COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMON LAW & EQUITY DIVISION
2019/CLE/GEN/00530

BETWEEN

HAJNA MOSS
(A beneficiary of the Estate of Eldica Theresa Moss)
First Plaintiff

TERRILL LOMAR VAN CARRINGTON
(A beneficiary of the Estate of Eldica Theresa Moss)
Second Plaintiff

AND

MICHAEL MOSS
(As Co-Executor of the Estate of Eldica Theresa Moss)
First Defendant

CEPEDA MOSS
(As Co-Executor of the Estate of Eldica Theresa Moss)
Second Defendant

BEFORE: **The Hon. Madam Justice G. Diane Stewart**

APPEARANCES: **Mr. Arthur Seligman and Mr. Ra'monne Gardiner for the First Plaintiff and Second Plaintiff**

Mrs. Krystal Rolle Q.C. and Ms. Cyd Ferguson for the First Defendant and Second Defendant

Civil Law – Probate – Will – Validity of Will – Lack of testamentary capacity – Undue Influence – Suspicious Circumstances

Judgment Date: **13th January, 2023**

JUDGMENT

1. By a Specially Endorsed Writ of Summons filed 17th April, 2019, the First Plaintiff, Hajna Moss **(the "First Plaintiff")** and the Second Plaintiff, Terrill Lomar Von Carrington **(the "Second Plaintiff"**) the daughter and grandson of the late Eldica Moss **(the "Deceased") (the "Plaintiffs")**, respectively, sought to challenge the validity of the Deceased's Will executed on 1st June, 2011 **(the 2011 Will")**.

2. Their claim was that the Deceased lacked the testamentary capacity to execute the 2011 Will and as a result it was executed by undue influence and under suspicious circumstances.

3. The Plaintiffs further seeks:-

    i. a pronunciation against the validity of the 2011 Will,

ii. a declaration that the probate granted to the Defendants in Action No. 2018/PRO/npr/00021 on 14th February 2018 ("**the 14th February 2018 Grant**") **is null and void**

iii. . a Revocation of the 14th February 2018 Probate pursuant to section 29 of the Probate and Administration of Estates Act, 2010 and in the Court's Inherent Jurisdiction,

iv. iii. a Declaration that that the Deceased's Last Will and Testament dated 24th July, 2009 **(the 2009 Will")** is the valid will of the Deceased.

4. The First Defendant, Michael Moss **(the "First Defendant")** and the Second Defendant, Cepeda Moss **(the "Second Defendant")** are the sons of the Deceased and co-executors of the Deceased's 2011 Will **(the "Defendants").**

5. The Plaintiffs also seek an Order that the Defendants produce a complete and full accounting of all monies received and disbursed and all assets disposed by the Defendants or under their direction, including receipts and any other supporting documents. In the alternative, they seek a Declaration that the Deceased died intestate and an Order that the estate of the Deceased be administered under the rules of intestacy and pursuant to section 4 of the Inheritance Act, 2002 and a Grant of Letters of Administration be made to the Plaintiffs in the Estate of the Deceased along with an Injunction.

The Plaintiffs' Case

6. The Deceased who was born on 13th August, 1930, was married to the late Charles E. Moss Sr., and their union produced seven children; four boys, Marcian Moss (deceased), the Defendants and Charles Moss and three girls, the First Plaintiff, Karen Ann Moss Carrington (deceased) and Deninez Anita Moss. The First Defendant and her sisters lived in the United States of America.

7. From June 2009, the Deceased would travel to New York one of the, United States of America **("New York")** for periods of one week to three months to visit with doctors and to spend time with her family. The frequency of her visits depended on her medical care. She would stay with the First Plaintiff at 730 Webster Avenue New Rochelle, NY 10801 in New York, USA, who took care of her twenty-four seven.

8. The Deceased had been diagnosed with several illness during her visits to New York for medical treatment. In January 2008, she was diagnosed with hypertension and a right carotid stenosis, in 22nd October, 2009, she was informed that as a result of her poor vision she should not be driving and on 30th October, 2009, she was diagnosed with Alzheimer's Dementia by Dr. Marcelo Laiz **("Dr. Laiz")**, her primary care physician and was prescribed medication for the disease. On 6th May, 2010, the Deceased fainted and was hospitalized in The Bahamas, which the First Defendant was aware of, because he had to take her to the hospital. The Deceased died on the 3rd June of 2017.

9. The Deceased's diagnosis of and treatment for Alzheimer's Dementia, was known by all her children, including the First Defendant. As a result of her diagnosis her mental capacity declined. The First Defendant knew this because the Second Plaintiff consistently couriered the Deceased's medication to him from as early as 17th

November, 2010. He was also aware of the many car accidents which the Deceased was involved in since 2008 and also that she would go missing.

10. In 2011, the First Defendant was responsible for paying the Deceased's bills, taxes as well as paying her employees and he would also take her to her bank appointments and to her business manager Mr. Ronald Atkinson ("Mr. Atkinson") who they claimed had a great influence over her at that time. The Deceased moved back to The Bahamas on 14th September, 2014, where she lived until her death.

11. The gifts given by the Deceased pursuant to the 2009 Will were:-

Gifts under 2009 Will

12. Pursuant to the 2009 Will, the following devises of real properties were made:

a) No. 1 Dorchester Street Property, New Providence, The Bahamas to the Second Plaintiff and his sister Taria Alexandria Garcia Rickets in equal shares as tenants in common;

b) No. 2 Dorchester Street Property, New Providence, The Bahamas to Deninez Anita Moss;

c) Dorchester and Heathfield Residence, New Providence, The Bahamas to the First and Second Plaintiffs in equal shares as tenants in common;

d) Two vacant lots in Lake Cunningham, New Providence The Bahamas adjacent to the Penn Residence to the Second Plaintiff;

e) Two vacant lots in northern Lake Cunningham, New Providence, The Bahamas to the First Plaintiff, Langston Issa Fishburne and Montana Gaiz Fishburne in equal shares as tenants in common;

f) Residential lot occupied by Michael Markell Moss in Johnsons Estate Property, New Providence, The Bahamas to Michael Markell Moss;

g) Residential lot occupied by Charles Edward ("Fuzzy") Moss on Johnson Estate Property, New Providence, The Bahamas to Charles Edward ("Fuzzy") Moss;

h) A lot of two acres in Coral Harbour, New Providence, The Bahamas to the Second Defendant;

i) Two residential lots at 730 Webster Avenue (block and lot number 1620-0054), New Rochelle, New York, The United States of America in the following shares: 52% to Terrill Lomar Van Carrington, 16% to the First Plaintiff, 16% to Langston Issa Fisburne and 16% to the Montana Gaiz Fishburne; and

j) A residential lot with a small house located on Virginia Street, New Providence, The Bahamas to Taria Alexandria Garcia Rickets.

13. Pursuant to the 2009 Will, the following gifts of funds held in bank accounts and shares owned by the Deceased were made:

a) The Deceased's children would equally receive shares in Moss Gas Company Limited;

b) The Plaintiffs would equally receive the funds in the deceased's City Bank Account in New York, the United States of America; and

c) The Deceased's children would equally receive shares in the Deceased's Bahamian bank accounts.

14. Pursuant to the 2009 Will, the following bequeaths of cash were made:

a) St. Francis Xavier Cathedral, Nassau, Bahamas (Bishop Patrick Pinder) – the Building Fund would receive $20,000.00;

b) The Second Plaintiff would receive $50,000.00;

c) Langton Issa Fishburne would receive $50,000.00;

d) Montana Gaiz Fishburne would receive $50,000.00;

e) Taria Alexandria Garcia Ricketts would receive $20,000.00;

f) Deninez Anita Moss would receive $20,000.00;

g) Armando Naugustry Demetri Peter Moss would receive $20,000.00;

h) Perez Lambert Marquis Moss would receive $20,000.00;

i) Denez Demetrius Rashad Moss would receive $20,000.00;

j) LaNajee Lauren Denard Moss would receive $20,000.00;

k) TiAuren Javier Cadero Lamar Moss would receive $20,000.00;

l) Lovar Peterson Moss would receive $20,000.00;

m) Mechelle Rebecca Moss would receive $20,000.00;

n) Tyler Chea Moss would receive $20,000.00;

o) Carlos Edwardo Moss would receive $10,000.00;

p) Charles Edward ("Chico") Moss would receive $10,000.00;

q) Aaron Hakeem Moss would receive $10,000.00;

r) Tianna Elisabeth Carrington Ricketts would receive $10,000.00;

s) Tiyan Alexis Carrington Ricketts would receive $10,000.00;

t) Xavier Alexander Ricketts would receive $10,000.00;

u) Aisha Yolanda Moss Clarke would receive $10,000.00;

v) Michael Markell ("Lil Mike") Moss would receive $10,000.00;

w) Charles Daniel ("Lil Mike") Moss would receive $10,000.00; and

x) Cherisse Marie Albury Moss would receive $10,000.00

15. The residue of the estate would be bequeathed to the Second Plaintiff.

The <u>2011 Will</u>

<u>Gifts Under the 2011 Will</u>

19. The gifts under the 2011 Will were significantly different from the gifts under the 2009 Will. The 1st June 2011 Will bequeathed more assets to the Defendants, Charles "Fuzzy" Moss and their children.

20. The gifts to the First Plaintiff's children, Langston Issa Fishburne and Montana Gaia Fishburne were lowered from $50,000.00 under the 2009 Will to $20,000.00. The 2011 Will also increased the gifts for the children of the Defendants and Charles "Fuzzy" Moss' from $10,000.00 to $20,000.00:

a) Charles Edward ("Chico") Moss;
b) Aaron Hakeem Moss;
c) Tianna Elisabeth Carrington Ricketts;
d) Tiyan Alexis Carrington Ricketts;
e) Xavier Alexander Ricketts;
f) Aisha Yolanda Moss Clarke;
g) Michael Markell ("Lil Mike") Moss;
h) Charles Daniel ("Lil Charles") Moss.

21. Additionally, Selina Seymour the daughter of the Second Defendant received a gift under the 2011 Will when she was not included under the 2009 Will. Further, Markell Jerome Moss, the First Defendant's son also received a gift under the 2011 Will when he was not included under the 2009 Will.

22. The devises of real properties under the 2011 Will also carried a substantial deviation from the 2009 Will regarding the following:

a) No. 1 Dorchester Street Property, New Providence, The Bahamas previously devised to the Second Plaintiff and his sister, Taria Alexandria Garcia Rickets, was now devised to ECM Holdings Limited;

b) No. 2 Dorchester Street Property, New Providence, The Bahamas previously devised to Deninez Anita Moss was now devised to ECM Holdings Limited;

c) One of the vacant lots in Lake Cunningham, New Providence, The Bahamas adjacent to the Penn Residence previously devised to the Second Plaintiff, was now devised to the Second Defendant;

d) The remaining vacant lot in Lake Cunningham, New Providence, The Bahamas adjacent to the Penn Residence previously devised to the Second Plaintiff, was now devised to ECM Holdings Limited;

e) The two vacant lots in northern Lake Cunningham, New Providence, The Bahamas previously devised to the First Plaintiff, Langston Issa Fishburne and Montana Gaiz Fishburne in equal shares as tenants in common, were now devised to ECM Holdings Limited;

f) A residential lot with a small house located on Virginia Street, New Providence, The Bahamas previously devised to Shakira Mitchell, was now devised to Taria Alexandria Garcia Ricketts; and

g) No provision was made for the Dorchester and Heathfield Residence, New Providence, The Bahamas previously devised to the First and Second Plaintiffs which would now become a part of the residue of the Estate.

23. The gifts of money and shares under the 2011 Will were as follows:

a) The First Defendant would receive 209 ordinary shares in E.C. Moss Gas Company Limited;

b) The Second Defendant would receive 209 ordinary shares in E.C. Moss Gas Company Limited;

c) Charles Edward ("Fuzzy") Moss would receive 209 ordinary shares in E.C. Moss Gas Company Limited;

d) The First Defendant would receiver one non-divisible share in E.C. Moss Gas Company Limited held in trust for each of the deceased's sons as tenants in common;

e) The First Defendant would receiver, 1666 of ordinary shares in ECM Holdings Limited;

f) The Second Defendant would receive 1,666 of ordinary shares in ECM Holdings Limited;
g) Charles Edward ("Fuzzy") Moss would receive 1,666 of ordinary shares in ECM Holdings Limited;
h) The First Defendant would receive two non-divisble shares in ECM Holdings Limited in trust for each of the deceased's sons as tenants in common;
i) Karen Ann Moss-Carrington, Denise Anita Moss and the First Plaintiff would each receive $2,500,00;
j) Deninez Anita Moss would receive $20,000.00 held in account in Citibank in New Rochelle New York;
k) The balance of any Citibank account to the First and Second Plaintiffs; and
l) Any moneys held at any bank or financial institution in The Bahamas to ECM Holdings Limited.

12. The Plaintiffs' claim that prior to June 2011, the First Defendant, who was aware of the Alzheimers dementia diagnosis, took the Deceased to the law offices of Mr. Anthony Thompson **("Mr. Thompson")** to execute the 2011 Will. During the visit, the First Defendant assumed responsibility for communicating the Deceased's instructions to Mr. Thompson in order for her to execute the 2011 Will.

13. The Deceased was eighty two years old, not of a sound mind, lacked memory and understanding and testamentary capacity. The 24th July 2009 Will was revoked as a result of the execution of the 1st June 2011 Will. During a visit by the First Plaintiff The Bahamas on 7th August, 2011 to visit the Deceased and accompany her on her return to New York, the Deceased never mentioned executing the 1st June 2011 Will.

14. Under the 2009 Will the Second Defendant was not an Executor and in the 2011 Will there was no provision for a substitute Executor. The distribution of money and shares under the 2011 Will substantially deviated from the 2009 Will in which the Deceased had distributed her shares evenly amongst her six children. However, her shares were now only distributed amongst the Defendants.

15. The 2009 Will provided for the funds in the Bahamian bank accounts to be distributed evenly amongst all of the children of the Deceased but under the 2011 Will, the funds were bequeathed to ECM Holdings Limited **("ECM Holdings")** which also made her sons the only shareholders of the company. The Defendants and Charles "Fuzzy" Moss worked together at ECM Holdings Limited.

16. The 2011 Will also devised to ECM Holdings, No. 1 and 2 Dorchester Street and the four lots in Lake Cunningham which had not been done in the 2009 Will. In the 2009 Will, the residuary of the Deceased's estate was bequeathed to the Second Plaintiff. However, in the 2011 Will it was now bequeathed to ECM Holdings Limited. The Defendants as Co-Executors, were granted the administration of all the real and personal estate and effects of the Deceased by the 14th February, 2018 Grant.

17. By email dated 7th May, 2018, the First Plaintiff wrote to the Deceased's estate's attorneys to challenge the validity of the 2011 Will on the ground that the Deceased was suffering from Alzheimer's disease on the date when the will was executed. By email

dated 8th May, 2018, Mr. Ronald Atkinson, an Accountant with E.C. Moss Gas Company Limited **(the "Gas Company")** and the First Defendant's advisor, sent a notice to the beneficiaries informing them that the attorneys of the Deceased's estate had ceased to make any further payments or transactions until the challenge had been satisfactorily resolved. Despite this the Defendants' attorney advised the First Plaintiff's attorneys that they would continue to distribute the Deceased's estate in accordance with the 2011 Will.

18. The Deceased displayed a complete inability to comprehend her personal and financial affairs, particularly she:-
    - was unable to remember regular visits from her doctor or whether she had cooked,
    - was unable to concentrate on what was being said to her and her forgetfulness made conversations difficult,
    - sometimes placed her purse in the oven and cell phone in the freezer,
    - would sometimes forget why she was in New York,
    - thought her bed ridden daughter in New York had faked being ill, and
    - the First Defendant had to be informed on numerous occasions that the Deceased was on Bay Street or wandering the streets.

19. The Plaintiffs also claim that the 2011 Will was executed under suspicious circumstances because there was no evidence that independent advice was given to the Deceased based on her medical diagnosis and no evidence that medical advice was sought to determine whether she could form the intent to make a will or draft and approve of its contents. The Plaintiffs claim that the Defendants and Charles "Fuzzy" Moss unduly influenced the Deceased and took advantage of her physical, mental condition and old age, in order for their children to benefit more than the remaining family members from the estate.

20. When the Deceased had executed the 2009 Will, she informed all of her children and grandchildren, including the Plaintiffs and had told Sherkeria Mitchell that Leandra Esfakis was her lawyer. She did not do the same after the 2011 Will was executed.

The Defendants' Case

21. The Defendants, on the other hand, claim that they are the duly and validly appointed Co-Executors of the Deceased's estate pursuant to the 2011 Will which they say is her true Last Will and Testament. They acknowledge that the Deceased did in fact travel between The Bahamas and New York during the last few years of her life and that she generally stayed with the First Plaintiff whenever she did. The Deceased almost invariably travelled alone and unaided without incident.

22. The Defendants claim that the Plaintiffs never informed them of the diagnosis and treatment for Alzheimer's Dementia at any time or at all until the 7th May, 2018 when the First Plaintiff sent an email to the Defendant's attorneys which exhibited a letter dated the 10th January, 2018 purporting to be from Dr. Laiz. They denied that they nor her other children had knowledge of the diagnosis and that her medicine was couriered to The Bahamas. At the time of her initial diagnosis in New York in 2008 and 2009, the Deceased bathed, dressed and fed herself. They denied that the Deceased was not of a sound mind or that she lacked memory, understanding and the testamentary capacity to execute the 2011 Will.

23. The First Defendant had assisted the Deceased with the payment of her bills for several years because of her frequent absences from The Bahamas. The Defendants confirmed the Plaintiffs' recollection of certain contents of the 2009 Will but denied that it was the Deceased's true Last Will and Testament. They deny that they or Charles "Fuzzy" Moss work together at ECM Holdings which they explained was only a Bahamian holding company for the majority of the Deceased's assets. The Defendants acknowledge that under the 2011 Will, no provision was made to substitute an executor.

24. Mr. Atkinson was the external accountant of the Gas Company and not an employee. Mr. Atkinson did in fact send a general notice to the beneficiaries which stated that no further payments or transactions would be made until the challenge was resolved and also that their Attorney did advise the First Plaintiff's attorneys that they would continue to distribute the Deceased's estate.

25. The Defendants denied that the Deceased lacked testamentary capacity as:-
    - She was known to her friends, employees, family and children to have a strong and forceful personality and was very outspoken and demanding, particularly with respect to her business affairs,
    - since her husband's death in 1991, she owned the absolute majority of the issued shares in the Gas Company and was in dominant control of its affairs until the end of 2015,
    - she still spent approximately eighty percent of her time in The Bahamas between 2007 and 2013 despite her trips to New York,
    - since her husband's death in 1991 up to January 2013, she was the sole signatory on the operating bank account of the Gas Company. Thereafter she was persuaded to added the two Defendants as signatories on the account.

26. The Defendants never noticed any change in the Deceased's personality, her cognitive powers or her awareness of either her own financial affairs or the business affairs of the Gas Company until the beginning of 2016.

27. In response to the Plaintiff's allegations that the 2011 Will was executed under suspicious circumstances, the Defendants claim:-
    - The Deceased was entitled to depart from the terms of 2009 Will however she saw fit and did so for her own reasons,
    - Without more, her departure from the 24th July 2009 Will cannot be considered suspicious,
    - They did not intervene with the Deceased's execution of the 1st June 2011 Will, nor were they aware of the diagnosis of Alzheimer's Dementia. Additionally, her will was changed at the request of and on the sole instructions of the Deceased,
    - The differences between the 24th July 2009 Will and the 1st June 2011 Will are still less unfair as between the principal beneficiaries of the Deceased's estate.

28. In response to the claim of undue influence the Defendants maintain:-
    - While the First Defendant did assist the Deceased from time to time with errands and other small matters, she did not become reliant on him nor did he become responsible for the organization of her daily affairs,
    - The Deceased exercised her own judgment firmly and appropriately on a regular basis until the final months of her life,

- The Defendants nor Charles "Fuzzy" Moss ever caused or suggested that the Deceased make the 2011 Will nor did they provide her with any input or suggestions to its terms,
- The Defendants nor Charles "Fuzzy" Moss were aware of the terms of the 2011 Will until it was read by the Attorney in their and the First Plaintiff's company on 8th May, 2018.

29. By counterclaim, the Defendants sought declarations stating that:-
    i. the 1st June 2011 Will was the true and correct Last Will and Testament of the Deceased,
    ii. the Defendants are the duly appointed Executors of the Deceased's estate and
    iii. Directions for the Executors to continue getting in and distributing the estate of the Deceased in accordance with the 1st June 2011 Will.

REPLY AND DEFENCE TO COUNTERCLAIM

30. By Reply and Defence the Counterclaim filed 31st July 2019, the Plaintiffs put the Defendants to strict proof that the Deceased travelled alone and without incident. They claim that the First Defendant was made fully aware of the Deceased's Alzheimer's Dementia diagnosis on 30th October, 2009 and was entrusted with informing the Second Defendant of the same. On 17th November, 2010, the First Defendant accepted a package from Federal Express which contained the Deceased's Alzheimer Dementia's medication.

31. On 24th September 2012 the Defendants were in fact made aware that the Deceased went missing and who had in turn responded that that was a common occurrence of the Deceased. On 19th May 2013, the First Plaintiff, First Defendant and others took the Deceased to Ken Monska Gas School in Ocala, Florida and then went on to Orlando, Florida during which, the Deceased required assistance with bathing, dressing and feeding herself. The Deceased had also needed assistance with transportation to and from her doctors' appointments, administration of daily medication and general supervision throughout the day.

32. ECM Holdings owned the Gas Company. While the Deceased did have a strong personality, in 2009 due to her declining health, her capacity for decisions became compromised and any Will or documents signed by her thereafter would be impacted by the diagnosis. The Plaintiffs denied the Defendants assertions with respect to the suspicious circumstances and put the Defendants to strict proof thereof. On 20th October, 2009 the Deceased's driver's license was revoked and she did in fact become reliant upon the First Defendant.

ISSUES

33. By the Plaintiffs Statement of Facts & Issues filed 17th August 2020 they state that the issues to be determined were:-
    i. Whether the Deceased possessed the necessary testamentary capacity when instructions were given to draft and to execute the 2011 Will?
    ii. Whether or not the Deceased knew and approved the contents of the 2011 Will.

iii. Whether or not the First Defendant and Mr. Atkinson indirectly influenced the deceased into executing the 2011 will.
iv. Whether or not the 2011 will was a substantial deviation from the previous wills.

35. By the Defendants Statement of Facts and Issues filed 1st September 2020, they state that the issues to be determined were:-
i. Whether the deceased had Alzheimers Dementia.
ii. If so, whether the Alzheimers Dementia was the cause of the dispositions made by the deceased in the 2011 Will.
iii. Whether the deceased had testamentary capacity when the 2011 Will was contemplated and ultimately executed.
iv. Whether the 2011 will was executed under the suspicious circumstances alleged by the Plaintiff.
v. Whether the deceased was unduly influenced by the Defendant in the preparation and execution of the 2011 Will.
vi. Whether the grant of probate should be revoked.

EVIDENCE

Plaintiffs' Evidence

36. The First Plaintiff, by her evidence in chief, confirmed the claims made in the Statement of Claim. She added that she and the Deceased, her mother, enjoyed a close relationship. The Deceased would frequently travel to New York to visit the doctor and relatives from 2008 to 2014 for a period of a week to three months. Since 2010, she and the Second Plaintiff would take care of the Deceased twenty four hours a day and seven days a week while she was in New York.

37. She attended the Deceased's medical appointments with her and after her 2008 and 2009 diagnoses she informed the First Defendant that the Deceased should not drive in The Bahamas due to her poor sight. Since 15th November, 2009 she would take the Deceased to Costco Pharmacy to collect her Alzheimer's medication. On 18th January 2011, Dr. Laiz provided them with a letter about her declining mental state as they considered appointing a guardian over the Deceased's affairs to protect the Gas Company of which the Deceased was the majority shareholder. It was written five months prior to the execution of the 2011 Will.

38. After the Deceased's death, Dr. Laiz was asked to and did produce an updated letter dated 27th July, 2018 which indicated that the Deceased had been his patient since 3rd January 2008 and that she had last visited him on 2nd June, 2014 before she permanently moved to Nassau because of her immigration status in New York. The letter demonstrated that prior to the 2011 Will, the Deceased visited with Dr. Laiz on 23rd November, 2009, 11th March 2010, 7th June, 2010, 13th September, 2010, 14th September 2010, 13th December 2010 and 14th March 2011.

39. It also showed that since the Deceased's diagnosis, her condition worsened and she required full time care and supervision, all of her medications were refilled and there were three month incremental doctor's visits to monitor her health and to get her prescriptions refilled. On the Deceased's death certificate dated 14th June, 2017, one of her causes of death was listed as Alzheimer's disease.

40. The First Plaintiff stated that since the Deceased's diagnosis of Alzheimer's in 2009, her mental capacity quickly deteriorated as she would not remember why she was in New York, she was unable to remember regular doctors' visits, whether she cooked , where her husband was and when he passed and if the funeral was well attended. The Deceased could not be left at home unattended while she was in New York and questioned whether her daughter Karen Ann Moss Carrington had faked being ill. The Deceased would look out of her second floor bedroom window in New York and ask how long she was in New York, what year she was born, the whereabouts of her purse and pocketbook which were usually at the side of the bed or in the night stand next to her.

41. After the Deceased's hospitalization on 6th May, 2010 in The Bahamas after fainting, the Deceased never travelled by herself. The First Plaintiff had instructed her son, Langston Fishburne to travel to Nassau to accompany the Deceased to New York on 5th June, 2010 during which trip the Deceased had received an MRI. On 10th June, 2010 she accompanied the Deceased on her return to The Bahamas and anytime the Deceased traveled thereafter, either she or one of her children would accompany the Deceased.

42. The Deceased had been wandering in The Bahamas and an attempt was made to place her in St. Joseph's Adult Day Care at the First Defendant's request. Dr. Laiz signed a form to allow enrollment however, the Deceased never went because she did not want to go instead surveillance cameras were installed at her home.

43. On 11th January, 2008 at the age of seventy seven, the deceased had executed a Will, which was at the time, her last Will and Testament **(the "2008 Will")**. The Executors under that Will were the First Defendant and herself but if a provision was included which provided that if either were unable or unwilling to act then Deninez Moss would serve as an alternative. The Deceased had devised her home in Dorchester Street to her daughters as joint tenants and that any devises of property which was utilized as a primary residence by her children were to be devised to such child and/or their issue.

44. All plots of land and any improvements thereon outside those specifically named in the 2008 Will including but not limited to three lots on Westridge, four lots on Dorchester (apart from the shares in the Gas Company), twenty acres on Gladstone and any lots in Coral Harbour were included in the residuary estate

45. The shares in the Gas Company and the related parent and subsidiary companies were to be devised by way of joint tenancy to all children surviving the Deceased and an extra share was bequeathed to the oldest surviving child to break any ties. The residue of the Deceased's estate would be devised and bequeathed to the Plaintiffs and it provided for an equitable distribution of the Deceased's assets. This will had been drafted and witnessed by her Attorney in New York who had taken notes of the draft Will.

46. In the 2009 Will the Executors consisted the First Defendant and Karen Carrington with the provision that the First Defendant would act if either of the named executors were unwilling to act. The bequests of cash were also slightly different as the bequest to St. Francis Xavier Cathedral was increased to $20,000.00 and Cherisse Marie Albury Moss was to receive $10,000.00.

47. In the 2011 Will, the Executors were changed to two males. Cepeda Moss was never an Executor nor an alternate under the 2008 and 2009 Wills. The gifts to her children were

lowered from $50,000 to $20,000.00 and the gifts for the Defendants and Charles "Fuzzy" Moss children were raised from $10,000 to $20,000.00.

48. The First Plaintiff was surprised that Mr. Thompson had prepared the 2011 Will as she was not aware of the Deceased utilizing him for any legal work. She knew that Mr. Thompson worked in the same building as Mr. Atkinson and it seemed as if only the First Defendant, Mr. Atkinson and Mr. Thompson were aware of the 2011 Will. Mr. Atkinson had a great influence over the Deceased during 2011 and also she relied heavily on the First Defendant. Upon her arrival in Nassau, on 7th May 2018, she went with the First Defendant to open the Deceased's safety deposit box and gave him the letter from Dr. Laiz in which he had diagnosed the Deceased with Alzheimer's disease.

49. During cross-examination, the First Plaintiff disagreed that the longest time the Deceased remained in New York on any visit was six weeks. The Deceased had been referred to Dr. Rowe by Dr. Laiz after she fell and hit her head in The Bahamas. She could not speak to the head trauma suffered because she was not present when the fall occurred.

50. Dr. Rowe had previously seen the Deceased in 2007 and then again in 2013 however, he had not seen her between 2009 and 2013. Between 2009 and 2013 Dr. Laiz had never referred the Deceased to a neurologist for her Alzheimer's condition and she disagreed that he did not refer her mother because the condition was not serious or manifested. The First Plaintiff denied that the doctor only said what she told him to say or that her mother was able to care for herself in 2014.

51. The Deceased had been involved in the Gas Company prior to her fathers passing, a business which her father had started. Thereafter, she became the pivotal moving force in this business where her brothers also worked. The First Plaintiff had lived in the USA since she was 12 year old about 44 years ago and since then she had not been involved in the day to day operation of the business. She could not say how the Deceased performed from 2010 to 2014.

52. The First Plaintiff's tax liability arose when she became a resident of the USA. She became aware of the changes in the tax laws in 2010, although not in detail, which would affect offshore assets. In late December 2010 the First Plaintiff travelled to The Bahamas and attended a meeting with the First Defendant and Mr. Atkinson where it was discussed that it was best for the American children's shares to be transferred to the Gas Company because of the changes in the tax law.

53. The First Plaintiff denied that it was agreed that she and her sisters should get cash instead. Changes to the Deceased's Will did not come as a surprise to her. She disagreed with the notion that her brothers had not inherited significantly more than her. The First Plaintiff confirmed receipt of a cheque for over $400,000.00 dated 9th June 2011, eight days after the execution of the 2011 Will. Although there was no physical evidence, she did object to the Deceased's signature based on her mental capacity but she never expressed this.

54. On the 16th September 2014 she and her sister Deninez arranged for a Power of Attorney to be drawn for Mr. Atkinson to have the sole authority to hire and fire all existing and future employees. She agreed that she did not suggest that the Deceased was incapable of executing a power of attorney. During the reading of the 2011 Will on

the 17th April 2018, she did not question the Deceased's mental capacity to sign it. On the 7th May 2018 she emailed Mr. Curry indicating that she had another Will and subsequent to that she expressed that the Will was invalid because of her mother's mental incapacity. She did not express her concern right away as she needed to digest the terms of the will, and while she had concerns she needed to review, read and thoroughly understand the will.

55. The 17th January 2018 when she arrived in Nassau to open her mother's safety deposit box, was not the first time that she had presented her brother with Dr. Laiz's diagnosis of Alzheimer's dementia but it was the first time that she had given him the letter from Dr. Laiz. The First Defendant having been being couriered the Deceased's Alzheimer's dementia medicine was not the only way he had been informed of the diagnosis. Her brother did not keep good records. There was a meeting with her, the Defendants and their other brothers and sisters with respect to appointing a Receiver for the Deceased but she could not say why one was not appointed.

56. The First Defendant did suggest to her that the Deceased needed supervision which is the reason she reached out to Dr. Laiz for a letter and the notion for supervision arose sooner than late 2014 early 2015. The 2008 Will was drafted in New York but the 2009 Will was drafted in The Bahamas.

57. During re-examination, she was shown a discharge letter dated the 7th May 2010 from the Princess Margaret Hospital **("PMH")**, one of the diagnoses was Alzheimer's dementia. It would have most likely been the First Defendant to pick her up from PMH. The form for the daycare was requested after the Defendants told her that the Deceased was wandering in the street and that she needed someone to watch after her. She was not told about the codicil. The professional tax advice she received from a US tax specialist was that only her and her sister's shares would be taxed and not the entire company.

58. The First Plaintiff made an attempt to secure Dr. Laiz's testimony and he had agreed to it however, he was an older gentleman and his office was closed during the COVID-19 pandemic and she was unable to secure his evidence. She was not a signatory on the account the Deceased had in New York.

59. The Second Plaintiff, by his evidence in chief, stated that he had enjoyed a very close bond of love, respect and truth with the Deceased during her lifetime. He lived in the Deceased's home in New York along with the First Plaintiff and her children. Prior to moving to the USA, his mother lived in The Bahamas at the family compound, in a house adjacent to the Deceased's home. The Deceased had taken him under her wing at an early age, he lived with her occasionally and she raised him as a child. He was widely known as her favorite grandchild and that they were both devoted to each other.

60. In 1986 the Deceased had made the decision to send him to New York to live with the First Plaintiff and her family and she financially took care of his schooling, living, activities, entertainment and travel. This arrangement continued pre and post college years in Florida. Between 1986 and 2010 he never went more than a day without hearing from the Deceased who would often request that he visit her in The Bahamas, if only for a day and that she would courier him a personal letter or visit as a surprise.

61. In 2010 the Deceased was moderately independent and relied upon others for assistance with helping her administer medication and eye drops. She started expressing confusion as to the relationship of one grandchild to her late husband and also her great-grandchildren to her grandchildren. The Deceased would sometimes forget who his bedridden mother was and would comment that his mother was faking her illness. In the latter part of 2010 the Deceased would manifest extreme high and low mood swings and would sometimes have episodes of protest, anger, confusion and frustration.

62. The First Defendant had to eventually give an allowance to the Deceased and more of the family company's financial accounting fell on him. The Deceased ended up spending more time at her home on Dorchester Street, The Bahamas, where the First Defendant would stop by to check in on her and administer her medication and eye drops.

63. By 2011, the faculties of the Deceased were unravelling more and that present and past events were becoming challenging to remember which resulted in her frequently asking the same questions. Some of the questions asked were about the whereabouts of her husband and whether he had died, how old she was, was Karen dead and where was Karen. He eventually had to place signs with information on the wall of the Deceased's bedroom to help ease her concerns and worries. The Deceased would roam the halls of the house and open and close doors at odd times throughout the night and she insisted on not being made to eat, bathe, dress or keep any of her appointments.

64. He attended many of the medical appointments with the Deceased and he would have to hold her purse because she was afraid that someone would steal from it. In 15th November, 2009, he would sometimes take the deceased to Costco Pharmacy in New Rochelle, New York, to collect medication for her Alzheimer's disease.

65. On 17th November 2010, he couriered the Deceased's Alzheimer's medication to the First Defendant in The Bahamas after the First Defendant had informed him that the supply was running low. In December 2010, he updated her morning and evening medication list and it was usual to share the instructional sheet listing the appropriate times, names of each of the prescriptive drugs, its use and dosage amount to be administered by the First Defendant and other relatives in The Bahamas.

66. The Defendants did not advise him of the reading of the 2011 Will, despite their having his phone number and his being easily contactable. On 11th May, 2018, he received an email from Mr. Atkinson indicating that the Deceased's estate needed to have a proper accounting of the Deceased's Citibank account in New York at the Eastchester Branch. As a result, he was asked to arrange for the accounting to be prepared and to forward it to Mr. Atkinson to transfer to the Executors.

67. By 6th June, 2018, Mr. Atkinson again emailed him requesting the proper accounting from him of the said Citibank account and that a failure to do so by Monday, 25th June, 2018, would result in the Deceased's estate engaging an accountant firm. In turn, the Second Plaintiff emailed Mr. Atkinson on 27th June, 2018 and provided the requested information. In the email, he also noted that he had not received a copy of the 1st June 2011 Will.

68. The Second Plaintiff posited that he was bewildered that Clause 3.10 of the 2011 Will was summarized by Mr. Atkinson as "any account in my name in Citibank in New Rochelle, New York" as the Deceased never referred to it as "Citibank in New Rochelle" nor had she ever conducted any business at a Citibank in New Rochelle, New York. The Deceased had referred to the bank as the "Lord & Taylor Citibank" because Lord & Taylor was close to it.

69. Mr. Atkinson emailed him thanking him for the information that he had provided and that he would courier a copy of the 2011 Will to him but he never received it. The Second Plaintiff contended that the Deceased lacked testamentary capacity at the time of the execution of the 2011 Will due to her diagnosis with Alzheimer's disease and that she was heavily reliant on the First Defendant while in The Bahamas and unduly influenced by the Defendants in the execution of the will.

70. During cross-examination, the Second Plaintiff could not say how the Deceased performed at work on a daily basis as he had lived in New York since 1986. He agreed that he did not have first knowledge of what was happening at the Gas Company. The Deceased would stay in New York for about a month to two months. In addition to the Alzheimer's medication being couriered to the First Defendant, there were other periods where information was couriered to the First Defendant.

71. In 2009, he had never expressed any objection or concern about the Deceased's continued involvement in the business as there were older children of the Deceased who were involved in the business. The Deceased would be in charge when her sons were in the office. He denied that in 2015 the Deceased maintained the mental capacity to conduct her affairs.

72. During re-examination, the Second Plaintiff stated that in 2014, the Deceased was not the same person he knew. With each visit he noticed a change in the Deceased prior to 2012. He did not visit the Bahamas often as he had to assist his own mother who had had a heart attack but he used to visit regularly up to 2002. The Deceased would travel to New York for her medical visits and she never mentioned the 2011 Will to him. He and the First Plaintiff accompanied the Deceased to the twenty plus visits she had with Dr. Laiz between 2008 and 2014. During those years she visited quite often to see the doctor.

73. Dr. Ziv Cohen, a licensed physician and board certified psychiatrist, was deemed an expert witness in the field of forensic psychiatry and psychiatric disorder for the purpose of this case **("Dr. Cohen")**. He gave opinion evidence on the Deceased's mental capacity when she executed the 2011 Will based on his review of documented medical history provided to him, his overall view was that the Deceased lacked the requisite mental capacity to execute the 2011 will.

74. During the extensive and vigorous cross-examination, Dr. Cohen stated that while he was not qualified in the practice of neurology, his psychiatric training included a neurology rotation and training which allowed him to answer limited questions in relation to the field of neurology. A neurologist is a doctor who specializes in diagnosing and testing diseases associated with the brain and nervous system. He felt comfortable answering questions about dementia as psychiatrists treated dementia commonly which

is a syndrome with multiple causes and symptoms such as memory loss and cognitive deficit.

75. One of the causes of dementia was Alzheimer's disease which could extensively affect the brain and could only definitively be diagnosed by autopsy as you would have to go into the brain and examine it very carefully. Prior to death, diagnosis would be done by eliminating other conditions that could be attributed to certain clinical signs.

76. Dr. Laiz would have concluded that the Deceased's Alzheimer's dementia diagnosis was based on the probability that it was that disease over others and on mostly assessments and findings. The Deceased could have had vascular dementia or Alzheimer's or both. Such diagnosis suggested two things, that there was a clinical syndrome of dementia which was caused by Alzheimer's disease.

77. The Deceased took medication to treat Alzheimer's which was used in an attempt to restore cognitive function. In 2007 she also had age appropriate atrophy which was essentially a clean bill of health; atrophy being the shrinking of the brain with more fluid in the skull and large ventricles. Between 2007 and 2011 there was essentially no change. By the imaging dated August 2011 there was evidence of blood vessel disease not only in her carotid arteries but in her brain itself which could cause scattered small strokes. This condition would usually be seen together with Alzheimer's disease.

78. Dr. Cohen agreed that the August imaging was taken after the Deceased had executed the 2011 Will. However, after considering the Deceased's entire treatment course, in retrospect he opined that the 2007 MRI showed the beginning of the brain disease. The 2013 MRI did not show that there were changes from the August 2011 MRI but similar findings.

79. It was his understanding of a previous doctor's assessment that the Deceased had severe progressive dementia and brain disease which ultimately resulted in encephalopathy; the end stage of dementia which is severe in August 2013. A report of new onset seizures of an eighty two year old woman would automatically lead to Alzheimer's disease.

80. During re-examination, Dr. Cohen explained that different MRI imaging and reports were conducted in different jurisdictions and could explain any inconsistencies in examination. He had not seen the images himself and only read the reports made as a result.

DEFENDANTS' EVIDENCE

81. The First Defendant, a son of the Deceased and part owner of the Gas Company, averred that he was affiliated with the Gas Company for over thirty years and that he had worked alongside the Deceased during that time. He confirmed that throughout 2011 the Deceased was always consistent and coherent in her thought, speech and understanding and that there were no signs that her mental faculties were failing her. The Deceased was regularly involved in the usual day to day business activities of the Company and participated in several meetings during which, she would provide her suggestions and opinions on matters pertaining to the Company.

82. At a 10th May 2013 meeting, he, along with the Second Defendant and the Deceased, met to discuss the allocation of dividends amongst shareholders of the Company. At a

3rd June 2013 meeting, the three of them discussed changing the signatures on the Company's chequing account which was changed for any two of the three to jointly sign. The First Defendant added that that decision was made in the best economic interest of the Gas Company.

83. During the period 2011 to 2015, the Deceased would travel to New York to see the First Plaintiff and Ms. Deninez Moss and upon being taken to the airport in The Bahamas, she would board the plane unaccompanied and disembark in New York unaccompanied. The Deceased would then meet with the First Plaintiff in New York. He concluded that the Deceased remained sharp minded, clear thinking and alert in her business and personal dealings from 2011 to at least 2015 and reiterated that during that period, she remained involved in the day to day dealings of any and all acts regarding the Company, her assets and activities involving her family.

84. During cross-examination, the First Defendant averred that he was unaware that the Deceased had been diagnosed with Alzheimer's disease in 2009. His two aunts, who were the Deceased's sisters, were diagnosed with Alzheimer's dementia. The Deceased did not see a doctor in New Providence as she trusted the doctors in New York. He never saw the 18th January 2011 letter.

85. He was not aware that Dr. Laiz was the Deceased's doctor in New York. He agreed that the medical view in both New York and The Bahamas was that his mother had Alzheimer's. He had no knowledge of the Deceased being hospitalized in 2010 after suffering a fainting spell. When he received the FedEx package on 11th November 2010 from the Second Plaintiff, he did not know it was the Deceased's Alzheimer medication.

86. The First Defendant stated that he was not responsible for the Deceased's care from 2010 onwards but was responsible from 2015, and he did not seek to have his mother admitted to daycare in The Bahamas. He had no idea why the Deceased was admitted to Princess Margaret Hospital and not Doctors Hospital from 2010 onwards. Prior to 2015 the Deceased looked after and lived at home by herself.

87. In 2010 he held no formal position in the Gas Company as he assisted the Deceased who handled it all. She ceased to hold a position in the Company around 2014 or 2015. He had no idea what a codicil was and he had no part in assisting the Deceased with a Will. Anytime there was a meeting, his other siblings were informed. The Deceased went to New York for doctor's appointments and would have had opportunities to talk about the Will.

88. The meeting he and Mr. Atkinson had concerned conversations with his siblings and the IRS changes coming into effect. He guessed Mr. Atkinson had knowledge of what was in the Will. Mr. Atkinson had asked him when his sisters were coming into town and he gave him the information. He denied that he had to speak on the Deceased's behalf because she was unable to understand the ramifications of the shares being transferred due to tax reasons.

89. The First Defendant confirmed that he had a very close relationship with his mother and she confided in him. The Deceased never mentioned her diagnosis to him. He agreed that if his mother had not shown up to work and he found out that she was in the hospital he would have asked her what the problem was.

90. He became aware of her medical condition around 2011 or 2012 when she ran out of her medication and inquired what it was about. Around 2013 he had hired a caretaker for the Deceased. He was not aware of the 2008 Will but he did not know whether Mr. Atkinson was aware of it. He also was not aware of the 2009 Will even though there was a record of him attending a meeting where it was discussed.

91. It was a part of his job to pay the Deceased's bills and he did not do so because she was not capable of paying them on their own. He stated that the Deceased had played a trick on him and left the home to see her niece after he had asked her not to leave. Security cameras were placed in her home and at the Gas Company because they were having break ins.

92. He did not know about the contents of the 2011 Will or what was discussed with the Deceased and Mr. Atkinson. Cepeda, the Second Defendant, would be present at the meetings but would never stay and walked out. He did not know who introduced Anthony Thompson to the Deceased nor did he know who took her to execute the Will. He was not present during any meetings with Anthony Thompson.

93. The First Defendant denied that an outside child was left out of the Deceased's 2011 Will because of her status. He denied that under the 2011 Will his children received more assets.

94. During re-examination, the First Defendant stated that he did not know who took the Deceased to the doctor before 2013.

95. By his evidence in chief, Mr. Ronald Atkinson, a Chartered Accountant by profession, averred that in 2008, through his firm Ronald Atkinson & Co., he was engaged by the Deceased to provide financial and accounting advice to her with respect to her personal business affairs and those of the Company. The Deceased had executed her Last Will and Testament on 1st June 2011 and at the time of its execution, her general business character and personality were of clarity, conviction and certainty.

96. From June 2011 to early 2015, Mr. Atkinson continued to have professional dealings with the Deceased and she continued to show clarity and understanding. The Deceased always knew what she wanted to do and she always asked pertinent questions and in turn expected definitive answers. He frequently dealt with the First Defendant with respect to the Deceased's business affairs as she entrusted the management and operation of the Gas Company to him when she was absent.

97. The meetings involving the operation of the Gas Company always included the Deceased and the First Defendant, which he was often invited to attend together with other family members. The legal records, correspondences and minutes of letters of the Gas Company would attest to her strong mental faculties and business acumen.

98. During a 30th September 2010 business meeting, he, the Deceased and the First Defendant met to discuss changes to the Deceased's 2009 Will and variations in the distribution of the Company's shareholding. One of the changes discussed was the replacement of Karen Carrington as Executor to the Second Defendant, because of her illness. The Deceased also discussed the transfer of fixed deposits to a new company during the meeting.

99. In a subsequent meeting held on 8th February, 2011, he, the Deceased and the First Defendant met to discuss:-

- the signing of the Gas Company's Directors Meeting dated 16th November, 2010 and a related share certificate transferring 66 shares of the Company to the Deceased,
- ECM Holdings which was a company specifically formed to hold fixed deposits previously held in the personal name of the Deceased or the Company, and
- The possible US tax ramifications of certain business activities of the Gas Company, specifically the beneficial ownership of Bahamian corporate shareholdings by the First Plaintiff and Ms. Deninez Moss. The suggestion to the Deceased was to consider giving her Bahamian assets, including the shares in the Gas Company to the Deceased's Bahamian children residing in The Bahamas and giving the U.S. assets to the children living in the U.S.A.,
- a Bahamian cash differential being paid to the three daughters, two of whom were American citizens. He had explained that approval from the Central Bank of The Bahamas would be required to make such payment transfers.

100. During a 22nd February 2011 meeting, the Deceased, the First Defendant and himself agreed that loans were to be made to each of the Deceased's six children. They also discussed Karen Carrington's hospital bills and Ms. Deninez Moss' home mortgage which both required exchange control approval prior to the transfers. This was all explained and understood by the Deceased.

101. The Deceased had given him specific instructions in early 2011 with respect to the approval of requisite transfers by the Company of funds to the First Plaintiff and Ms. Deninez Moss of $200,000.00 each for their personal financial matters. By email dated 24th June 2011, Mr. Atkinson stated that the First Plaintiff was well aware of such business activities conducted by the Deceased in 2011. To his knowledge, there was no noticeable change to the Deceased's strong and energetic character from the signing of the 1st June 2011 Will up to early 2015.

102. During cross-examination, Mr. Atkinson stated that he was not aware that the Deceased was diagnosed with the Alzheimer's dementia disease in 2009 and that he found about the letter dated 27th July 2018 from her doctor which stated that she did. He was also unaware of an attempt to appoint a guardian for the Deceased. He agreed that in a medical sense, the 18th January 2011 letter and the 4th April 2014 email, that she required around the clock caregivers, contradicted his evidence that the Deceased's clarity and understanding existed until 2015.

103. Mr. Atkinson acknowledged that during a 30th September 2010 meeting with the Deceased and himself, it was discussed that there was to be a codicil to the 2009 Will. He did not agree that he and the First Defendant were involved in preparing an additional Will. He could not remember who made the suggestion. He advised her on her financial affairs but what she was going to do with her assets was entirely her decision. Some of those assets were her shares in the Gas Company.

104. He did not suggest to her that there should be a codicil done for tax purposes in reference to any of her shares. Not only was the Deceased his client but also the children who were beneficial owners of the Gas Company although he did not know why they were not at the meetings. He was not aware of a 2008 Will. Mr. Atkinson could not speak to whether the Deceased had spent considerable time in New York with the First Plaintiff up to 2014.

105. Mr. Atkinson stated that there were many changes in the 2011 Will and that he was aware of the Will because Anthony Thompson had sent it to him after it was drafted. He did not notify any of the family members because it was a private document. It was reasonable to say that he had no issue with discussing changes to the 2009 Will with the First Defendant despite the other siblings' absence. He could not say if the Deceased attended the doctor prior to executing the 1st June 2011 Will. Mr. Atkinson denied that he had recommended Anthony Thompson to the Deceased to draft the 1st June 2011 Will.

106. During re-examination, Mr. Atkinson averred that the Deceased attended his office which was across the street from her house. She was clear, sure of herself and had come to him with a specific agenda and requested answers. She never indulged in "chit chat" and it did not appear that she was not in control of her faculties. He did not have occasion to use the words "round the clock caregivers" in relation to the Deceased prior to 2014.

107. The Deceased had explained to him that Anthony Thompson had acted for the Moss and Moss Estate and that he should work with him in connection with a share transfer.

108. Mr. Anthony Thompson, an Attorney was subpoenaed by the Plaintiffs. He stated that he recognized the 2011 Will which he had prepared for the Deceased after she attended his chambers and provided him with written instructions. They went through the draft of the said Will together and she indicated that it was acceptable. He could not recall receiving instructions from anyone else. His chambers was in the same building as Mr. Atkinson's and believed it was he who had referred the Deceased to him.

109. Mr. Thompson did not recall how old the Deceased was nor was he aware of her Alzheimer's dementia diagnosis but he was of the view that she very well knew what she was doing. If he had known he would not have taken instructions from the Deceased.

110. After being shown the Deceased's death certificate, he acknowledged that she was 81 years at the time she executed the 2011 Will. He was not familiar with the golden rule that an older person required a medical certificate and he did not request one. While he was not a medical doctor, she appeared quite capable of making a will based on her demeanor.

111. Mr. Anthony Thompson stated that the Deceased did not know the 2011 Will's witnesses as they were employed with his law firm. He was unaware that she had executed Wills in 2008 and 2009 and he understood that Mr. Atkinson was the accountant for the Gas Company. He believed that the Deceased had paid him for his services and did not recall meeting a Michael Moss.

112. He had known Mr. Atkinson since 1966 when he worked as an auditor for Bacardi Co where he had worked as an accountant. He would consider Mr. Atkinson a friend and also a business associate as they would assist each other with obtaining work. He was

not instructed by Mr. Atkinson to use the 2009 Will or any will as a template. He would not have a copy of the note provided by the Deceased as it was the practice of his firm to discard files which had been inactive for six to eight years.

113. He was recalled in order to address a document entitled Assignment and Transfer dated 18th August 2010 which was prepared by his firm. He stated that the Deceased may have instructed him to prepare it and accepted that it concerned the Gas Company. The Deceased was not aware of allegations made subsequently by Shekira Moss against him that she had received a sum which was less than she was entitled to.

114. During re-examination, Mr. Thompson stated that he did not recall preparing the document as there may have been a draft prepared and given to him but he did not complete it from its beginning. The basic information to be included in it was handed to him in order to prepare it. The disbursements from the Assignment and Undertaking were made by him. As far as he was aware all of the children signed it by possibly attending his chambers or Mr. Atkinson's office. He did not recall preparing a codicil for the 2009 Will.

115. Andrew Thompson, the General Manger of the Gas Company since 2017 stated that he had known the Deceased since childhood but in a business capacity since 2003, when he had been a supervisor for the Shell Gas Company. During that time, the Deceased would ask him to assist her from time to time with certain repair and maintenance issues arising in the Gas Company.

116. Up to and inclusive of 2011, anytime he interacted with the Deceased, she was alert, coherent, and consistent and was clear and articulate in her speech and understanding. There were no signs that anything was wrong with her mental state or that she lacked understanding. Whenever the Deceased contacted him to assist with maintenance and/or repair issues, she clearly identified the problem and gave him clear instructions which he would address.

117. Mr. Andrew Thompson stated that the Deceased had recommended his maintenance and repair services to others on many occasions, for example on 20th February, 2013 she referred him to the American Ambassador's residence and around 9th June, 2013, she referred him to the Chinese Embassy. Outside of their professional relationship, he and the Deceased regularly spoke and she would ask him about his family who he would bring to the Gas Company's office to see her. The Deceased would also call his wife to inquire of her wellbeing and to conduct business.

118. He concluded that up to 2014, the Deceased was always alert, clear, coherent and articulate. She was cheerful and business oriented and deliberate in her actions. He never had any reason to suspect that the Deceased lack understanding in the matters they discussed or what she had instructed him on and that she was incapable of handling her affairs.

119. During cross-examination, Mr. Thompson stated that he spoke to the Deceased just about every day. He was unaware of her 2009 Alzheimer's dementia diagnosis or that she was medicated for the same. He knew nothing about a Will. Despite being referred to medical evidence, Mr. Thompson stated that he had seen no change in the Deceased.

He denied having an incentive to support the First Defendant due to his employment with the Gas Company.

120. During re-examination he clarified that he saw the Deceased every day from 2000 to 2004/2005. He saw a deterioration at the end of 2015 and going into 2016. He serviced the tanks at the Gas Company.

SUBMISSIONS

ISSUE ONE – Whether the deceased had Alzheimer's Dementia and whether it was the cause of the dispositions made in the 2011 Will.

PLAINTIFF'S SUBMISSIONS

121. The Plaintiff rely on the diagnosis by Dr. Marcelo Laz, the Deceased Primary Care Physician. They submit that :-

i. On 30th October 2009, the deceased was diagnosed with Alzheimer's Dementia by Dr. Marcelo Laiz (Primary Care physician). The deceased was on medication for Alzheimer's disease since 15th November 2009.

ii. In May 2010, the deceased was hospitalized at Princess Margaret Hospital and her discharge form noted that she was suffering from Alzheimer's disease. On 17th November 2010, the Second Plaintiff arranged for the deceased's Alzheimer's medicine to be couriered to the First Defendant for the deceased whilst in Nassau.

iii. By a letter dated 18 January 2011, Dr Marcelo Laiz wrote that the deceased was his patient since January 2008 and was unable to perform activities of daily living, make decisions about her health care and/or personal needs. Dr. Laiz recommended that it was in the deceased's best interest to appoint a guardian over the property of the deceased.

iv. On 2nd September 2011, Dr. Laiz completed an application for daycare for the deceased to be enrolled in St. Joseph's Adult Day Care Centre located at #47 Boyd Road, Nassau, Bahamas which documented that the deceased was severely suffering from Alzheimer's dementia.

v. In 2018, an updated letter by Dr. Laiz was obtained. The letter demonstrated that prior to the June 2011 Will being executed, the deceased visited Dr. Laiz on 23rd November 2009, 11th March 2010, 7th June 2010, 13th September 2010, 14th September 2010, 13th December 2010 and 14th March 2011. Additionally, since the deceased's diagnoses, her condition had worsened and she required full time care and supervision.

vi. The deceased died on 3rd June 2017. Pursuant to the deceased's death certificate dated 14th June 2017, one of the deceased's causes of death was listed as Alzheimer's disease.

122. They further rely on their evidence of the Deceased behavior as led at the trial as to be forgetfulness and requiring help with her daily activities.

123. They also rely on the expert report of Dr. Cohen where he concluded with a degree of medical certainty that when the deceased executed the 2011 will she was suffering from a progressive brain disease.

124. Dr. Cohen maintained that it did not matter which form of dementia the deceased had with Vascular or Alzheimer's it did not change his opinion that the deceased lacked capacity to execute the 2011 Will.

125. Mr. Moss conceded that he had received Alzheimer's medication for the deceased and was aware that she was taking medication but did not know what for.

126. He acknowledged that the deceased would go missing sometime in New York in 2011 and that she played a trick on him in the Bahamas by going missing.

127. Mr. Moss's evidence was inconsistent in that his witness statement maintained that the Deceased remained sharp up to 2015 but in cross-examination he stated that she could have been diagnosed with Alzheimer's disease.

128. His evidence on his knowledge of the nature of the medication received by him for the Deceased was contradictory. He initially stated that he did not know why she was taking medication but subsequently found out of her diagnosis when she ran out of medication in November 2010. Finally he stated that he found out about her diagnosis in 2013.

THE DEFENDANTS' SUBMISSIONS

129. The Defendants challenged the expertise of Dr. Cohen to opine on Alzheimer's disease as an expert can only opine where he has some specialty knowledge and the court accepts that the witness has that specialty.

130. Dr. Cohen is not an expert in the field of neurology and in his evidence he confirms that he is a psychiatrist with limited training in the field of neurology. He was accepted as an expert in the field of psychiatry including forensic psychiatry and psychiatric disorders.

131. He confirmed that he would only be able to answer limited questions on neurology and neurological symptoms.

132. The duties and responsibilities of experts were stated by Justice Creswell in **National Justice Compania Navierasa S.A v Prudential Insurance Company (Ikarian Reefer)**:-

> **I will refer to some of the duties and responsibilities of experts in civil cases because I consider that a misunderstanding on the part of certain expert witnesses . . . as to their duties and responsibilities contributed to the length of the trial. The duties and responsibilities of expert witnesses in civil cases include the following:**
>
> **i. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation;**
>
> **ii. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within its expertises. An expert witness in the High Court should never assume the role of advocate.**

iii. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion;

iv. An expert witness should make it clear when a particular question or issue falls outside his expertise;

v. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more a provisional one. In cases when expert witnesses who has prepared a report could not assert that the report contain the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report;

vi. If after the exchange of reports, an expert witness changes his view on a material matter having read the otherside's expert report or for any other reasons, such change of view should be communicated (through legal representatives) to the otherside without delay and when appropriate to the court.

133. Dr. Cohen breached 1-4 of these duties by trying to advance the Plaintiff's case at all costs and failing to recognize that his purpose was to assist the court. This breach was evidenced in his opinion that the Deceased's death certificate which noted various causes of death such as Brain Cancer and Multiple Myeloma was incorrect rather than considering that these causes could have caused the encephalopathy, and inter alia seizures which the Deceased had suffered from in and after 2013 as opposed to Alzheimer's and such ultimately led to her death. He only partially conceded the possibility under cross-examination.

134. Further Dr. Cohen asserted that Dr. Laiz hand written notes must be incomplete because they did not include any clinical findings or basis for the Alzheimer's Dementia diagnosis rather than accept that there were no clinical findings in his report.

135. Dr. Cohen is unable to give an opinion to reject the effect the role the Brain Cancer played because of his limited ability both from a neurological and oncological standpoint.

136. Dr. Cohen failed to consider that all of his opinion was based on inferences drawn from documents reviewed without questioning the accuracy of those documents. It was only when he was questioned about the possibility of the brain cancer causing the symptoms manifested in 2013 that he asserted the inaccuracy of the death certificate.

137. There is no other medical evidence to support the diagnosis of Dr. Laiz. The Plaintiffs are relying solely on the handwritten notes of Dr. Laiz. There were no diagnostic tests conducted at the time of the diagnosis. The MRI conducted in 2007 concluded that the Deceased had a clear bill of health as described by Dr. Cohen. The test in 2010 did not support the diagnosis.

138. The application to have the Deceased admitted to daycare was because of fainting and not Alzheimer's; no mention was made of loss of cognitive function.

139. No neurologist gave evidence. Dr. Laiz did not give evidence to explain his handwritten notes.

140. The neurologist, Dr. Roe, when he examined the Deceased made a diagnosis of encephalopathy and not Alzheimer's.

141. The MRIs' conducted show age related brain atrophy up to the time that she executed her will and were not consistent with dementia.

142. Finally, Dr. Cohen conceded that the diagnosis was guesswork and that Alzheimer's could only be definitively determined at death. He eventually moved from Alzheimer's disease in his conclusion to a progressive brain disease.

DECISION

143. Expert witnesses must be accepted by the court to have expertise in the field relevant to the issues which the court must decide.

144. Dr. Cohen is not a neurologist; neither is Dr. Laiz. Dr. Cohen confirmed in his evidence that his fellowship was not in neurology and that his psychiatric training included a neurology rotation and that he would be qualified to answer limited questions in the field of neurology.

145. He also accepted that neurology is a branch of medicine dealing with disorders of the nervous system; and that a neurologist is a medical doctor who specializes in diagnosing and healing diseases associated with the brain and the nervous system.

146. He maintained that psychiatrists treat dementia very commonly.

147. He accepted that dementia is a syndrome based on clinical findings with multiple possible causes inclusive of memory loss and loss of cognitive function. There are various causes of dementia of which Alzheimer's is one.

148. Based on this, Dr. Cohen would have to satisfy the court that there were clinical findings to prove the diagnosis of Alzheimer's and not another cause.

149. He defines Alzheimer's disease as a progressive disorder which causes brain cells to degenerate and waste away.

150. Dr. Cohen's opinion is based on his interpretation of the medical evidence as set out in his opinion. He did not examine the Deceased nor did he perform any medical tests on her. In fact, he is personally unable to make a diagnosis of this brain disorder because he is not qualified to do so.

151. I am not satisfied that upon a review of the medical evidence produced, and the oral evidence led at trial that at the time the diagnosis was made, one could definitively state that the Deceased was suffering from Alzheimer's in 2009. I am aware however that one of the causes of death was Alzheimer's disease and therefore as the disease could only be definitively determined at death, the onset of the diseased happened at some point in

her life.

152. As for Dr. Cohen's expert opinion, as Dr. Cohen is not qualified to make the diagnosis, he could only rely on what was before him to confirm that diagnosis. I find it curious that he failed to concede his limited ability to be definitive in the diagnosis based on his lack of specialty in that field and to acknowledge other possible causes of the Deceased symptoms based on the same evidence he reviewed. Based on this, I did not find his evidence persuasive as an expert as to the cause of the symptoms being manifested by the Deceased leading to her death. His evidence of the general pathology of the various types of causes of dementia was particularly helpful, however, although not to confirm that the Deceased was in fact suffering from Alzheimer's disease.

153. Accordingly I find that in the absence of further evidence from Dr. Laiz to explain his handwritten notes or evidence from a neurologist who is qualified to diagnose disorders of the brain, the Plaintiff cannot categorically prove that the Deceased was suffering from Alzheimer's disease in 2011 and not some other disease or medical condition.

154. I accept that the diagnosis is made based on probability but Dr. Cohen is not the specialist to satisfy the court that this diagnosis was the most probable of all other causes and by such expert opinion, prove that the Deceased categorically suffered from Alzheimers in 2011.

155. I therefore must consider what other evidence existed to assist the Court. There are four pieces of evidence which the Plaintiffs rely on to support their claim that the Deceased suffering from Alzheimer's Disease, 1) Dr. Laiz's handwritten note, 2) Medication prescribed, 3) PMH discharge note and 4) the death certificate of the Deceased. Based on these I accept that there may have been a probability that the Deceased had Alzheimer's in 2011, but they do not, when juxtaposed with the other medical evidence rule out other causes of the symptoms being experienced by the Deceased.

156. The issue of whether this probability resulted in the dispositions made in the 2011 Will will be addressed in the other issues.

ISSUE TWO – Whether the Deceased had the requisite testamentary capacity to instruct, draft and execute the 2011 Will?

Plaintiffs' Submissions

157. The Plaintiffs rely on S. 4 of the **Wills Act** in relation to testamentary capacity, which states:-

"4. 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.

158. **In the Estate of Parks [1953] 2 ALL ER 1411** the test to be applied in determining whether or not a person possessed a sound disposing mind is whether that person was capable of understanding the nature of the contract they were entering free from influence of morbid delusions on the subject.

159. The Plaintiffs submit that the test of testamentary capacity was established in **Banks v. Goodfellow (1870) LR 5 QB 549** where Cockburn CJ stated at pg. 565 of the judgment that"

> **"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 in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.**
> **Here, then, we have the measure of the degree of mental power which should be insisted on. If the human instincts and affections, or the moral sense, become perverted by mental disease; if insane suspicion, or aversion, take the place of natural affection; if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions, and to lead to a testamentary disposition, due only to their baneful influence - in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand."**

160. The test set out in **Banks v. Goodfellow (supra)** was relied on in **Sharp and another v Adam and others [2006] EWCA Civ 449** and, **In Re Key, deed: Key and another v Key and others [2010] 1 WLR 2020**, where the court stated at paras. 7 and 8 of their judgment that:-

> **"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 examination and findings: .....**
> **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."**

161. The Plaintiffs contend that the burden of proof is on the Defendants to demonstrate that the deceased had testamentary capacity and rely on the text in **Williams, Mortimer and Sunnucks on Executors, Administrators and Probate** in support. At pg. 169 it states:-

> **"It has, therefore, been said that the burden of proving unsoundness of mind lies on those who allege it. But when the whole evidence is before the Court, the decision must be against the validity of the will, unless it is affirmatively established that the deceased was of sound mind when he executed it. The burden of proof may shift from one party to another in the course of a case. Where grave suspicion of incapacity arises in the case of those propounding the will, they must dispel that suspicion by proving testamentary capacity. Thus where it is admitted by those propounding the will that the deceased suffered from serious mental**

illness at a period before the will, or where its terms are incoherent, irrational or strange, a presumption is raised against it, though not a conclusive one."

162. In **Key & another v. Key and others [2010] EWHC 408** Briggs J discussed the burden of proof at para. 97 of his judgment:-

> **"The burden of proof in relation to testamentary capacity is subject to the following rules:**
>
> **(i) While the burden starts with the propounder of a will to establish capacity, where the will is duly executed and appears rational on its face, then a court will presume capacity.**
>
> **(ii) In such a case the evidential burden then shifts to the objector to raise a real doubt about capacity.**
>
> **(iii)If a real doubt is raised, the evidential burden shifts back to the propounder to establish capacity nonetheless."**

163. The Plaintiffs submit that the Defendants have not disputed the medical evidence presented however, they suggest that notwithstanding the Deceased's diagnosis, she was alert, had strong mental faculties and business acumen. The Defendants did not provide any medical evidence to support their position. Contrary to the Defendant's position, the evidence provided shows that prior to the execution of the 2011 Will, the Deceased's condition progressively deteriorated and there was no medical evidence produced to demonstrate that she had the testamentary capacity to execute the 2011 Will based on her old age and diagnosis.

Defendants' Submissions

164. The Defendants contend that because the Plaintiffs seek the revocation of the Grant of Probate the Will must be proved in solemn form. In **Chow Siu Po v Wong Ming Fund 5 IELR 843 [2003] 1 HKC 146** the Court stated:-

> **'Under the common law, a person whose interest was adversely affected by a probate granted in common form could call it in by citation and proceed by action for revocation of the grant. This required the personal representative who obtained the probate to prove the will in solemn form.' (My emphasis.)'**

165. The common law rule had not been altered by the **Probate & Administration of Estates Act, 2011** and that despite having received a Grant of Probate in common form, they were the propounders of the 2011 Will. In such capacity, they carried the burden or the *'onus probandu'* of satisfying the conscience of the court that the 1st June 2011 Will was the last will of a free and capable testator. They submit that there was a legal presumption which aided them in discharging the burden.

166. The Defendants contend that upon reviewing the 2011 Will, it was unquestionably revealed that it was executed and attested in the manner prescribed by the Wills Act, 2002 and that the Deceased even initiated each page of the 1st June 2011 Will even though that was not a requirement under the Wills Act, 2002 but was an indicator that there was due and proper execution.

167. Although it was not a requirement under the Wills Act, 2002, the 2011 was accompanied by duly executed and notarized Affidavits of Execution sworn by each of the attesting witnesses and attached to the Will itself. There was no objection by the Plaintiffs that the

signature on the 2011 Will was not the Deceased or that she did not execute it. The Defendants rely on **Re Jean Mary Clitheroe (deceased) Clitheroe v Bond [2020] EWHC 1185 (Ch)** in which it was stated:-

> **"A will rational on its face, executed and attested the manner required by law is presumed in the absence of evidence to contrary to have been made by a person of competent understanding"**

168. The Defendants submit that the authorities demonstrated that the presumption was a rebuttable one and that the onus shifted to the Plaintiffs to rebut the presumption of capacity by adducing evidence which created a "real doubt" as to the Deceased's capacity. In **Guy v McGregor [2019] NICh 17**, the Court endorsed and adopted the rules in presumptions set out in **Re Key (Deceased).**

> **"The burden of proof in relation to testamentary capacity is subject to the following rules:**
>
> **i. While the burden starts with the propounder of a will to establish capacity, where the will is duly executed and appears rational on its face, then the court will presume capacity.**
> **ii. In such a case the evidential burden then shifts to the objector to raise a real doubt about capacity.**
> **iii. If a real doubt is raise, the evidential burden shifts back to the propunder to establish capacity nonetheless".**

169. In **Ledger v Wooton [2008] WTLR 235** the Court provided some guidance on the evidentiary burden or "real doubt" being discharged and relied heavily **on Bank v Goodfellow (1870) LR 5 QB 549** which stated:

> **"It is well to remember that the context of the passage was a case in which the testator (who made his will in 1863) had formerly been of unsound mind. He had been confined to the county lunatic asylum in 1841. When discharged he acquired the fixed delusion that a man called Alexander pursued and molested him, which persisted notwithstanding Alexander's death. He believed he was pursued by visible evil spirits. He suffered from epileptic fits. But he was capable of managing his financial affairs, and gave coherent instructions for a Will at the same time as those for a lease, and as the taking of an account of rent due. The jury found for his will. The question for the Court was whether the delusions under which the testator laboured were fatal to testamentary capacity " in other words, whether delusions arising from mental disease, but not calculated to prevent the exercise of the faculties essential to the making of a will, or to interfere with the consideration of the matters which should be weighed and taken into account on such an occasion, and which delusions had in point of fact no influence whatever on the testamentary disposition in question, are sufficient to deprive the testator of testamentary capacity and to invalidate a Will.." (ibid p.555). It was in this context that the Court pronounced the rule that the testator "... 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 in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made..... if insane suspicion, or aversion, take the place of natural affection; if reason and judgement are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions, and to lead to a testamentary**

disposition, due only to their baneful influence - in such a case it is obvious that the condition of the testamentary power fails..." [Emphasis Added]

170. Based on the dicta in **Banks v Goodfellow**, the Court in Ledger determined that (1) where mental illness was alleged that it must first be established (2) that there must be a causal connection between the established mental condition and the dispositions of the Will and (3) the question as to whether there was a causal connection between the mental condition and the dispositions was a matter for the Court to determine. In that regard, the Defendants submitted that the Plaintiffs needed to establish (1) that the Deceased had Alzheimer's Dementia as pleaded, (2) the causal connection between the Alzheimer's Dementia and the dispositions made by the 2011 Will.

171. The Defendants rely on **Vadakathu v George [2009] SHGC 79** in support of the notion that there had to be a causal connection between the established mental condition and the dispositions in the 2011 Will:-

> **"A presumption of continuance of testamentary incapacity did not arise merely because the testator had a serious mental illness; it had to be shown that the illness was sufficient to have caused lack of testamentary capacity on the earlier date" [Emphasis Added]**

172. The establishment of a mental condition did not in and of itself cast "real doubt". Should the Plaintiffs' evidence fail to meet the evidentiary standard of establishing the mental condition and establishing the causal connection between the form and the dispositions in the 2011 Will, there would be no real doubt and the burden remained on the Plaintiffs to establish a lack of testamentary capacity.

173. The Defendants contend that the test for testamentary capacity was not a medical test but a question for the Court and that the authorities have even held that it could be the opinion of a solicitor and lay witnesses. In **Guy v McGregor and others (supra)** the Court stated:-

> "**The test for testamentary capacity set out in Banks v Goodfellow is not a medical test although the court will pay particular attention to and will generally be greatly assisted in most cases by expert medical opinion. The court will however also take into account and give weight to the evidence of drafting solicitors and lay witnesses who knew the testator.**" [Emphasis Added]
> **"in determining whether a testator has capacity the court must consider the evidence of all the witnesses including the medical experts, the drafting solicitor and the other lay witnesses. The weight to be given to each type of evidence will depend upon a number of factors, including the witness's expertise, knowledge, experience and independence. In some cases the assessment of a medical expert may be limited by the fact he has never met nor examined the testator and there are limited medical notes and records available to him, for example in respect of the severity of the testator's speech problems or memory loss as of the date of execution of the will. In such cases the weight to be attached to the medical evidence may be significantly less than that attached to the evidence of an experienced solicitor who knew the testator well or who carried out a specific assessment of capacity at the date of execution of the will. In other cases the nature of the medical evidence may be such that it outweighs the evidence of even an experienced solicitor. In general the weight to be attached to the view expressed by a solicitor as to capacity will depend on that solicitor's experience,**

his knowledge of the testator, and the nature of any assessment carried out by him in respect of capacity. The weight to be attached to the evidence of lay witnesses will generally depend on their independence, experience and knowledge of the testator. In cases where there is a divergence in the views of the expert medical witnesses or where there is a paucity of medical notes and records, the evidence of lay witnesses who can give detailed evidence of the testator's behaviour, demeanour and activities around the time of the execution of the will, by reference to conversations they had with the testator or in respect of activities conducted by the testator at the relevant date, will be of much assistance and will be given great weight".

"Accordingly, I consider that there is no hierarchy of witnesses. Each case will be fact specific. In some cases the medical evidence will be the weightiest factor. In other cases the evidence of the solicitor will be of magnetic importance and in yet other cases the evidence of the lay witnesses will be decisive".

174. Accordingly, the Defendants submit that clearly the opinion of Dr. Cohen and/or the medical evidence was not necessarily dispositive or determinative of the issue of the Deceased's testamentary capacity.

175. The Defendants additionally contend that independent medical advice was required if the evidence as a whole demonstrated that the testator was seriously ill at the time of the Will's execution and for the same to be applied in the present case, the Plaintiffs had to establish that the Deceased had Alzheimer's Dementia as pleaded and as a result, she was seriously ill when the 2011 Will was contemplated, planned and executed. The absence of such independent medical advice would not necessarily vitiate the 2011 Will. In **Re Key, Deceased [2010] EWHC 408 (Ch)** the golden rule and its application was discussed:-

"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 examination and findings ..."

"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...Those observations, in my view, reflect the law in this jurisdiction. Irrespective of whether the golden rule or best practice was followed in a particular case, it is a question of fact, which is to be determined having regard to all of the evidence and by applying the evidential standard of the balance of probabilities, whether a testator was of sound disposing mind when the testamentary document which is being propounded was executed."

DECISION

176. A key requirement for the execution of a Will is the sound mind of the testator. It is a statutory requirement as provided for by section 4 of the Wills Act which states that in order for a Will to be valid it must be made by a person who is eighteen years of age or older and is of sound disposing mind.

177. A sound disposing mind is translated into the testator's testamentary capacity. The test for testamentary capacity was established in **Banks v Goodfellow (1869-70) LR 5 QB 549**.

In **Boast v Ballardi and others [2022] EWHC 1533 (Ch)**, Master Clark discussed the legal principles governing testamentary capacity.

> "**Legal principles**
>
> **28. The applicable test as to testamentary capacity is set out in *Banks v Goodfellow* (1869-70) LR 5 QB 549:**
> **"It is essential to the exercise of such a power that a testator [a] shall understand the nature of the act and its effects; [b] shall understand the extent of the property of which he is disposing; [c] shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object, [d] 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 in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made."**
> **29. As to the burden of proof:**
> **(1) The burden is on the person seeking to establish the will ('the propounder') to establish capacity;**
> **(2) Where a will is duly executed and appears rational on its face, then the court will presume capacity;**
> **(3) An evidential burden then lies on the objector to raise a real doubt as to capacity;**
> **(4) Once a real doubt arises there is a positive burden on the propounder to establish capacity.**
> **See *Ledger v Wootton* [2007] EWHC 2599 (Ch), [2008] W.T.L.R. 235 at [5].**
> **30. As to the principles governing a trial on written evidence, I refer to para 14-009 of *Theobald on Wills* (19th edn, 2021):**
> **"Where the court is asked to pronounce against what purports to be the last will of the deceased, evidence must be produced to show lack of due execution, incapacity or whatever ground is alleged for the invalidity of the will. It is the duty of the probate court to give effect if it can to the wishes of the testator as expressed in testamentary documents and it should not, therefore, pronounce against what it knows to be the last will in date without making an inquiry as to its validity."**

178. Given the fact that the Plaintiffs have claimed that the Deceased lacked the testamentary capacity to execute the 2011 Will, they bear the burden of proving that there was some doubt that she lacked testamentary capacity. They have provided their evidence of the Deceased's intentions in the similarly drafted 2008 Will and the 2009 Will which the Deceased had informed them of, their evidence of their relationship with the Deceased the documentary evidence and the opinion evidence of Dr. Cohen.

179. Although Dr. Cohen did not personally examine the Deceased, by the evidence provided to him, it was his professional opinion that the Deceased did in fact suffer from Alzheimer's dementia and that she lacked the mental capacity to execute the 2011 Will. Dr. Cohen explained that Alzheimer's dementia was diagnosed on a balance of probability and that such diagnosis could not be conclusively determined until the death of an individual. The only evidence from a neurologist who would be the appropriate professional to definitively determine the diagnosis did not mention the disease in his report in 2013.

180. Dr. Cohen stated that after reviewing the notes of the MRIs taken of the Deceased, there was, evidence of brain atrophy from old age and evidence of smaller strokes in the brain. These, he opined would have confirmed that the Deceased had Alzheimer's dementia. The

Deceased's death certificate also listed amongst other causes a cause of death as Alzheimer's dementia.

181. The Plaintiffs stated that in the years leading up to the 2011 Will, they watched the Deceased's mental capacity decline and in response they were responsible for taking care of her daily needs. She was unable to remember things about her daughter's sickness and her husband's death. They also stated that they had to accompany the Deceased during her travels to New York and to courier her Alzheimer's dementia medicine to the First Defendant even though he denies knowing what the medicine was for.

182. The First Defendant stated that up to 2015 the Deceased ran the Gas Company and he assisted her. His assistance was not as a result of her diminished mental capacity. He had cameras installed at his home because of break-ins and not because she wandered. He in fact stated that on an occasion when he could not find the Deceased, she had not wandered but played a trick on him and attended her niece's home. However, there was one occasion when the Deceased ended up in the Princess Margaret Hospital.

183. On 16th September 2014, the Deceased executed a Power of Attorney allowing Mr. Atkinson to hire and fire employees at the Gas Company. This was arranged by the First Plaintiff and another daughter. Similarly, the 2009 Will was executed three months prior to the Deceased's 2009 Alzheimer's dementia diagnosis by Dr. Laiz. Finally the First Plaintiff had acknowledged receipt of a cheque from the Deceased for over $400,000.00 which was signed 8 days after the June 2011 Will which she accepted.

184. I do not therefore accept that the Plaintiffs have discharged their burden of proving that the Deceased lacked testamentary capacity at the time she executed the 2011 Will. More importantly, the fact even if the Deceased was indeed suffering from Alzheimer's disease at the time of the 2011 Will, it is not the determinative factor to take into consideration when deciding whether there was a lack of testamentary capacity. I adopt the dicta in **Vadakathu v George [2009] SGHC 79, 12 ITELR 101**, where Chan Sek Keong CJ of the Singapore High Court held,

> **A presumption of continuance of testamentary incapacity did not arise merely because the testator had a serious mental illness; it had to be shown that the illness was sufficient to have caused lack of testamentary capacity on the earlier date. Faced with an allegation of serious mental illness, the propounder of the will had either to show that the illness was not such as to have caused lack of testamentary capacity or that the testator had executed the will during a lucid period. There was no evidence as to when the testator might have ceased to have testamentary capacity and evidence that he had been lucid at the time of execution of the will."**
>
> **Further at Para 64:**
> **"64 In a case of this nature, the function of the court is to decide whether the testator has testamentary capacity at the relevant time. This involves making a finding of fact by applying the law to the evidence. In matters involving specialised knowledge, such as schizophrenia, the court has to rely on the opinion of medical experts, but it does not have to accept any medical opinion if it is not supported by the objective evidence. An expert opinion should have at the least a substratum of facts."**

185. The 2009 Will was accepted as valid even though it was executed months before her diagnosis and there is no doubt that there would have been signs of the Alzheimer's dementia if she did in fact suffer from the disease at that point which led to tests being run to make such a diagnosis. The acceptance of her ability to execute a Power of Attorney and the acceptance of her ability to sign cheques for substantial sums of money would support the finding that despite her diagnosis she had the ability to think clearly and to carry out financial activities. The medical opinion was not supported by the majority of the evidence of the cognitive ability of the Deceased so as invalidate her actions. Even the Plaintiffs accepted that she could transact business and allowed her to do so.

186. I am satisfied that despite a diagnosis of Alzheimer's whether definitively proven or not, it did not prevent her at the material time from conducting estate planning as she saw fit. The evidence of Mr. Atkinson is persuasive in that the issue of the tax changes in the USA would directly impact her US family members and hence an appropriate reason to change her will. The Plaintiffs knew of the issue, even though they deny accepting the proposed changes.

187. As Chief Justice Keong stated in Vadakathu:-

> **"67 Besides being simple, the Will was also entirely rational. Neither Dr Ngui nor Dr N was questioned on the rationality of the Will in relation to GG's testamentary capacity. The DJ did not raise it either. In my view, the rationality of a will has a significant bearing on the testator's rationality, and is a sound indication of testamentary capacity. In *Banks* ([29] *supra*) and *Estate of Eusoff* ([33] *supra*), the courts took into account the "inofficiousness" of the will as indicating a lack of testamentary capacity. In my view, just as an inofficious will is some evidence of an irrational testator, a rational will is some evidence of a rational testator. In the present case, not only was the Will not inofficious, it was completely rational and something that was naturally expected.**

188. The Deceased's 2011 Will was rational based on the risk from the changes in the US tax regime which would directly impact offshore assets of US citizens.

189. I also note that the doctor responsible for the diagnosis failed to give evidence to support his medical findings and explain how he arrived at his diagnosis.

190. As established in the evidence there is no legal defect apparent on the face of the will, it is in compliance with the requirements of the Wills Act. The presumption therefore shifts to the Plaintiff to rebut the presumption that the testator lacked the testamentary capacity to execute the 2011 Will. They have in my opinion failed to do so.

191. As held in **Ledger v Wooton** the Plaintiffs also needed to show that there was a causal connection between the diagnosis and the execution of the 2011 Will. There was no evidence led which showed that any of the Plaintiffs were omitted from benefiting under the will. It is accepted that there was a marked change in the recipients and amount of the gifts devised and bequeathed under the will but I am satisfied and accept as highly persuasive the evidence of Mr. Atkinson who spoke of the concern of US taxes being levied upon the Gas Company if shares were inherited by US

residents. There is no evidence of any irrational behavior leading up to the Deceased instructing Mr. Thompson and when she executed her will.

192. Mr. Anthony Thompson who was subpoenaed by the Plaintiffs stated that in his opinion he did not notice any mental deficits. The Deceased was coherent. Mr. Atkinson who provided financial services for her for many years attested to her strong mental acumen and strong personality which he said did not decline until 2014/2015. All of her children confirmed her sharp business intellect and acumen. The only doubt raised was that she suffered from Alzheimers. No evidence was led of any mental inability to run her business or manage her assets as a result of this diagnosis.

193. Accordingly, I do not find that the Deceased lacked the testamentary capacity to execute the 2011 Will.

ISSUE THREE – Whether the 2011 Will was executed under suspicious circumstances?

Plaintiffs' Submissions

194. The Plaintiffs contend that the 2011 Will was executed under suspicious circumstances. In **Tyrrell v. Painton and another [1894]** the Court quoted the dicta of Parke B in **Barry v. Butlin 2 Moo. P.C. 480** where it stated:-

> **"The rules of law according to which cases of this nature are to be decided do not admit of any dispute so far as they are necessary to the determination of the present appeal, and they have been acquiesced in on both sides. These rules are two: The first that the onus probandi lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased."**

195. In **Williams, Mortimer and Sunnucks on Executors Administrators and Probate** it states at pgs. 175 – 176:-

> **"The fact that the deceased has given no instructions for the will requires explanation, especially where the beneficiary himself prepared it; and so does the fact that the deceased was without independent advice, legal or otherwise, and that his relations and friends were kept from him. A radical departure from testamentary dispositions, long adhered to, requires explanation, especially if the person in whose favour the change is made possesses great influence and authority with the deceased and originates and conducts the whole transaction; and such facts may raise strong suspicion that that the change was not the result of the free volition of the deceased."**

196. In **Hoff and others v Atherton [2004] EWCA Civ 1554** the Court noted at paragraph 63:-

"[63] Whether those are inferences which should be drawn depends, of course, on the facts of the particular case. The fact that a beneficiary has been concerned in the instructions for, and preparation of, the will excites suspicion that the testator may not know the contents of the document which he signs – or may not know the whole of those contents. The degree of suspicion – and the evidence needed to dispel that suspicion – were considered by this Court in Fuller v Strum [2001] EWCA Civ 1879, [2002] 2 All ER 87 paragraphs [32]–[36], [73], [77], [2002] 1 WLR 1097, 1107C- 1109A, 1122A-C, 1122G-1123C."

197. In **Moss v. Moss and another [2015] 1 BHS J. No. 93**, a case similar to this, the Plaintiff brought an action against the beneficiaries on the basis that the Defendants were not carrying out the wishes of the testator under a Will and the Defendants counterclaimed seeking to challenge the Will on the basis that the deceased lacked testamentary capacity at the time of execution and that the will was executed under suspicious circumstances.

198. In that case the Plaintiff was intimately involved in the preparation of the Will. .At paragraph 27(f) the Court noted the following concerns:

"The Plaintiff who inherits the entirety of Clarence Moss' estate was involved, as was the beneficiary in the Moonan v Moonan, with the process of taking instructions for the preparation of the Will:

i.) The Plaintiff was involved in locating the attorney to be utilized, who was not the Testator's usual solicitor. She obtains the services of the sister-in-law of Wendy's husband. She was well aware of an acquainted with the Testators usual attorney, Fred Mitchell as she had been aware of the preparation of the prior will.

ii.) Contrary to the Plaintiff's and Wendy Rolle's assertion that the Testator had sent for Krystal Rolle specifically, the evidence of Krystal Rolle was that she had never met the Testator or done work for him prior to being contacted on May 23rd 2011. I do not accept that he had any previous knowledge of Krysal Rolle as was alleged.

iii.) The Plaintiff was present in the hospital room with the Testator during the initial giving of the instructions to Krystal Rolle over the telephone.

iv.) The Plaintiff received Krystal Rolle at the hospital and took her to the Testator's room the following day when Krystal Rolle met with the Testator to confirm the instructions.

v.) The Plaintiff remained in the hospital room for the entire time whilst Krystal Rolle consulted with and examined the Testator and for the eventual execution of the document.

vi.) The Plaintiff and or Wendy Rolle saw to the settlement of the fees of the Attorney for the preparation of the will.

Conclusion

28 In the circumstances therefore I am of the view that the Defendants have succeeded on their averment that the execution of the Will of 24 May 2011 was attended to by suspicious circumstances such that the deceased was in such a condition of mind that he was unable to understand the nature of the act and its effect, or to comprehend and appreciate matters to which he ought to give effect."

199. The 2008 Will provided for an equal distribution of the Deceased's estate to her children and her grandchildren with the executors being the First Plaintiff and the First Defendant and that if either one was unwilling to serve as such, then the Second Plaintiff would serve as Executor or if he was unwilling then Deninez Moss would serve as an alternative. The devises in the 2008 Will were similar to those in the 2009 Will.

200. The shares in the Gas Company and all related parent and subsidiary companies were to be devised by way of joint tenancy to all of the Deceased's surviving children and that the residue would be bequeathed to the Plaintiffs which they submit was an equitable distribution of the deceased's assets. The Deceased was two months away from her eighty first birthday when the 2011 Will was executed. She was on medication for Alzheimers disease for two years, in addition to being on hypertension medication for three years. It contained substantial deviations from the 2008 and 2009 Wills.

Defendants' Submissions

201. The Defendants rely on **Brown v Willoughby 14 ITELR 758 [2012] WASC 20** which endorsed the sentiments of **Theobald on Wills (16th ed, 2001):-**

> **"If a will was prepared and executed under circumstances which raise a well-grounded suspicion that the will (or some provision in it, such as the residuary gift) did not express the mind of the testator, the will (or that provision) is not admissible to probate unless that suspicion is removed by affirmative proof of the testator's knowledge and approval (Tyrrell v Painton [1894] P 151 at 159; Wintle v Nye [1959] 1 WLR; In the Estate of Fuld (No 3) [1968] P 675 and 712.) A classic instance of suspicious circumstances is where the will was prepared by a person who takes a substantial benefit under it. (Barry v Butlin (1838) 2 Moo VC 480; Paske v Ollat (1815) 2 Phillim 223 [among others]). Another instance is where a person was active in procuring the execution of a will under which he takes a substantial benefit (Fulton v Andrew (1875) 7 HL 448 at 471–472) by, for instance, suggesting the terms of the will to the testator and instructing a solicitor chosen by that person."**

202. While the classic circumstances of suspicious circumstances were not exhaustive, the Plaintiffs' allegation of suspicious circumstances was not included in the "classic" circumstances attending or at least relevant to the preparation of the Will. Based on **Brown v Willoughby**, they contend that circumstances could only raise a suspicion of want of knowledge and approval if there were circumstances attending, or at least relevant to, the preparation and execution of the Will itself. The evidence led at trial demonstrated a reasonable and legitimate reason and justification for the alleged departures and deviations which would have no basis for grounding a suspicion.

DECISION

203. The Plaintiffs allege that the 2011 Will was executed under suspicious circumstances due to the gifts favoring the Defendants and their children over the Plaintiffs when compared to the gifts in the 2009 Will.

204. They maintain that there was a failure to comply with the Golden Rule and seek medical advice of a physician as to the Deceased fitness to execute her will. The Plaintiffs maintain that the First Defendant and Mr. Ronald Atkinson had secret meetings with the Deceased to discuss changes to the will as a result of purported US tax ramifications and to replace Ms. Karen Carrington as the Executrix of the Deceased's estate due to her illness.

205. They further claim that the First Defendant and Mr. Atkinson were intimately involved in the drafting and executing of the will.

206. The test of suspicious circumstances was considered by Charles J in **Lyle Ethrin Adderley and lyric Ethan Adderley and another v Michael Duran Adderley and another [2020] 1 BHS J. No. 8**:-

> **15 It is well-established that the onus probandi lies with the party seeking to propound the will. Lindley LJ in Tyrrell v. Painton and another [1894] P. 151 at page 156 stated:**
>
> > **"In Barry v. Butlin 2 Moo. P.C. 480, Parke, B. delivering the opinion of the Judicial Committee, said: "The rules of law according to which cases of this nature are to be decided do not admit of any dispute so far as they are necessary to the determination of the present appeal, and they have been acquiesced in on both sides. These rules are two: The first, that the onus probandi lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded in the last will of a free and a capable testator. The second is, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favor of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased."**
>
> **16 Lindley LJ at page 157 continued:**
>
> > **"The rule in Barry v. Butlin (3), Fulton v. Andrew (1), and Brown v. Fisher (2) is not, in my opinion, confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the Court; and wherever such circumstances exist, and whatever their nature may be, it is for those who propound the will to remove such suspicion, and to approve affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will."**

207. The onus again falls on the Plaintiffs to prove that the 2011 Will was executed under suspicious circumstances. In support of this contention they rely on the substantial changes in the devises which they claim seemed to favor the Defendants and which removed the appointment of one male and one female child as the Co-Executors as proof and which should excite the suspicion of the Court. They also claim that the intimate involvement of the First Defendant and Mr. Atkinson is further proof.

208. The First Defendant stated that he was not present with the Deceased when she executed the 2011 Will. This was confirmed by the Attorney Anthony Thompson who was called by the Plaintiffs and who prepared the document and added that the Deceased provided to him a written note which contained the information she wished to have included in the Will. Anthony Thompson also stated that he was not aware of

the Deceased's age nor her Alzheimer's dementia diagnosis nor was he aware of the Golden Rule which stated that an elderly testator wishing to execute a Will must be declared to have a sound mind by a physician prior to executing a will.

209. There were discrepancies between the Defendants' evidence and Mr. Atkinson's evidence with respect to the 2009 Will and the execution of the 2011 Will. The First Defendant initially denied knowing about the 2009 Will while Mr. Atkinson stated that they, along with the Deceased, met to discuss changes to the same. The First Defendant then stated that he was unaware of the contents of this will. Additionally, Anthony Thompson stated that he believed Mr. Atkinson had referred the Deceased to him while Mr. Atkinson denied doing so.

210. Despite these inconsistencies, there was no evidence led which proved that either the First Defendant or Mr. Atkinson were involved with the drafting of the will. It is accepted that there was a meeting held with the First Defendant, Mr. Atkinson and the Deceased to discuss potential changes to the Deceased's will as a result of changes in the US Tax Laws. The First Plaintiff and her sisters were aware of this development as they were present at a meeting held in 2010 where this was discussed. This fact was acceded to by the First Plaintiff.

211. Mr. Anthony Thompson had acted for the Deceased previously when dealing with her company shareholding arising from the death of her son in 2010.

212. In **Key and another v Key and others]2010] EWHC 408 (Ch)**, Briggs J stated,

> **"[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 examination and findings: see *Kenward v Adams* (1975) Times 29 November 1975; *Re Simpson* (1977) 121 SJ 224, in both cases per Templeman J, and subsequently approved in *Buckenhan v Dickinson* [2000] WTLR 1083; *Hoff v Atherton* [2005] WTLR 99; *Cattermole v Prisk* [2006] 1 FLR 693, [2006] Fam Law 98, and in *Scammell v Farmer* [2008] EWHC 1100 (Ch), at paras 117 to 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."**

213. The Plaintiffs allege that the dispositions substantially deviated from the 2009 Will. This fact is accepted by the Court but without more this fact is not sufficient to prove suspicious circumstances.

214. I accept that Mr. Thompson did not obtain a medical opinion to satisfy himself of the fitness of the Deceased to make her will. However, this lack of compliance does not invalidate the will when the court looks at all of the evidence surrounding the execution of the will. There is no evidence led by the Plaintiffs that Mr. Thompson knew or should have known that the Deceased had been seriously ill. In fact, the evidence of all the parties was that the Deceased was a capable astute business woman who was in charge of her affairs and who did not show any signs of any serious illness.

215. The Plaintiffs did not challenge her mental competency or seek to impugn her mental capacity to make decisions until 2014. The First Plaintiff accepted a cheque for in excess of $400,000.00 signed by the Deceased days after the Will was executed. They only began to acknowledge the Deceased's mental impairment in 2014 when they sought to obtain a Power of Attorney, which the Deceased herself had to execute. Further, Mr. Thompson did not benefit from the estate in any way and as held in Guy v McGregor which I adopt his observations as to her fitness can be accepted.

216. The medical and general evidence adduced only reflected a marked deterioration in the Deceased's condition after 2013. Dr. Laiz last saw her in 2014. She was referred to a neurologist in 2013 when she was diagnosed with brain cancer and multiple myeloma. Prior to this all of the brain MRIs adduced showed only aging brain atrophy until after the will was executed. Dr. Laiz's report had no back up medical documentation to support his diagnosis. He did not give evidence so as to clarify how he arrived at her diagnosis and in the absence of such I must look at what was in fact adduced. There was nothing to support the need to obtain a medical opinion as to the Deceased ability to instruct and to execute her will in light of all of the surrounding evidence.

217. I therefore accept that neither the First Defendant nor Mr. Atkinson were present when the instructions were given to Mr. Thompson. Mr. Thompson drafted the will but he did not receive any benefit under the will. The evidence of both the Plaintiffs and the Defendants prove that in 2011, the Deceased was competent to manage her affairs, and her actions and decisions were accepted by all. The First Plaintiff knew the reason for the proposed changes in the will. Accordingly, I find that the will was not executed under suspicious circumstances.

ISSUE FOUR – Whether the Deceased was unduly influenced to execute the 2011 Will by the First Defendant?

Plaintiffs' Submissions

218. The Plaintiffs rely on **Hall v. Hall (1868) L.R. 1 P & D 481** where Sir Wilde J.P. states:-

"To make a good will a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like, - these are all legitimate, and

may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgment, discretion or wishes, is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led but not driven; and his will must be the offspring of his own volition, and not the record of someone else's."

219. In **Wingrove v. Wingrove and others (1885) 11 P.D. 81** the court states:-

"The coercion may of course be of different kinds, it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may have become so weak and feeble, that a very little pressure will be sufficient to bring about the desired result, and it may even be, that the mere talking to him at that stage of illness and pressing something upon him may so fatigue the brain, that the sick person may be induced, for quietness' sake, to do anything. This would equally be coercion, though not actual violence."

220. In **Couwenbergh v. Valkova [2008] ALL ER (D) 264 (Oct)** the Court held that a Will was invalid after determining that the testator was severely suffering from Alzheimer's at the time of its execution.

221. The Deceased had never informed them about executing the 2011 Will despite spending months at a time with them each year. The document was prepared by Anthony Thompson whom the deceased had never retained for any legal work adding that he worked in the same office building as Mr. Atkinson. The Deceased was not certified by a medical doctor as mentally fit to execute the 2011 Will due to her old age and Alzheimer's diagnosis.

222. In 2011, the Deceased relied heavily on the First Defendant while in The Bahamas to pay her bills and taxes, take her to her appointments and conduct her banking. Mr. Atkinson had a great influence over her because she relied on him with her business affairs. The Defendants did not present any medical evidence nor did they challenge the deceased's medical background. The First Defendant and Mr. Atkinson held business meetings without the Deceased and any of the other children on 30th September 2010 and 8th February 2011. During those meetings, which were held more than a year after the Alzheimer's diagnosis, changes to the Deceased's Will were discussed.

Defendants' Submissions

223. The Defendants rely on **Ball and others v Ball and others [2017] EWHC 1750 (Ch)** which held that in probate cases, undue influence must always be proved and never presumed. They submit that **Cowderoy v Cranfield [2011] EWHC 1616 (Ch)** confirmed the law of undue influence in the case of a Will, as summarized in **Edwards v Edwards [2007] WTLR 1387**:

> ""**There is no serious dispute about the law. The approach that I should adopt may be summarised as follows:**
> **i) In a case of a 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 not 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 disposition; 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) Coercion 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 discretion 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 dispositions, the testator has acted as a free agent."** [Emphasis Added]

224. Accordingly, the allegations made by the Plaintiffs were questions of facts which they had to prove. They submit that in order to justify undue influence, the making of the 2011 Will and its content must be inconsistent with a contrary hypothesis other that undue influence. If the evidence demonstrates any other hypothesis or explanation for the making of the 2011 Will and its content, then the Plaintiffs 'allegation of undue influence must fail. In **Cowderoy v Cranfield** the Court stated,

> ""**In the present case, where I have considerable evidence as to the circumstances in which the disputed will was prepared and executed, I think that it is more appropriate for me simply to ask whether the party asserting undue influence has satisfied me to the requisite standard that the will was executed as a result of undue influence. The requisite standard is proof on the balance of probabilities but as the allegation of undue influence is a serious one, the evidence required must be sufficiently cogent to persuade the court that the explanation for what has**

occurred is that the testator's will has been overborne by coercion rather than there being some other explanation." [Emphasis Added]

225. The Defendants invite the Court to consider the evidence and to make a determination on the issues consistent with the authorities. The foregoing rules, tests and legal principles coupled with the totality of the evidence will demonstrate that the Plaintiffs' claim should be dismissed in its entirety and that the 2011 Will and the Grant of Probate be affirmed.

DECISION

226. **In Re estate of Abdelnoor; Abdelnoor and another (as executors of the estate of Pamela Mavis Anne Abdelnoor, deceased) v Barker and others [2022] EWHC 1468 (Ch), Master Pester**

> **"(2) Undue influence**
> **47. As to undue influence, there are no presumptions of undue influence in a probate context. On the facts of this case, Elten bears the burden of proving that Pamela was coerced into making the 2018 Will against her own volition.**
> **48. The relevant principles are concisely summarised in the decision of Lewison J (as he then was) in Edwards v Edwards [2007] EWHC 1119 (Ch) at [47]:**
>
> > **"i) In a case of a 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 not 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, (my emphasis). 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 disposition;**
> > **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) Coercion 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 discretion 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;**
> > **... ...**
> > **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 dispositions, the testator has acted as a free agent."

49. Whilst Lewison J stated that what must be shown is that the facts are "inconsistent with any other hypothesis" other than undue influence, this is to overstate the position. The standard of proof is the normal civil one of the balance of probabilities. As counsel for the Claimants pointed out, an allegation of undue influence is a most serious one to make: see Re Good (deceased) Carapeto v Good [2002] EWHC 640 (Ch). It is a species of fraud, which requires strong and cogent evidence to prove, citing Re H (Minors) [1996] AC 563, in the well-known speech of Lord Nicholls, at p. 586:

"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence... Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.

Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred."

227. The Plaintiffs allege that the Deceased relied on the First Defendant to organize her daily affairs and for inter alia running her business during her illness. They also allege that the First Defndant took advantage of her as she was unable to exercise her own volition all of which led her to instruct and execute the 2011 will.

228. I must decide whether the Deceased made the 2011 Will on her own volition. The factors which must be considered are the state of her physical and mental disposition at the time and whether the First Defendant may have used her diminished state if any, to coerce her into executing the 2011 Will.

229. The Plaintiffs allege that the Deceased was influenced by the First Defendant to make the changes to the 2011 Will as it deviated from the bequests in the 2009 Will and favored the Defendants and their children more. The First Defendant denies that he influenced the Deceased to make the changes she made and alleges that he did not know when she was executing it and relied on a meeting held with Mr. Atkinson, the First Plaintiff and another sister to confirm that the First Plaintiff knew of the proposed changes.

230. At that meeting, Mr. Atkinson informed them that because they were citizens of the United States of America, to avoid the impact from the changes in the US tax law on their shareholding in the Bahamian company it was proposed that the Bahamian assets would be given to the Bahamian children and the US children would receive the US assets as well as cash to balance the values.

231. While the Deceased spent some months in New York with the Plaintiffs, the majority of her time was spent in The Bahamas. The Plaintiffs admit to not knowing what was happening with the Deceased or her businesses while she was here. Any allegations as to the actions of the First Defendant are mere speculation and unaccepted and not

supported by any objective evidence. I accept the evidence of Mr. Atkinson as to the reason for the changes in the will and accept that the First Plaintiff conceded that what was stated by Mr. Atkinson was the reason for the changes in the will.

232. Finally on a general overview of the values devised and bequeathed, there was no marked disparity between the Plaintiffs and the Defendants. This too would support the reason given for the changes and the intention of the Deceased to be fair to all of her children.

233. I therefore do not accept that the Deceased was unduly influenced to execute her 2011 Will by the First Defendant. No claim is made against Mr. Atkinson and so I need not address those submissions.

CONCLUSION

234. There was no definitive proof of the Deceased suffering from Alzheimer's disease at the time of her instructing and executing her 2011 Will, only a probable diagnosis amongst others.

235. I find that the Deceased did not lack the testamentary capacity to execute the 2011 Will.

236. The Deceased was not unduly influenced to execute the 2011 Will by the First Defendant.

237. The Deceased's 2011 Will was not executed under suspicious circumstances.

238. It is declared that the 2011 Will is the true and correct last Will and Testament of the Deceased and the Grant of Probate issued on 14th February 2018 is the valid grant proving the said will of the Deceased.

239. The Defendants are the duly appointed Executors of the Deceased's Estate.

240. The Executors shall make the necessary applications to the court for directions to collect and distribute the estate in accordance with the 2011 Will.

241. The Plaintiffs action is dismissed and the costs of the action are awarded to the Defendants fit for two counsel to be paid by the Plaintiffs and to be taxed if not agreed.

Dated this 13th day of January 2023

Hon. Madam Justice G. Diane Stewart