence of Dr. Harries in respect of dementia to be admitted into evidence for several reasons. First, Dr. Harries' correspondence states that he first met and assessed the Father on 11 December 2014 when he then produced the 2014 Medical Report. Thus, he had not assessed the Father beforehand and in particular at the time of the execution of the 2010 Will or 2012 Will. I accept Dr. Harries' clarification that he could not speak to any lack of testamentary capacity of the Father in 2012. In my view, Dr. Harries reports are not relevant to the time period in question and are of no assistance to the Court in determining testamentary capacity in 2010 or 2012.

25. Second, the questions posed and answered in the 2022 Medical Report are pure speculation. They are based on the Father having a diagnosis of dementia in 2010. However, there is no evidence of such a diagnosis in 2010 and Dr. Harries clarified that point in the 2022 Medical Report. In my view, the speculative nature of the questions and answers lead me to not allow the evidence of Dr. Harries in respect of whether the Father had a lack of testamentary capacity in 2010.

26. Third, Mr. Durham sought to rely on the expertise of Dr. Harries in geriatric medicine to thus give his opinion on the lack of testamentary capacity. Although Dr. Harries appeared reluctant to consider himself an expert he did state in his correspondence and in his *curriculum vitae* that he considered himself to be an expert in geriatric medicine of which assessing dementia is one of the regular tasks. Indeed, in the 2014 Medical Report he stated that the Father had scored 7/30 on the Montreal Cognitive Assessment (MOCA) indicating severe cognitive impairment. In that report he also stated that based on the assessment of 11 December 2014 that the Father did not have the mental capacity to make complex legal and of financial decisions especially in the context of a convoluted dispute. I note here that Mr. Harshaw complained in correspondence that Dr Harries' 2022 Medical Report failed to meet the requirements of an expert report on 13 points.

27. Mr. Durham relied on the case of *Roby Rihanna Fenty, Roraj Trade LLC, Combermere Entertainment Properties LLC v Arcadia Group Brands Ltd. (t/a Topshop) & Topshop/Topman Ltd* [2013] EWHC 1945 (ch) about what is or is not expert evidence. The case stated "*17 There are three things to note from the passage to which I have just referred. First, it is impossible to formulate an overall test. Second, in addition to opinion evidence, factual evidence given by an expert can also be expert evidence. Third, I note the reference to the reliance on the expertise of the person giving the evidence.*"

28. Mr. Harshaw relied on *Phipson on Evidence*, Twentieth Edition which stated "*33-09 Insofar as the experts opinion is founded on the facts of the particular case, it is essential that the facts be established by direct testimony, though the necessity for actually adducing evidence by witnesses can and frequently be avoided by appropriate admissions, for example at the plea and direction hearing.*"

29. On the basis that Dr. Harries could remedy the defects in the 2022 Medical Report to satisfy the requirements for expert evidence, the uphill challenge that remains is that there is no factual evidence of any diagnosis that the Father suffered from dementia in or around 2010 or 2012. Thus, any purported expert opinion by Dr. Harries fails to get off the ground as it

remains purely speculative about the factual evidence in 2010 and 2012 and thus irrelevant and inadmissible.

The Trial - Evidence

30. The trial took place with evidence given by witnesses for the Plaintiff and Defendant.

31. For the Plaintiff's case, Doleta gave evidence along with four other witnesses - Damina, Julian, Dianne Simons, and attorney Philip Perinchief.

32. For the Second Defendant's case, Keith gave evidence along with Joulanda.

Evidence not in dispute

33. There was evidence that generally was not in dispute. The Property was acquired around 1965 by the Father and Julie during the course of their marriage. Julie was added to the title deeds later on. In respect of the children living there, Keith, Anthony and Doleta lived there first, followed by the remainder of Julie's Children as they were born. The Father enjoyed doing the work around the Property which was always his pride and joy. There were some issues about whether Keith and Julian did work around the Property with their Father.

34. At the time when the Property was purchased, there was only the main house but over time various additions took place. Keith stated that in 1971 a detached garage was converted into a studio funded mainly by him, and in 1972 an upper and lower unit were added, funded by bank loans. Keith stated that he, Anthony and their Father did most of the work on those additions with some labour assistance from family and friends. There was some challenge to Keith's funding of the studio work but it was not material to the issues in the case. Thus, the Property eventually comprised the following:
    a. The Main House – Julie's Children grew up there but eventually the Father and Julian lived there.

b. The Studio – Keith lived in the studio from 1971 to 1974 when he left Bermuda age 23. Thereafter, Anthony lived in the Studio for a period of time.
c. The Upper Unit – This unit was rented at first until Doleta moved into it, moving out when she married her first husband. Then it was rented again. Eventually Doleta moved back into the Upper Unit with her second husband Lionel. There were some issues about what work Doleta had done and paid for in the Upper Unit and rents that she was obliged to pay.
d. The Lower Unit – This unit was rented once it was completed. At some point Maria moved in paying rent as a tenant but she also paid for some minor items. Plumbing work and other interior maintenance was paid for by their Father.

35. In 1974 Keith left Bermuda to reside in Australia. The Father, Julie and Julie's Children lived at the Property growing up as a family. Julie's Children state that there were no issues with their Father during this period. As the Father got older Doleta and her sisters would care for him, including cooking and financial matters. Her sister Maria was Power of Attorney until it was revoked and Anthony became POA.

36. Mrs. Dianne Simons was a long time adjoining neighbor of about 54 years. She was a close friend to the Father and Julie and the Father did work on her house on numerous occasions. She recalled the Father saying to her that he wanted Doleta to move back into the Property as it would be hers one day. She spent a lot of time with the Father, listening to music, passing time and talking about their lives and properties.

37. Keith returned to Bermuda in 2001/2002 and moved into the Studio. He stated his intention was to stay in Bermuda for a few years to make some money and then leave again. However, various circumstances caused him to stay. At the time of his return, the Father, Julian and Doleta were living at the Property. Doleta's former husband was living there also. At some point, Maria's then boyfriend Wayne "**Toast**" Tucker lived with her at the Property.

38. It is clear that after Julie died in 2003 the relationship between Keith and Julie's Children became rocky. There were numerous disputes between them, often with their elderly Father, caught in the middle. Extensive documentation and correspondence about the Property and events at the Property flowed, some involving lawyers, and some of the disputes caused criminal and civil proceedings to be commenced. I will set out the main events, documentation and or proceedings as follows:

    a. 2006 POA – (already defined) - On 10 November 2006 the Father transferred his Power of Attorney from Maria making Anthony his POA.
    b. **2010 Juris Letter** – A letter dated 7 December 2010 from Juris Law Chambers on behalf of Maria and Toast in response to a letter from the Father dated 27 October 2010 to ban Toast from the Property. The Juris letter mentioned that Julian and Doleta had not complained of Toast's behaviour. Keith accepted that the Juris Letter was dated ten days before the 2010 Letter to Julie's Children. He denied that the 2010 Letter to Julie's Children (defined below) was an angry response to the Juris Letter.
    c. **Undated Letter to Julie's Children** – a typed letter purportedly from the Father complaining about their conduct and stating that Keith had purchased his custom motorcycles out of his Keith's own funds.
    d. **Undated Glowing Letter** – a typed letter purportedly from the Father to his sons Keith, Andre and Craig which were complimentary about them. Keith accepted that the letter spoke glowingly of them.
    e. **2010 Letter to Julie's Children** – A typed letter dated 17 December 2010 purportedly written by the Father addressed to Julie's Children making a number of allegations against them (disrespect, contempt, calling him a liar in front of the police, defaming his character, siding with people against him and 'pushing the knife in and twisting it'). The letter informed them that all that they feel they are to inherit they have had, it was time for them to leave the nest and get their own, and that he will not leave them anything in regards to his estate. The letter was signed with two witnesses before a notary public. That letter stated that the Father was not leaving anything in regards to his estate to Julie's Children and instructed his lawyer

to carry out his wish. He also stated that as he expected his wishes to be contested that that he had left a video recording that will repeat his last wishes. I note here that no video recording of the Father's last wishes has been put into evidence. Julie's children stated that this letter was not the true feelings of their Father but rather it was drafted by Keith and represented his feelings. They pointed out various inaccuracies in the letter that their Father would not have made.

f. The 2010 Will was executed on 21 December 2010.

g. **2011 Notes to Julie's Children** – The Father purportedly wrote a note to each of Julie's Children, which I refer to collectively as the "2011 Notes to Julie's Children". They were typed and similar in content but with some specific issues in respect of each of child.

h. **2011 Assault Proceedings** – On 1 April 2011 there was an altercation between Julian and his Father which Keith then joined. The Father made a criminal complaint against Julian which went to trial in the Magistrates' Court where he was eventually acquitted. The alleged assault was started in the Main House during an argument between Julian and his Father over a parking area which was overheard by Keith who intervened and was then allegedly assaulted by Julian. Keith did not see the alleged assault on the Father. Keith encouraged his Father to have Julian prosecuted for assaulting him but Keith never pursued a prosecution in relation to the assault on himself.

i. **Keith's Police Witness Statement** dated 4 April 2011 - in connection with the altercation with Julian. Keith was extensively cross-examined on the contents of his statement.

j. **Father's Police Witness Statement** dated 4 April 2011 - in connection with the altercation with Julian.

k. The "**2011 Eviction Proceedings**" which includes letters before action and Magistrates' Court proceedings, that is, termination summonses taken out by the Father against Julie's Children. Julie's Children state that after Keith created a number of issues with them, about car parking with Doleta's former husband and created issues of threats and harassment with Maria's husband, Keith manipulated their Father into writing letters to evict Julie's Children from the Property.

l. 2012 Equitable Interest Action – (already defined). Julie's Children commenced this action in the Supreme Court to seek an equitable interest in the Property against the Father.

m. **2012 DVPO** - the Domestic Violence Protection Order dated 29 June 2012 taken out by the Father against Julian. Julian denied some of the contents of the application document dated 17 February 2012 for the 2012 DVPO stating a lot of the evidence was lies, in particular that his Father had fled the Property on 1 April 2011. He maintained that his Father did not speak like what was set out in the application document.

n. **Father's 2012 Affidavit** - The Father swore an affidavit dated 23 July 2012 to be used in the 2012 Equitable Interest Action.

o. The 2012 Will was executed on 9 August 2012. Attorney Philip Perinchief, a senior experienced lawyer) stated that he attended Antony's House in 2012 when he spoke with the Father alone for about an hour and took his instructions for drafting a Will. He recalled that the Father appeared jovial and of sound mind and stated that he wished for all his children to get along, that he did not like that they were bickering and he desired for them to live peaceably amongst each other. He told Anthony that it would be a good practice to get two medical doctors to examine the Father under the Mental Health Act. He paused during the meetings at Anthony's house and at the office as he did not want to tire or overwhelm the Father. Later Anthony brought the Father to meet him at the law offices of Peniston and Associates to meet him to execute the 2012 Will. He asked Mr. Peniston to talk with the Father to assess whether he was competent to sign the Will and Mr. Peniston did so alone for about 15 to 20 minutes, albeit he did not know what they spoke about. Mr. Peniston told him the Father was OK. Mr. Perinchief stated that he went over the 2012 Will line by line with the Father and questioned him to ensure he understood what he was signing. Thereafter, the Father signed the 2012 Will before two witnesses.

a. **2017 EIA Order** - The order stated that Doleta was heard in person, the parties had agreed to the terms of the order and the Plaintiffs' claims were dismissed with no order as to costs. Despite those terms of the order, Doleta did not accept that the

action was dismissed as it never stopped. She denied that the 2012 Equitable Interest Action was brought to an end by the Order dated 13 July 2017.

p. **KEMH DNR Form** (inferred to be around 14 June 2018) – A form at King Edward VII Memorial Hospital that indicated that artificial medical assistance should not be used to prolong the Father's life. Doleta and Julian claimed the KEMH DNR Form had their signatures on it but they had never signed it. It was never produced in evidence. Doleta and Keith explained that they never had access to her Father's medical records and that Anthony as POA had access to them. Keith denied that he signed Doleta's and Julian's signatures on the KEMH DNR Form.

q. On 5 August 2018 the Father died.

r. 2020 Possession Action - (already defined) Keith commenced these proceedings in the Supreme Court to have Doleta removed from the Property.

s. Doleta commenced the present action.

39. There were various main areas of evidence that were in dispute as set out below.

a. Testamentary Capacity of the Father - Julie's Children claimed that their Father was suffering from dementia, confusion and loss of acuity when he executed the 2010 Will and 2012 Will. Keith's and Joulanda's evidence was that he was not suffering from dementia, delusions or cognitive defects in 2010 or 2012.

b. The children's relationships with their Father – Julie's Children claimed that they had a loving relationship with their Father, spent time with him, cared for him as he got older, that Julian did work around the Property with their Father, and that Keith did no work around the Property after he had returned from Australia. Further, their Father wanted them to be around and at the Property as they were growing up. Keith denied that Julian had done work around the Property but that he himself did the work with his Father. His evidence was that he was close to his Father, even while he was in Australia, but that Julie's Children never showed any gratitude to the Father although he was generous to them.

c. The Father's wishes for Julie's Children to inherit the Property - Julie's Children's evidence in essence was that their parents had planned to leave the Property to them as based on their 1992 Wills and the Father's 2006 Will. Further, the Father had

expressed to them that the Property would be theirs. Keith's evidence was that he never expected anything from his Father in respect of the Property and did not know he was a beneficiary of his Father's Wills. His evidence was that his Father treated Julie's Children as tenants and he had never heard his Father promise an interest in the Property to any of his siblings or to anyone at all. He was cross-examined extensively about a 2006 meeting at Conyer's with his Father about what his knowledge was in respect of his Father's 1992 Will at the time with references to his police witness statement. He stated that at that meeting he did hear his Father give instructions that he wanted his son Keith added as a beneficiary although he denied that he influenced his Father to do so.

d. Whether the words and feelings of the documents purportedly written by the Father were his words and feelings or Keith's words and feelings – Julie's Children evidence generally was that their Father was not the author of the various documents depicting them in a negative light, that the words were not their Father's feelings towards him, that their Father never used a computer, that their father would not have made some inaccuracies as order of names, use of names and Julian's place of employment. Their evidence was the content of those documents were Keith's words and feelings. Keith's evidence included that he denied writing the words or that they were his feelings noting he only wrote one document which their Father had dictated to him.

e. Allegations that Julie's children were trying to take the Property from the Father – Julies' Children's evidence generally was that they had never tried to take the Property from their Father, although the 2012 Equitable Interest Action was to seek an interest in it. Thus, any comment from Keith, especially to their Father that they were trying to take his Property from him was designed to poison their Father's mind against Julie's Children. Keith's evidence was that their Father had formed his own view on that point as he was being taken to Court by Julie's Children.

f. Keith's undue influence over his Father – Julie's Children evidence generally was that Keith had over time poisoned the mind of their Father against them by his conduct, creating issues and his constant reporting of the same to their Father, including that they were trying to take his Property from him, thus causing the

Father to exclude them as beneficiaries of his Will. Keith's evidence was that he denied the accusations that he had unduly influenced his Father to remove Julie's Children from his 2010 Will and 2012 Will.

The Absence of Anthony

40. Mr. Durham submitted that the Court should draw negative inferences from the absence of Anthony as there were no justifiable reasons for his absence. He argued that if the absence was for medical reasons then the Court would have expected to have been provided with medical documentation. He was being accused of undue influence in his personal capacity and not as trustee and therefore should have defended the allegations against him unless there was a mental incapacity. Thus, the conclusion should be that he had no meritorious defence to the allegation.

41. Mr. Harshaw submitted that the case against Anthony is as trustee of his Father's estate. He argued that where a Will dispute is primarily between the estate's adult beneficiaries, the appropriate position for the executor to take is one of neutrality.

42. First, in my view, the claim against Anthony is clearly in his role as executor, not in his personal capacity. Thus, I accept Mr. Harshaw's argument that Anthony, as executor, should have a neutral position in this case. In *Alsop Wilkinson v Neary* [1996] 1 WLR 1220 the Court stated "*In a case where the dispute is between rival claimants to a beneficial interest in the subject matter of the trust, rather the duty of the trustee is to remain neutral and ... offer to submit to the court's directions leaving it to the rivals to fight their battles.*" The same position was espoused by Michael Mello K.C. in *The Laws of Wills and Estates in Bermuda, 10th Edition*, (31 August 2020).

43. Second, on 21 April 2022, the Court was informed by *amicus curiae* that Anthony could not participate in the proceedings due to medical circumstances. I accepted that position as I do now. Mr. Durham has never made a submission to the Court at any stage before the end of the evidence requiring further proof of Anthony's medical circumstances or that he would invite the Court to draw negative inferences from Anthony's absence.

44. Third, in light of these circumstances, I decline to draw negative inferences from Anthony's absence due to his medical circumstances and I accept his role, even in his absence, as being neutral.

The Issues

45. There are two main issues in this case, namely the testamentary capacity of the Father and whether Keith exerted undue influence on his Father when he executed the 2010 Will and the 2012 Will. I will deal with those issues in turn.

Testamentary Capacity

The Law on Wills and Testamentary Capacity

46. Section 1 of the Trustee Act 1975 states as follows:

"property" includes real and personal property, and any estate, share and interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest, whether in possession or not;

"trustee" includes an estate representative.

47. The Wills Act 1988 states as follows:

"Property disposable by a Will

5(1) Property disposable by will Subject to this Act, every person may dispose, by will executed in accordance with this Act, of all real estate and all personal estate owned by him at the time of his death."

"Capacity to make a will

6 To be valid, a will shall be made by a person who—

(a) is aged eighteen years or over; and

(b) is of sound disposing mind."

48. The test for whether a testator has sufficient testamentary capacity to execute a will remains that set out in *Banks v Goodfellow* [1861-1873] ALL ER Rep. 74. Mr. Banks had at times been of unsound mind and had been confined previously in a county lunatic asylum. He had been discharged from the asylum but he remained subject to certain fixed delusions. Cockburn CJ stated as follows [at page 56]:

> *"It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties; that no insane delusion shall influence his will on disposing of his property, and bring about a disposal of it which would not have been made otherwise.*
>
> ...
>
> *It may be here not unimportant to advert to the law relating to unsoundness of mind arising from another cause, namely, from want of intelligence arising from defective organisation, or from supervening physical infirmity or the decay of advancing age, as distinguished from mental derangement, such defeat of intelligence being equally a cause of incapacity. In these cases it is admitted on all hands that, though the mental power may be reduced below the ordinary standard, yet, if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains."*

49. In *Key v Key [2010] 1 WLR 20 Ch, per Briggs J also stated:*

> *"95. Without in any way detracting from the continuing authority of Banksv Goodfellow, it must be recognised that psychiatric medicine has come a long way since 1870 in recognising an ever widening range of circumstances now regarded as sufficient at least to give rise to a risk of mental disorder, sufficient to deprive a patient of the power of rational decision making, quite distinctly from old age and infirmity. The mental shock of witnessing an injury to a loved one is an example recognised by the law, and the affective disorder which may be caused by bereavement is an example*

recognised by psychiatrists, as both Dr Hughes and Professor Jacoby acknowledged. The latter described the symptomatic effect of bereavement as capable of being almost identical to that associated with severe depression. Accordingly, although neither I nor counsel has found any reported case dealing with the effect of bereavement on testamentary capacity, the Banks v Goodfellow test must be applied so as to accommodate this, among other factors capable of impairing testamentary capacity, in a way in which, perhaps, the court would have found difficult to recognise in the 19th century.

96. Banks v Goodfellow was itself mainly a case about alleged insane delusions. Many of the cases which have followed it are about cognitive impairment brought on by old age and dementia. The test which has emerged is primarily about the mental capacity to understand or comprehend. The evidence of the experts in the present case shows, as I shall later describe, that affective disorder such as depression, including that caused by bereavement, is more likely to affect powers of decision-making than comprehension. A person in that condition may have the capacity to understand what his property is, and even who his relatives and dependants are, without having the mental energy to make any decisions of his own about whom to benefit."

50. In the Bermuda case of *Gwendolyn Creary, Duane De la Chevotiere v Marvlyn Paula De la Chevotiere* [2014] Bda LR 70, Hellman J set out the law as follows:

"5. The relevant law was considered recently by this Court in Re Taylor; Charles v Pearman & Ors [2014] Bda LR 44 at paras 11 – 17. The applicable principles are as follows.

6. Disposition of property by will is governed by the Wills Act 1988 ("the 1988 Act"). Section 5 provides that, subject to the 1988 Act, every person may dispose by will of all real estate and all personal estate owned by him at the time of his death. Section 7 sets out the formalities required for the execution of a valid will. It is common ground that these have been complied with. However section 6 provides that, to be valid, a will

shall be made by a person who "is of sound disposing mind". The issue in this case is whether, when he made his will, the Testator satisfied that requirement.

7. "Sound disposing mind" means that the testator must be able to understand the effect of his wishes being carried out at his death, the extent of the property of which he is disposing, and the nature of the claims upon him. See Jeffrey v Jeffrey [2013] EWHC 1942 Ch per Vos J at para 210.

8. As to the nature of the claims of others upon the testator, it has been said that the court must be satisfied that no insane delusion is influencing him to dispose of his property in a way that he would not have done had his mind been sound. See the leading case of Banks v Goodfellow (1870) LR 5 QB 549, per Cockburn CJ at 565.

9. Thus, where a testator suffers from delusions, the court must be satisfied that they did not or were not likely to have an influence on the disposal of his property. This is because the rationale for denying testamentary capacity to persons of unsound mind is the inability to take into account and give due effect to the considerations which ought to be present to the mind of a testator in making his will. See Banks v Goodfellow, per Cockburn CJ at 561 and 566.

10. The court must also be satisfied that the testator's mind is not too enfeebled to comprehend more than one potential object of his largesse, especially when that one object has been so forced upon his attention as to shut out all others that might require consideration. See Harwood v Baker (1840) 3 Moo PC 282, per Erskine J at 290.

11. However a testator is free to dispose of his property as he sees fit, even if the terms of the will are hurtful, ungrateful, or unfair to those whose legitimate expectations of testamentary capacity are disappointed. See Hawes v Burgess [2013] EWCA Civ 74, per Mummery LJ at para 14.

12. Provided that the testator has the requisite understanding, he need not possess the faculties of mind and memory in as great a degree as he may have formally done. See Den v Vancleve 2 Southard at 660, to which I was referred in argument, cited with approval by Cockburn CJ in Banks v Goodfellow at 567.

13. The burden is on the propounder of the will to establish capacity. See Ledger v Wootton [2007] EWHC 2599 (Ch), per HH Judge Norris (as he then was) at para 5. Thus, where the testator suffers from delusions, the burden is on the propounder to show that they could not reasonably be supposed to affect the disposition of his property. See Smee v Smee (1879) 5 PD 84 at 91, per Sir James Hannen at 91.

14. However, where the will is duly executed and appears rational on its face, capacity will be presumed. An evidential burden then lies on the objector to raise a real doubt about capacity. Once a real doubt has been raised, the burden shifts back to the propounder to establish capacity. See Ledger v Wootton ibid.

15. It has been said that where a properly executed will has been professionally prepared on instructions and then explained by an independent and experienced solicitor, it will be markedly more difficult to challenge its validity on the ground of lack of mental capacity than in a case where those prudent procedures have not been followed. See Hawes v Burgess, per Mummery LJ at para 13.[1]

16. On the other hand, I was referred to a passage from Key v Key [2010] 1 WLR 20 Ch, per Briggs J at paras 7 and 8 dealing with what is known as the Golden Rule:

> *7 The substance of the golden rule is that when a solicitor is instructed to prepare a will for an aged testator, or for one who has been seriously ill, he should arrange for a medical practitioner first to satisfy himself as to the capacity and understanding of the testator, and to make a contemporaneous record of his*

[1] I note that in Hawes and Burgess, Sir Scott Baker stated "*69. Where a will is drafted by an experienced solicitor who oversees its execution and records at or close to the time that the testatrix was compos mentis and able to give instructions persuasive evidence to the contrary is required.*"

examination and findings: see Kenward v Adams, The Times, 28 November 1975 ; In re Simpson, decd (1977) 121 SJ 224 , in both cases per Templeman J, and subsequently approved in Buckenham v Dickinson [2000] WTLR 1083 , Hoff v Atherton [2005] WTLR 99 , Cattermole v Prisk [2006] 1 FLR 693 and in Scammell v Farmer [2008] WTLR 1261 , paras 117–123.

8 Compliance with the golden rule does not, of course, operate as a touchstone of the validity of a will, nor does non-compliance demonstrate its invalidity. Its purpose, as has repeatedly been emphasised, is to assist in the avoidance of disputes, or at least in the minimisation of their scope. As the expert evidence in the present case confirms, persons with failing or impaired mental faculties may, for perfectly understandable reasons, seek to conceal what they regard as their embarrassing shortcomings from persons with whom they deal, so that a friend or professional person such as a solicitor may fail to detect defects in mental capacity which would be or become apparent to a trained and experienced medical examiner, to whom a proper description of the legal test for testamentary capacity had first been provided.

Dementia

17. The Plaintiffs allege that when the Testator ostensibly made the will he lacked a sound disposing mind by reason of dementia. Although I heard no expert evidence on dementia, both parties referred me to a passage at para 13-09 of the eighteenth edition of Williams, Mortimer and Sunnucks on Executors, Administrators and Probate which I have found helpful. Although it was not the most recent edition of the textbook, which is now in its twentieth edition, I accept the invitation of both parties that I should proceed on the basis that the passage remains accurate.

Dementia is by far the most common cause of probate actions. It is predominantly a condition of older people. Cases below 60 are uncommon, and below 50 very rare, unless caused by brain damage from head injury ... Dementia is a syndrome, not a specific disease, that is to say a group of clinical manifestations detectable by clinical examination in life, or inferred after death from clinical descriptions in

medical casenotes, or even from descriptions by non-medical persons. In summary, dementia is a global impairment of higher cerebral function in clear consciousness.

Disorder of memory is the most common and frequently the first manifestation of dementia. However, without other clinical features, it is insufficient to permit a diagnosis of dementia. Furthermore, memory impairment is a complex phenomenon of which there are different types and gradations. For example, such impairment may be confined only to memory for recent events or the encoding of new information (episodic memory). In more advanced cases, retrieval of episodic memories from long term store may be affected, whereas semantic memory (memories which confer meaning) may remain intact. The significance of this is twofold: first, that memory impairment of itself may not necessarily result in loss of testamentary capacity; secondly, different types of memory disorder may affect different criteria for testamentary capacity. For example, a woman in her eighties with moderate dementia and episodic memory impairment might still be perfectly able to understand what a will is, to have sufficient overall grasp of the extent of her estate, and not to experience any problems in knowing and appreciating the subtleties of all the relative claims on her bounty.

Frontal lobe damage which occurs in many types of dementia, including Alzheimer's disease, impairs reasoned judgment, emotional control and social inhibition, and often results in an alteration of personality. This may reduce testamentary capacity by affecting a proper appreciation of those who might have a claim on the estate.

Sometimes, until quite late in the disease, many aspects of personality, and in particular the ability to display social graces are preserved. Doctors refer to this as "a good social façade". Essentially it is a manifestation of the longer retention of what cognitive psychologists term "over-learned material", than those more recently acquired, less frequently rehearsed, which disappear earlier in the

disease. Demented persons with a good social façade may give every appearance of being capable of making a will although, in fact, they lack the necessary capacity.

Non-cognitive deficits commonly found in dementia include delusions (false beliefs) and hallucinations (false perceptions). ... However, delusions in dementia are usually more evanescent or temporary than in schizophrenia and may, therefore, be of less importance. For example, a man with mild to moderate dementia may generally have testamentary capacity but on one day he believes, falsely, that his children have conspired to defraud him and he wishes to disinherit them. The next day the delusions have disappeared and he has regained the capacity to make a will."

51. In *The Laws of Wills and Estates in Bermuda, 10th Edition*, (31 August 2020) Michael Mello K.C. stated:

"With our rapidly aging population, the elderly are becoming increasingly vulnerable to exploitation. However, vulnerability to exploitation does not of itself lead to the conclusion that there was a lack of capacity. Elderly persons who have full capacity may be vulnerable to exploitation or more so than younger persons it seems, but this is not always the case. Some people just make rash and irresponsible decisions, even though they had full capacity when they did so. The issue is whether the testator has sufficient mental capacity to make a rational decision. In assessing such capacity in the context of elderly testators the court's task is a more specific one than simply assessing the mental state of the testator, which has to be assessed so as to determine (i) whether he had a specific capacity (i.e. testamentary capacity) and (ii) whether he possessed that capacity at the specific time at which he made his Will. Many changes will be observed in the elderly as they lose the vigour and acuity that they previously enjoyed as younger people, but the exercise is not one of contrasting the former person with his state at the time of executing his Will. Despite the obvious physical decline, a person may still enjoy the necessary degree of memory and understanding to meet the law's standard for testamentary capacity, as it may come and go. In such cases it is important to focus on the question whether the testator possessed the necessary

testamentary capacity at the relevant time as such a testator, even if diminished in physical and mental strength, may nevertheless make a valid Will provided always that he can and does understand that which the law requires of him at the time he signed his Will." [page 4]

"There is a legal presumption that when a Will is read over to a capable testator, which he then executes, it is (as a general rule) conclusive evidence that it was with his full knowledge and approval of its contents. However such presumption may be rebutted if the circumstance under which the Will is prepared raises a reasonable suspicion that it does not truly express the testator's intentions. In such a case the Court will not find in favour of the Will unless the reasonable suspicion is dispelled. For example, where a person who prepares the Will takes a substantial benefit this will raise the suspicion of the Court and it will carefully scrutinize any evidence in support of the Will before pronouncing that the Will does indeed express the true wishes of the testator. The Court's duty in such cases is clear and simple: "To take care that and that only which is the true expression of a man's mind shall have effect given to it as his Will"" [page 8]

52. In the Court of Appeal case of *Hughes v Pritchard, Hughes and Hughes* [2022] EWCA Civ 386 the Court stated:

"98. In relation to testamentary capacity, Lewison LJ, quoting Peter Gibson LJ in Hoff v Atherton [2004] EWCA Civ 1554, [2005] WTLR 89, made clear that capacity is concerned with the potential to understand. It is not a test of memory or a requirement for actual recollection ([39] and [40]). Lewison LJ went on to address the judge's finding that the testatrix had not been "capable" of remembering why her earlier will had benefited one of her children, Robert, and concluded that what he meant was that she had forgotten. He stated that the judge's important finding was not that the testatrix had forgotten the terms of and reasons for her earlier will but: "[I]t was that she was capable of accessing and understanding the information; but chose not to. Her decision to benefit her children equally was a perfectly rational decision . . . As an expression of understanding the claims upon her bounty that seems to me to be unexceptionable."

99. Testamentary capacity does not require a testator to recall the terms of a past will they have made, or the reasons why it provided as it did, as long as they are capable of accessing the information, if needed, and of understanding it once reminded of it."

Plaintiff's Submissions

53. Mr. Durham made a number of submissions in support of the Plaintiff's case as follows:
    a. That the Father did not understand the nature of his act which was a significant change. That is, making the 2010 Will and 2012 Will and its effect, in particular that his act would disinherit all of Julia's children and their children.
    b. That upon reviewing the 1992 Will, per the evidence of Keith's police witness interview, the Father was unaware that he made the Will and did not understand why it provided as it did.
    c. In the Father's police witness statement, he expressed his own concern about his mental state.
    d. That Mr. Perinchief who drafted the 2012 Will was not aware that the Father had previous Wills and therefore he could not have jogged the Father's memory as to the contents of those Wills. Further, Mr. Perinchief was not highly experienced in drafting Wills and it encompassed less than 5% of his practice at the time.
    e. The Father was laboring under a delusion caused by dementia that Julia's Children were trying to take the Property from him.
    f. The Plaintiff has raised sufficient doubt as to the Father's capacity to shift the burden of proof to Keith as the propounder of the 2010 Will and 2012 Will, upon which Keith has not raised sufficient evidence to discharge that burden.

Second Defendant's Submissions

54. Mr. Harshaw submitted that the Father had the testamentary capacity to execute the 2010 Will and 2012 Will as follows:
    a. The Plaintiff did not lead any evidence in relation to the making of the 2010 Will. There was no change in beneficiaries between the 2010 Will and the 2012 Will.

b. The Father was not suffering from dementia, a matter for expert medical evidence, when he executed the 2010 Will and the 2012 Will.

c. The 2012 Will was prepared by an experienced attorney Mr. Perinchief who read the Will over to the Father line by line and questioned the Father about it. That at that time, the Father had discussed matters with an independent attorney Mr. Peniston. Further, there is no mention in the evidence in chief of Mr. Perinchief that that the Father was never advised of the consequences of changing the beneficiaries of his will in relation to the disinheritance of future heirs.

d. There is a presumption that when a will is read over to a capable testator, which he then executes, then as a general rule it is conclusive evidence that it was with his full knowledge and approval of its contents. The presumption has not been rebutted under circumstances of a reasonable suspicion, for example where a person who prepares the will takes a substantial benefit.

e. Keith was not aware of a cognitive deficit on the part of his Father at or about the time the 2012 Will was executed.

f. Keith denied that his Father had any material cognitive deficit when the 2012 Will was executed or at any material time.

55. Mr. Harshaw also raised a point to be determined by the Court a follows:

a. That Julie died leaving the Father surviving and entitled to the Property. Mr. Harshaw submits that that allegation was admitted and thus no evidence is allowed to support it. However he submits that the allegation is in conflict with the evidence of Doleta and Julian who believe the 2012 proceedings are not concluded in which they claim to hold an interest in the property. He regarded these circumstances as a contradiction.

b. In respect of this concern, I am satisfied that the Consent Order dated 13 July 2017 settled the 2012 Equitable Interest Action despite Doleta's and Julian's evidence that it was not concluded.

Analysis – Testamentary Capacity of the Father

56. In my view, I am satisfied that some aspects of the test as set out in *Banks and Goodfellow* on testamentary capacity have been satisfied. However, I am not satisfied on some other aspects of the test that the Father had testamentary capacity to execute the 2010 Will and the 2012 Will, in particular, that he was not suffering from some insane delusions and the breach of the Golden Rule. I set out my reasons below.

57. First, there is no medical evidence to support the contention that the Father was suffering from dementia at any material time. To that point, I accept that a medical opinion is required to establish a diagnosis of dementia. In this case, I find that there is no such evidence of the Father suffering from dementia in 2012 or before.

58. Second, I have considered the evidence of Mr. Perinchief about taking instructions from the Father at Anthony's house, when the Father appeared jovial and to be of sound mind and later when the Father attended the offices of Peniston and Associates. I have considered the fact that Mr. Perinchief is a former Attorney General and an attorney of some significant experience. There is no evidence about what Mr. Peniston spoke to the Father, but I note Mr. Perinchief's evidence that he went over the 2012 Will line by line with the Father and questioned him to ensure that he understood what he was signing.

59. However, I have considered that the Golden Rule was not followed in this case in that a medical practitioner did not first satisfy himself that as to the capacity and understanding of the Father. I refer to *Key v Key* where Briggs J stated that compliance with the Golden Rule did not operate as a touchstone of the validity of a will and non-compliance did not demonstrate its invalidity. However, in this case, it appears to me that it would have been extremely useful to comply with the Golden Rule because the Father was age 84 at the time of the execution of the 2012 Will and specifically, on cross-examination, Mr. Perinchief stated that he told Anthony at his house that it would be a good practice to get two medical doctors to examine the father under the Mental Health Act. Further, had Mr. Perinchief had

knowledge of the previous Wills then he would have known there were other children who were going to be excluded as beneficiaries.

60. Initially, I was confronted by the principle in *Creary and De la Chevotiere v De la Chevotiere* where Hellman J cited *Hawes v Burgess* for the principle that it would be difficult to challenge the validity of a will on the ground of lack of mental capacity when an attorney had taken instructions and prepared the Will. However, I am satisfied that there is persuasive evidence to the contrary as contemplated by Sir Scott Baker in *Hawes v Burgess* in that: (a) the Father was elderly at age 84; (b) Mr. Perinchief had advised that two medical doctors should be consulted; (c) Mr. Perinchief had not seen the previous Wills; and (d) I agree with Mr. Durham's argument that Mr. Perinchief had limited experience in drafting wills at the material time. The combination of these circumstances lead me to the view that the breach of the Golden Rule is significant enough to support invalidating the 2012 Will.

61. Third, I am not satisfied that the Father was of sound disposing mind when he executed the 2012 Will. As a start point, I rely on Hellman J in *Creary and De la Chevotiere v De la Chevotiere* where he cited *Jeffrey v Jeffrey* in that the Father understood the effect of his wishes being carried out at his death and the extent of the property that he was disposing. However, in respect to the nature of the claims of others upon the Father, in my view a huge pall hangs over the delusions of the Father that Julie's Children were seeking to take the Property from the Father. On the one hand, Keith has stated that he was not aware of his Father suffering any delusions in 2010 or 2012. On the other hand, I note that the Plaintiff argues that her Father was suffering under the delusion that Julie's Children were trying to take the Property from him. I have given minimal weight to Doleta's, Damina's, and Julian's evidence that they believed their Father believed they were trying to take his Property from him because there is no evidence on what their second hand beliefs (that is, Doleta's, Damina's, Julian's) are based. However, I have given considerable weight to the following evidence originating from the Father himself and Joulanda's and Keith's knowledge:

a. The Father in his 2012 Affidavit [para 20] stated that "*For some reason Julie's Children believe they are entitled to have my property and they think that their mother left it to them.*"
b. The Father's Police Witness statement [at page 20 line 51] – The Father made a remark that he guessed that Julie's Children are trying to drive him out of the Property by their conduct towards him at the Property.
c. Joulanda's evidence was that she knew their Father was upset that Julie's Children were trying to take the Property from him.
d. Keith stated that their Father was hurt as Julie's Children were trying to take the Property from him as they kept taking him to Court.

62. In light of these reasons, I am compelled to find that the Father believed Julie's Children were trying to take the property from him. Further, I find that Julie's Children were not trying to take the Property from him because the 2012 Equitable Interest Action that they commenced sought an interest in the Property, not to take it from the Father.

63. Thus, I am satisfied that the Father had insane delusions that were influencing him to dispose of his property in a way that he would not have done had his mind been sound. The reason for this is because the Father was very concerned that Julie's Children were trying to take his Property from him when in fact upon the evidence this was not true and it was not the aim of the 2012 Equitable Interest Action. I have given careful consideration to this aspect of the test in *Banks v Goodfellow*. In my view, if this delusion was not present, then it is likely that he would have disposed of his Property in some other way.

64. Fourth, I refer to Hellman J in *Creary and De la Chevotiere v De la Chevotiere* where he cited *Smee v Smee* where the principle was set out that where the testator suffers from delusions, the burden is on the propounder to show that they could not reasonably be supposed to affect the disposition of his property. In my view, Keith as the propounder of the Wills has failed to show that the delusions would not have affected the Father's disposition of the Property because in my view, on the evidence, the thought of losing his pride and joy Property weighed heavily on his mind.

65. Fifth, I refer to Hellman J in *Creary and De la Chevotiere v De la Chevotiere* where he cited *Ledger v Wootton.* I have considered the Father's capacity in light of whether it was rational for him to disinherit Julie's Children in favour of Keith only. I have balanced this task with the principle per LJ Mummery in *Hawes v Burgess* that a testator is free to dispose of his property as he sees fit, even if the terms of the will are hurtful, ungrateful, or unfair to those whose legitimate expectations of testamentary capacity are disappointed. The start point is that I am satisfied to find that the Father's wishes were for Julie's Children to inherent the Property, even though he may have treated them as tenants paying rent while he was alive. I do not find this arrangement unusual in that in that it seems reasonable for parents as owners to agree a rent with adult children living at a property in order to meet the expenses of the property. My finding above is based on the fact of the 1992 Will which was identical to Julie's and on the fact of the 2006 Will which had added Keith to Julie's children as beneficiaries, both Wills executed before the relationships between Keith and Julie's Children took a turn for the worse.

66. In my view, the Father's actions in respect of the 2010 Will and the 2012 Will are irrational when the history is evaluated namely: (a) the Father, Julie, Julies's Children and Keith lived at the Property most of their lives although Keith was off island for approximately 20 years; (b) the Father and Julie had similar 1992 Wills leaving the Property to each other and then Julie's Children; and (c) the 1996 Will added Keith as a beneficiary. The question then begs why would the Father, who on the evidence cared for all his children, remove Julie's Children in his 2010 Will and 2012 Will when he had provided homes for them since 1965, allowed or caused additional units to be built for use of Julie's Children and Keith, provided for them in his Wills for eighteen (18) years since 1992 to suddenly remove them in 2010 for the benefit of Keith only, who on the evidence had no children of his own. I am satisfied that the Plaintiff has raised a real doubt about capacity. In response to that real doubt, I am not satisfied that Keith has raised sufficient evidence, the main thrust being that the Father disliked the conduct of Julie's Children over time and had formed his own opinions, to discharge that burden.

67. Sixth, in light of the reasons stated above, in my view the test in *Banks and Goodfellow* has not been satisfied as I find that the Father did not have the testamentary capacity to execute the 2012 Will.

68. I have given consideration to the execution of the 2010 Will. In my view my findings about delusions and capacity based on the evidence as set out above apply equally to 2010 as they do to 2012. For that reason, I also find that the Father did not have the testamentary capacity to execute the 2010 Will.

Undue Influence

The Law

69. In the Privy council case of *Craig v Lamoureux* [1920] A.C. 349 (1856) 6 H.L.C. the Court stated as follows:

> *"When once it is proved that a will has been executed with due solemnities by a person of competent understanding and apparently free agent, the burden of proving that is was executed under undue influence rests on the party who alleges this." [page 356]*

70. In the House of Lords case of *Boyse v Rossborough* (1856) 6 H.L.C. 2 the Court stated:

> *"Undue influence, in order to render a will void, must be an influence which can justly be described, by a person looking at the matter judicially, to have caused the execution of a paper pretending to express a testator's mind, but which really did not express his mind, but expressed something else, something which he did not really mean." [page 1205]*
>
> *"But in order to set aside the will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis. Can it be truly said that there is any such inconsistency here.*

The undue influence must be an influence exercised in relation to the will itself, not an influence in relation to other matters or transactions. But this principle must not be carried too far. Where a jury sees that at and near the time when the will sought to be impeached was executed, the alleged testator was, in other important transactions, so under the influence of the person benefited by the will, that as to them he was not a free agent, but was acting under undue control, the circumstances may be such as fairly to warrant the conclusion, even in the absence of evidence bearing directly on the execution of the will, that in regard to that also the same undue influence was exercised. But even allowing the utmost latitude in the application of this principle, I feel compelled to say that I do not discover the proof of anything sufficient to show undue influence in the obtaining of this will." [page 1212]. The underlined text above was cited in the case of *Gordon Halliday v Charles Victor Shoesmith & Denis Sydney Mills* [1992] EWCA Civ J0630-6.

71. In the case of *John Edwards v Terence James Edwards, Elizabeth Maude Coombes & The Partner of KTP Solicitors* [2007] EWHC 119 (Ch) Lewinson J stated as follows:

"There is no serious s doubt about the law. The approach that I should adopt may be summarised as follows:

i) In a case of testamentary disposition of assets, unlike a lifetime disposition, there is no presumption of undue influence;

ii) Whether undue influence has procured the execution of a will is therefore a question of fact;

iii) The burden of proving it lies on the person who asserts it. It is enough to prove that the facts are consistent with the hypothesis of undue influence. What must be shown is that the facts are inconsistent with any other hypothesis. In the modern law this is, perhaps no more than a reminder of the high burden, even on the civil standard, that a claimant bears in proving undue influence as vitiating a testamentary deposition;

iv) In this context undue influence means influence exercised either by coercion, in the sense that the testator's will must be overborne, or by fraud;

v) Coercions is pressure that overpowers the volition without convincing the testator's judgment. It is to be distinguished from mere persuasion, appeals to ties of affection or pity for future destitution, all of which are legitimate. Pressure which causes a testator to succumb for the sake of a quiet life, if carried to an extent that overbears the testator's free judgment direction or wishes, is enough to amount to coercion in this sense;

vi) The physical and mental strength of the testator are relevant factors in determining how much pressure is necessary in order to overbear the will. The will of a weak and ill person may be more easily overborne than that of a hale and hearty one. As was said in one case simply to talk to a weak and feeble testator may so fatigue the brain that a sick person may be induced for quietness' sake to do anything. A "drip drip" approach may be highly effective in sapping the will;

vii) There is a separate ground for avoiding a testamentary disposition on the ground of fraud. The shorthand used to refer to this species of fraud is "fraudulent calumny" The basic idea is that if A poisons the testator's mind against B, who would otherwise be a natural beneficiary of the testator's bounty, by casting dishonest aspersions on his character then the will is liable to be set aside;

viii) The essence of fraudulent calumny is that the person alleged to have been poisoning the testator's mind must either know that the aspersions are false or not care whether they are true or false. In my judgment, if a person believes that he is telling the truth about a potential beneficiary then even if what he tells the testator is objectively untrue, the will is not liable to be set aside on that ground alone;

ix) The question is not whether the court considers that the testator's testamentary disposition is fair because, subject to statutory powers of intervention, a testator may dispose of his estate as he wishes. The question, in the end, is whether in making his disposition, the testator has acted as a free agent."

72. In *The Laws of Wills and Estates in Bermuda, 10th Edition*, (31 August 2020) Michael Mello K.C. stated:

> *"[page 3] It is undue influence and not influence that is objectionable. The doctrine of undue influence does not apply to Wills, as it does to contracts or other transactions made while a person is alive. In other words, unlike in contract law, there is never a presumption that a Will is made under undue influence simply because there is a relationship between the testator and beneficiary – it must always be proven to the Court.*
>
> ...
>
> *"Fraudulent calumny" sometimes arises in these cases, which is a species of "undue influence" (see: the 2019 case of Rea v Rea ...). This basically means "casting dishonest aspersions on the character" of a party involved in the Will and/or estate dispute, usually made against the claimant as part of the allegation of undue influence by the claimant over the testator to undermine the claim or the validity of the Will. Such aspersions involve the making of a false representation knowingly or without belief in its truth or recklessly."*

73. In Bermuda, a notary public is created by the Commissioners for Oaths and Notaries Public Act 1972. Section 6 of that Act sets out that a notary public shall be an officer of the Supreme Court. In Halsbury's Laws of England 4th Edition, Volume 34 1980 it stated as follows:
    a. A notary public is one of great antiquity, recognised in all civilized countries, and by the law of nations his acts have credit everywhere; and
    b. A notary public is entitled to verify, authenticate, and attest by his official seal the execution of deeds or other documents, contracts, and powers of attorney.

Plaintiff's Submissions - Undue Influence

74. Mr. Durham submitted that Anthony and/or Keith exerted undue influence over their Father as follows:
    a. Dianne Simmons had witnessed Keith intimidate his Father on multiple occasions;

b. Doleta believed that the Defendants has manipulated their Father into altering his Will at a time when he was vulnerable by poisoning his mind against Julie's Children.

c. Julian believed that the Defendants had manipulated their Father after Keith had returned from Australia beginning with them convincing the Father to transfer his Power of Attorney from Maria to Anthony on 10 November 2006 when there was no justification for the change.

d. The evidence showed that Keith was clearly the author of the 2010 Letter to Julie's Children, although he tried to distance himself from it. A glaring error was that their Father knew that Julian had worked at Fairmount Southampton Princess rather than Sousa's Landscaping.

e. Keith wrote or collaborated with Anthony to write the 2010 Letter to Julie's Children to present a justification for his Father's drastic changes from his 1992 Will to the 2010 Will and 2012 Will. This was to cover up the undue influence, noting that Keith's evidence was that it was strange that their Father would choose him to be the only beneficiary when he had many other children, the rationale being because of how they treated their Father. Further, there was no evidence of Keith, age 60 at the material time, having any children, so the Father possibly would be placing the Property, his pride and joy, subject to intestacy if Keith was the only beneficiary.

f. The letter to Toast banning him for life from the Property and the lie about the Father's selling his car to Keith was further evidence of undue influence taken place near to the time of the execution of the 2010 Will and the 2012 Will. He relied on *Gordon Halliday v Charles Victor Shoesmith & Denis Sydney Mills.*

g. The Father, due to the developing dementia, was vulnerable and susceptible to undue influence over a period of time poisoning his mind.

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Plaintiff's Submissions – Fraudulent Calumny

75. Mr. Durham submitted that there was fraudulent calumny as follows:

a. The Defendants fraudulent calumny removed Julie's Children from their Father's affections and from their inheritance.
b. Keith constantly made himself out to be the victim to his Father constantly calling the police in relation to offences against him, knowing these circumstances would exacerbate tensions between him and Julie's Children, thus causing their Father further turmoil as he desired that his children got along.
c. That Keith never pressed charges against Julian for assault, but ensured that there were charges in respect of Julian's alleged assault on their Father. Keith used the circumstances of the alleged assault to negatively influence their Father against Julian.
d. Keith had to be well aware that Julie's Children did not like him because they perceived he was unduly influencing their Father, documenting issues and notifying their Father of the same in order to create negative feelings in their Father against them.
e. The Defendants poisoned their Father's mind because they persuaded their Father to evict Julie's Children from the Property, having convinced him that Julie' Children were trying to take his Property from him, when they knew that was not true. Per Keith's police witness statement, up to 2006, Julie's Children knew they were still in their Father Will and thus there was no need for them to try to take the Property from their Father. Per Keith's witness statement and evidence, he knew that Julie's Children commenced the 2012 Equitable Interest Action to establish their interest in the Property, not to take it from their Father. Thus, Keith poisoning his Father's mind was dishonest and meant to negatively affect the Father's view of Julie' Children. To that point, Joulanda's evidence that she discussed the 2012 Equitable Interest Action with the Defendants but not with them and their Father was not believable when she had stated that she cared for him and had his best interests at heart.
f. The impact on the Father was such that he executed the 2012 Will less than a month after producing an affidavit in which he stated that believed Julie's Children were trying to get the Property from him.

g. Keith had persuaded their Father that Julie's daughters were instructing Julian to be disrespectful to their Father. The Father made mention of such conduct in his police witness statement.
h. Keith was using his dispute with Julian about the use of their Father's car to negatively affect their Father's view of Julian.
i. Keith wrote or arranged the writing of the 2011 Notes to Julie's Children to better justify the 2012 Will.

Second Defendant's Submissions

76. Mr. Harshaw submitted that Anthony and Keith did not exert undue influence on the Father to execute the 2010 Will and 2012 Will as follows:
    a. It is for Doleta to prove that the Wills were executed under undue influence or coercion. In particular, it must be shown that Keith had the power to overbear his Father's will and that power was exercised and the execution of the Will was obtained as a result.
    b. Anthony did not exert undue influence over the Father for the benefit of Keith.
    c. Keith denied that he exerted any undue influence over his Father when the 2012 Will was executed or at any material time.
    d. The allegation that the Father's mind was poisoned against Julie's Children by Anthony and Keith's dishonest aspersions on their character should be rejected as the Defendants did not do so. He contended that the only evidence of dishonest aspersions comes from Doleta who stated that she was aware that Maria and Julian had received a letter purportedly from their Father alleging that they had defamed his character to the neighbors and the police.
    e. The evidence is far from being inconsistent with any other hypothesis. The evidence is consistent with the Father being unhappy with Julie's Children. He wrote that they had defamed him and called him a liar in front of the police. He wrote that he felt that Julie's Children "*have taken turns pushing the knife in and twisting it*" and that he was not leaving them anything in his estate. That 2010 Letter to Julie's Children was written 4 days before he executed the 2010 Will. It was significant

that the 2010 Letter to Julie's Children was signed before a notary public, thus the Father adopted the contents as his own and it was signed with greater solemnity than other correspondence. Further, the Will was consistent with those sentiments expressed in the letter.

f. There is no evidence that the Father was physically and mentally frail when he executed the 2012 Will.

g. Keith was and is not a person of dominant character.

h. Keith did not exercise undue influence over the Father as it related to decisions affecting Julie's Children's occupation of the Property. Such assertions should be treated with caution as they are self-serving and do not rise to the level of being evidence of coercion or fraud necessary to prove undue influence. Further, none of the allegations relate specifically to any time period in 2010 or 2012 when the Wills were being prepared and/or executed.

i. The allegations of undue influence by either coercions or by fraud by Keith should be rejected as they are unsupported by any evidence.

j. The allegations that the Defendants accessed and abused the Father's bank accounts for their personal use should be rejected as they are not supported by the evidence.

Analysis of Undue Influence and Fraudulent Calumny

77. In *Boyse v Rossborough*, in relation to undue influence, the Court set out its reasons about setting aside the will of a person who was of a sound mind. I have already found above that in my view the Father was not of a sound disposing mind when executing the 2010 Will and the 2012 Will. However, I will still address the issues of undue influence and fraudulent calumny.

78. In my view, I find that there was undue influence and fraudulent calumny for several reasons. First, upon my observations of Doleta, Damina and Julian giving evidence, I found that they were credible witnesses who gave their evidence in a forthright and honest manner. Their evidence about their relationships with their Father had a resounding ring of truth to it albeit in the norms of issues that families encounter over a period of years. I do

note that Doleta took firm positions on some issues including in relation to Joulanda's parentage. Doleta, Damina and Julian all insisted that the 2012 Equitable Interest Action was not settled but that insistence appears to be based on the consequential matters that flowed from the Consent Order settling the matter and thus it has not undermined my views of their credibility. Thus, I found them to be credible and straightforward in their evidence about the material matters such that I preferred their evidence over Keith's evidence.

79. Second, I have considered the evidence of the long term neighbor Mrs. Simons and I find her evidence to be credible and that she had no axe to grind. I accept her evidence that she witnessed the reaction of the Father to be intimidated when Keith came around. She was concerned to consider that the Age Concern authorities should be notified. Although she did not exactly pinpoint the time when she made these observations I am satisfied that her observations were over the period of time to capture the material times.

80. Third, I have considered the evidence of Keith and my observations of him when he was giving his evidence. I found him to be evasive and not to be a credible witness. An example of this is when Keith was confronted with what documents he had seen at Conyers when he went there with his Father prior to the 2006 Will being executed. In my view he was completely evasive about the meeting eventually conceding that he guessed his Father was referring to his own Will. Another example is in relation to the alleged assault by Julian of Keith and their Father. I did not find Keith's explanation credible as to why he supported his Father's assault claim against Julian but he would not pursue his own claim against Julian who accorded to him had dragged him over a doorway whilst pulling out some of his hair. This was the same Julian who he had issues with about their Father's car such that Keith asked his Father to lie to Julie's Children that Keith had bought the car. His explanation that he wished no ill will on Julian or for him to be in trouble with the police is contrary to Keith's request to the police to charge Julian. Another example is where Keith stated in evidence that he believed that Julie's Children were trying to take the Property from their Father but then conceded that he knew seeking an interest was different from outright ownership. In my view, I am not able to attach any weight to Keith's evidence and I prefer the evidence of Doleta, Damina and Julian over his evidence.

81. Fourth, I am satisfied on the evidence of Doleta, Damina and Julian that the contents of the 2010 Letter to Julie's Children, the 2011 Notes to Julie's Children, the Undated Note to Julie's Children and the Undated Glowing Letter are not the words of their Father but are the words and feelings of Keith. I find on the evidence that the Father was not a person who used computers and he appeared to be a man who when faced with problems would sit with his children and address the problem, not write them typed detailed and comprehensive letters. This is at odds with the list of documents purportedly written by the Father about events at the Property and with Julie's Children that had been drafted and compiled. Additionally, I accept the evidence from Julie's Children about the inaccuracies in the documents which would not have happened if the words were truly the words of their Father, for instance the name he usually called Julian and where Julian was employed. The Father did state in his police witness statement that Keith kept a diary of the events, and described his compiling records of events as akin to the work of the police. In my view, although the Father may have attached his signature to the documents, even before a notary public, the sentiments therein were those of Keith and his continuous recording of events is consistent with the level of detail as set out in the documents purportedly written by their Father.

82. Fifth, it is compelling that the relationship between the Father and Julie's Children deteriorated after Julie died and Keith returned to Bermuda. Prior to his return, Julie's Children lived at the Property generally and there is no evidence of negative events taking place before then. In my view, their Father was clearly pleased with Keith's return, providing him with accommodation after he lived overseas for approximately twenty years. However, Keith was not equally enamoured with Julie's Children. In my view, Keith took the drip-by-drip approach as espoused in *John Edwards v Ewards et al* to sap the will of his elderly Father in a significant way deploying the method of making himself out to his Father to be a victim of Julie's Children's conduct. It is convincing that as various events took place, Keith was keeping a record of them and plainly his Father was aware of both the events and the records. In my view, Keith had set about a years' long campaign of coercion and to poison the mind of his Father against Julie's Children. In my view, this

conduct caused the Father's will to be overborne. The campaign included Keith encouraging the Father to proceed with the 2011 Assault Proceedings and the production of the 2010 Letters to Julie's Children, the 2011 Notes to Julie's Children and the Undated Letter to Julie's Children.

83. Sixth, I have given consideration to the Glowing Letter, extremely complimentary about Keith, which I also consider to have been the words of Keith and more likely than not written by him. In my view, there is no apparent purpose for the Father to have written the Glowing Letter. In my view, the Glowing Letter was another aspect of Keith's campaign to boost himself in the eyes of his Father, or others, and more likely than not to elevate his status in his Father's eyes over Julie's Children.

84. Seventh, in my view, the chronology of the contemporaneous documents starting with the 2010 Letter to Julie's Children were at the material times of the execution of the 2010 and 2012 Wills. In particular, the 2010 Will was executed shortly after the 2010 Letter to Julie's Children. In my view, the undue influence was exercised in relation to the 2010 Will and the 2012 Will themselves. In applying the principles of *Boyse v Rossborough*, there were also other transactions that demonstrated that the Father was under the undue influence of Keith. In particular and of some significance, Keith influenced his Father to lie to Julie's Children about selling the car to Keith. I find Keith's explanation on that point to be weak and outbalanced by the seriousness of the lie in the face of Julie's Children. Additionally, it sought to deny Julian use of the car when he lived at the Property, in favour of Keith's own use of the car.

85. Eighth, I have considered the evidence of Joulanda that she had discussed the 2012 Equitable Interest Action with Anthony and Keith but not with them and their Father. I do not find this evidence to be credible in light of the balance of her evidence that she spent considerable time with her Father, taking care of him, and holding his best interests at heart. She did state that she took their Father to Anthony's House because there was always something going on at the Property. It is inconceivable to me, that Joulanda, Anthony and Keith would not discuss with their Father, their beliefs that Julie's Children were trying to

take his Property from him. In my view Keith was poisoning his father's mind against Julie's Children by casting dishonest aspersions against them that they were trying to take his Property away from him when he knew that was not the case.

86. Ninth, in my view, the evidence of the undue influence is inconsistent with any other or contrary hypothesis. That finding is absolutely compelling once the documentation that I have found were the words and feelings of Keith are disregarded as being the words and feelings of the Father. In my view, what would remain are the desires of the Father for Keith and Julie's Children to get along at his pride and joy Property.

87. Tenth, in light of these reasons, I find that the Plaintiff has proved that Keith exercised undue influence on their Father in respect of both the 2010 Will and the 2012 Will.

The Counter Claim

88. Mr. Harshaw submitted as follows:
    a. Doleta has refused to pay rent to the Father and to Keith although she undertook to pay rent by the Consent Order dated 13 July 2017 in the 2012 Equitable Interest Action.
    b. These proceedings are an abuse brought in response to the 2020 Possession Action commenced six months earlier.

89. In light of my reasons as set out above, I dismiss the counterclaim on the basis that Doleta held an interest in the Property as of the date of the death of the Father on 5 August 2018 as a result of being a beneficiary of the 2006 Will, except the part of the counterclaim that the rents owing before his death, as a result of the Consent Order, are still due to the Father's Estate, namely the period between 13 July 2017 and 5 August 2018.

Conclusion

90. In summary I have made the following findings:
    a. I have accepted the First Defendant to be neutral in this case;

b. I am satisfied that the Father did not have testamentary capacity to execute the 2010 Will and the 2012 Will;

c. I am satisfied that the Second Defendant placed undue influence on the Father when he executed his 2010 Will and 2012 Will;

d. I am satisfied that the Second Defendant conducted fraudulent calumny upon the Father in respect of the execution of his 2010 Will and 2012 Will;

e. I declare the Father's 2010 Will and 2012 Will to be void and set-aside;

c. In light of the above reasons, I declare that:

   i. The 2006 Will is affirmed; and

   ii. The Vesting Deed is set aside; and

d. The counterclaim is dismissed except the part of the counterclaim that Doleta is liable to pay the rents owing, as a result of the Consent Order, to the Father's Estate, that is, for the period between the Consent Order dated 13 July 2017 and the date of the Father's death on 5 August 2018.

91. Unless either party files a Form 31TC within 7 days of the date of this Judgment to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Plaintiff against the Second Defendant on a standard basis to be taxed by the Registrar if not agreed.

Dated 22 February 2023

HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT