

IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Claim No. 2023/PRO/cpr/00010

In the Estate of KATHERINE LESLIE SCRIMGEOUR, also known as KATHERINE SCRIMGEOUR, late of Angel Cove, Palmetto Point in the Island of Eleuthera, one of the Islands of the Commonwealth of the Bahamas

AND

In the Matter of a Last Will and Testament of KATHARINE SCRIMGEOUR, also known as KATHERINE SCRIMGEOUR, deceased, dated the 17th day of December, A.D., 2021

AND

In the Matter of a Last Will and Testament of KATHERINE SCRIMGEOUR, also known as KATHARINE SCRIMGEOUR, deceased, dated the 4th February, A.D., 2014

HAROLD CARTER SCRIMGEOUR

1st Claimant

AND

KEVIN BRUCE SCRIMGEOUR

2nd Claimant

AND

MACGREGOR KIRK SCRIMGEOUR

3rd Claimant

AND

TIMOTHY ATWATER

Defendant

**Before: The Honourable Madam Justice C.V. Hope Strachan,
Justice of The Supreme Court of The Commonwealth of The Bahamas**

**Appearances: Miss Margaret Gonsalves - Sabola for the Claimants
Mrs. Gail Lockhart – Charles K.C. and Ms. Tatyanna Maynard for the Defendant**

Hearing Dates: 14th April 2025; 14th May 2025

Contentious Probate – Application for witnesses to testify remotely – Should the Claimants application for remote testimony be acceded to or refused – Overriding objective – Disclosure –

Whether full and frank disclosure was made by the Defendant – Consequences for Failing to abide by Court Order

RULING

BACKGROUND

[1.] The parties are in contested probate proceedings before this Court. The Claimants alleged that the Last Will and Testament dated 17th December 2021 of their mother Katharine Scrimgeour (“the Testatrix”) is not valid. The Claimants allege that Timothy Atwater (“the Defendant”) unduly influenced the Testatrix to create the 2021 Will, leaving the majority of her assets to him.

The Claimants filed four Notices of Application on 14th March 2025. By Notice of Application dated 7th March 2025 and filed on 14th March 2025, (“the First Notice”) the Applicants sought: -

“1. That the following witnesses be permitted to give their evidence at trial via video link, namely:

- (a) Audrey Overbaugh*
- (b) Roger Sansom*
- (c) MacGregor Carter Scrimgeour, the 3rd Claimant*
- (d) Susan Charlow*
- (e) Nicole Thompson*
- (f) Dr. Jessica Moss*
- (g) John Bethell”*

[2.] The First Notice is supported by the Affidavit of Christine Sweeting, sworn on 7th March 2025, and the Second and Third Affidavits of Simmieanne Curry, both sworn on 16th June 2025.

By Notice of Application dated 7th March 2025 and filed on 14th March 2025, (“the Second Notice”), the Applicants sought:

“1. Pursuant to Civil Procedure Rules, Part 28.5 (1) (b), that the Defendant, Timothy Atwater, do within 7 days of the date of the Order give disclosure of the following documents, namely:

- (i) Fee note of Holowesko, Pyfrom & Fletcher for the preparation of the Last Will and Testament of Katharine Scrimgeour dated 17th day of December, A.D., 2021,*
- (ii) Any receipt for payment of the said fee note,*
- (iii) Any notes made by Mr. Peter Fletcher of his meetings with Katharine Scrimgeour in November and/or December 2021, and*
- (iv) Any emails between the Defendant and Mr. Peter Fletcher relating to the preparation of the Last Will and Testament of Katharine Scrimgeour dated the 17th day of December, A.D., 2021 not previously disclosed, by filing and serving a Supplemental List of Documents.*

- 2. That the Defendant Timothy Atwater do permit the Applicants or their Attorney to inspect the original documents disclosed in the Defendant's List of Documents filed*

on the 5th day of December, 2024 or any Supplemental List of Documents filed on behalf of the Defendant within 14 days of the date of the Order or service of a Supplemental List of Documents.

3. *Pursuant to Civil Procedure Rules, Part 28.13(1) that the Defendant may not rely on or produce at trial any documents that the Defendant has either failed to disclose to the Applicants or to permit the Applicants or their Attorney to inspect the original documents."*

[3.] The Second Notice is supported by the Third Affidavit of Christine Sweeting, sworn on 7th March 2025, and the First Affidavit of Simmieanne Curry, sworn on 13th June 2025.

By Notice of Application dated 13th March 2025 and filed on 14th March 2025, ("the Third Notice") the Applicants also sought the following: -

"1. Pursuant to Civil Procedure Rules, Part 26.1(2)(k), that the time for filing and serving the Applicants' Witness Statements be extended to within 7 days of the date of the Order to permit the Witness Statements of Robert Morrison Atwater and Alexander Morrison Atwater to be filed and served.

2. Robert Morrison Atwater and Alexander Morrison Atwater be permitted to give their evidence at trial via video link.

[4.] The Third Notice is supported by the Fourth Affidavit of Christine Sweeting, sworn on 7th March 2025, and the First Affidavit of Alexander Morrison Atwater, sworn on 16th June 2025.

[5.] On 14th April, 2025, the Court made an Order in relation to the Claimants' Notice of Application dated 6th March 2025 and the Defendant's Notice of Application dated 14th March 2025. The Court invited both Counsel to lay over submissions on or before 23rd June 2025, and that the three remaining applications filed by the Claimants' Counsel, would be dealt with on the papers.

[6.] Counsel for the Defendant laid over submissions to the Court dated 7th May 2025. The submissions opposed the Claimants' application for two witnesses, Robert Atwater and Alexander Atwater, to testify remotely. The Defendant's Counsel did not respond to the Claimants' First Notice and Second Notice. The Claimants attorney laid over submissions to the court on 23rd June 2025 in relation to their three remaining applications.

CLAIMANTS' EVIDENCE

FOURTH AFFIDAVIT OF CHRISTINE SWEETING

[7.] Ms. Christine Sweeting swore an Affidavit ("the Fourth Affidavit") 13th March 2025 in support of the application requesting the witnesses Robert Atwater and Alexander Atwater to give their evidence at trial by video link. Paragraph 4 of her Affidavit states:

"4. Further, Robert and Alexander Atwater are not residents of The Bahamas and would have to travel to The Bahamas from the United Kingdom and from Massachusetts in the United States of America at great expense and personal and professional inconvenience to be present in person at the trial. If required to travel to give evidence in person at the trial, I verily believe that Robert and Alexander Atwater would not do so."

FIRST AFFIDAVIT OF ALEXANDER MORRISON ATWATER

[8.] Mr. Alexander Atwater swore an Affidavit on 16th June, 2025, in support of the application for him and his brother Robert Atwater to give evidence at the trial via video link. The applicable parts of his Affidavit are indicated below:

"1. That I am the younger brother of the Defendant, Timothy Atwater (referred to herein as "Tim" or "the Defendant"). I make this affidavit in response to the First Affidavit of Timothy Atwater filed on the 14th day of May, 2025, on my own behalf, and on behalf of my brother Robert Morrison Atwater (referred to herein as "Robert"), he authorizing me to make it and concurring herewith, and further, in support of the 1st 2nd and 3rd Claimants' application that my brother Robert and I be permitted to give our evidence at the trial via video link. I am fully familiar with the matters stated herein. Save as otherwise appears, this affidavit is made from my own knowledge which I verily believe to be true.

3. I note that while the Defendant is insisting that my brother Robert and I attend the trial in Nassau to give our evidence in person, he himself does not appear in person in foreign court hearings or bring our mother to hearings when summoned. I believe that this is simply a ploy on his part to create obstacles to Robert and myself giving testimony at the trial.

10. While it would be costly and disruptive of my personal life and other commitments to come to The Bahamas to give evidence in person, if the court deems it necessary that I travel to The Bahamas to give testimony at the trial which is scheduled for 22, 23 and 24 September 2025, I will do so in the interest of justice. My ability to attend trial in The Bahamas at any other time is uncertain due to other commitments including the necessity of attending court proceedings elsewhere.

11. My brother Robert is under the care of his doctors in the UK as he been diagnosed with cancer and cardiac conditions which would make it risky for him to undertake a long flight from the UK to The Bahamas and he is concerned about access to medical attention in the event of any developments in his condition or emergencies while he is in The Bahamas. He is therefore asking to be excused from attending in person to give his evidence at the trial..."

DEFENDANT'S EVIDENCE

[9.] Mr. Timothy Atwater swore an Affidavit which was filed on 14th May 2025. In his Affidavit, he opposes the Claimants' application for his brothers to give evidence remotely. At paragraphs 2, 18, and 19 of his Affidavit, he avers:

"2. I oppose the application for remote testimony on the grounds that both Robert and Alexander have a longstanding and well-documented history of vexatious, obstructive, and dishonest litigation concerning matters involving myself, our mother Ms. Marina Mattiazzo and her affairs in the Republic of Italy.

18. Their application to give evidence remotely must be viewed through the lens of this wider campaign of litigation abuse. Their prior actions in Italy demonstrate a willingness to manipulate legal processes and to misrepresent facts before courts. To permit their evidence to be given remotely would undermine the integrity of these proceedings, deprive the court of the ability to properly assess their credibility in person and facilitate continued evasion of scrutiny and accountability.

19. I believe that the interests of justice are best served by requiring Robert and Alexander to attend in person if they wish to give evidence in this matter. Their conduct is not that of impartial witnesses but of individuals with a vested interest in discrediting both myself and our mother, and whose credibility ought to be tested under direct examination before this Honourable Court."

CLAIMANTS' SUBMISSIONS

[10.] Claimant's Counsel submitted that the guiding principle in deciding whether the witnesses, Audrey Overbaugh, Roger Sansom, MacGregor Scrimgeour, Nicole Thompson, Susan Charlow, Dr. Jessica Moss, John Bethell, Robert Atwater and Alexander Atwater, will be permitted to give their evidence via video link or must attend the trial in person, must be the Overriding Objective of the Civil Procedure Rules 2022 (CPR) which is to enable the Court to deal with cases justly and at proportionate cost: CPR r. 1.1 (1).

[11.] Counsel relied on the English Court of Appeal authority of **Pastouna v Black [2005] EWCA Civ 1389**. It was held that it is incumbent on those advising parties appearing before the court to take all the steps they can in accordance with CPR rules 1.1 and 1.3 to reduce the cost of the proceedings. This includes taking advantage of such cost saving facilities as video-conferencing whenever they are available and it is appropriate to use them.

[12.] The Bahamian Court of Appeal decision in **Garet Finlayson et al v. Caterpillar Financial Services Corporation SCCivApp. No. 97 of 2020** referred with approval to the approach of the trial judge and sets out the decision for proceeding with a remote hearing. At subparagraphs 23 (iv), (v) and (vi) of the trial judge's Judgment explains why the issues raised by opposing Counsel would not present any difficulties for a remote hearing.

[13.] Remote witnesses can be provided with copies of relevant documents relating to their testimony. As the trial judge observed in the *Garet Finlayson* case, the judge is better able to see and assess the facial expressions and body movements of the remote witness who appears in the courtroom on a large screen. If anything, the party most likely to be prejudiced by any difficulties with the remote evidence is the party whose witness it is. In any event, *Barnett P.* as he then was, opined that the issue whether the taking of the evidence by remote access as a matter of fact made the trial unfair and any judgment unsafe was a matter that could be raised on appeal after the trial.

[14.] The Defendant's Counsel has referred the Court to a number of cases which were decided in the English courts and were based on a Practice Direction which, although applicable to those courts, is not applicable in The Bahamas. Tempting though it might be to follow the guidance and dictum from those cases, our courts ought to be careful not to inadvertently import the rules and practice directions of another jurisdiction into our jurisprudence. In The Bahamas and under our Civil Procedure Rules (2022) ("the CPR"), our courts are bound by the Practice Directions issued by our Chief Justice and the judgments of the Court of Appeal of The Bahamas. It is submitted, therefore, that the Court in this case should be guided by what has been identified as the guiding principle of the CPR, the guidance offered by Practice Direction No. 3 of 2020, and the Court of Appeal's approval of the approach taken by the trial judge in the *Garet Finlayson* case.

[15.] The Claimants propose to call 13 witnesses to give evidence on their behalf. The three (3) Claimants, together with five (5) of their witnesses, permanently reside outside The Bahamas. Three (3) other of the Claimants' witnesses reside and work on the Island of Eleuthera. One (1) witness although a resident of New Providence, is physically infirm, therefore making their attendance in person at the trial either hazardous or simply not possible due to physical frailty.

[16.] The 1st and 2nd Claimants together with Haley Scrimgeour, the wife of the 1st Claimant and John Harold Bethell will attend the trial in person.

[17.] Roger Sansom and Audrey Overbaugh were witnesses to the Testatrix's execution of two separate promissory notes in 2007 and 2010 respectively. Their evidence relates to a very discrete matter where they signed as witnesses to the execution of documents 18 years and 15 years ago respectively, and their witness statements filed on 31st January 2025 are brief.

[18.] Roger Sansom is a farmer and realtor who would be required to be away from his farm and other business interests in Maryland. Mr. Sansom has stated that he is apprehensive about air travel over open water during the hurricane season and about travelling to The Bahamas, where there is a current travel advisory in place by the United States Department of State. Mr. Sansom suffers from a phobia surrounding air travel. The expense of bringing Mr. Sansom from Maryland to The Bahamas for the trial, having him on standby while he waits to give his very brief evidence, the cost of providing accommodation, meals and transportation in The Bahamas, and the undoubted cost to him of having to leave his farm and other business interests to travel to The Bahamas, would be disproportionate when compared with the brevity of his evidence. Mr.

Sansom has indicated his willingness to make himself available to give evidence at the trial via video link. Mr. Sansom's letter is exhibited to the Third Affidavit of Simmieanne Curry.

[19.] Audrey Overbaugh is the mother-in-law of the 1st Claimant, Harold Carter Scrimgeour. She is an elderly female who resides in an assisted living facility in Oregon, U.S.A. Mrs. Overbaugh receives medication that is administered by medical personnel at the facility where she resides. Her medical caregivers have opined that she would not be able to travel far distances, let alone air travel to The Bahamas for the purpose of attending the trial. Mrs. Overbaugh's medical condition is supported by the letter exhibited to the Second Affidavit of Simmieanne Curry.

[20.] The above witnesses, if required to attend the trial in person for the purpose of giving evidence and being cross-examined, would incur significant expense for airfares, accommodation in Nassau, transportation, and food while away from their homes when their evidence and any anticipated cross-examination are expected to be fairly brief.

[21.] MacGregor Kirk Scrimgeour resides in Maryland, U.S.A. He has previously been advised against undertaking air travel due to uncontrolled anxiety and hypertension. His most recent medical evaluation indicates no improvement in his medical condition. This is supported by the medical letter exhibited to the Affidavit of Christine Sweeting dated 7th March 2025 and the First Affidavit of Simmieanne Curry. In the circumstances, it would be medically unwise for Mr. Scrimgeour to travel to Nassau for the purpose of attending the trial in person.

[22.] Robert Atwater and Alexander Atwater are the brothers of the Defendant. They reside in London, in the United Kingdom, and in Massachusetts, U.S.A., respectively. Robert Atwater, the elder brother of the Defendant has been diagnosed with serious health conditions which would make travel to The Bahamas medically inadvisable for him. Robert Atwater's medical condition is supported by the letter exhibited to the First Affidavit of Alexander Morrison Atwater.

[23.] Alexander Atwater has indicated that while he would prefer not to have to travel to The Bahamas for the purpose of giving evidence at the trial, he would do so for the trial dates in September 2025 if required. He has indicated that he cannot commit to traveling to The Bahamas at any other time due to personal commitments, including the need to be present at other court hearings in other places.

[24.] Given the unpredictability of weather conditions and air travel during the Atlantic Hurricane Season and other circumstances beyond our control which could lead to the trial dates being affected, Alexander Atwater's ability to be present in person for the trial is uncertain if the trial does not proceed in September or if his evidence is not completed in September. With thirteen (13) witnesses for the Claimants to be examined and cross examined at the trial, it is doubtful if his evidence will be started and completed within the three (3) days currently scheduled for the trial. If his evidence is not completed, even greater expense and prejudice will be incurred by the Claimants if he has to return on another occasion to complete his evidence.

[25.] Susan Charlow and Nicole Thompson reside in Eleuthera. They are the 2 witnesses to the 2014 Will of Katharine Scrimgeour and an Advance Directive which she executed at the same

time as the 2014 Will. As with Roger Sansom and Audrey Overbaugh, their evidence is discrete and is anticipated to be brief. Both of these witnesses are business women who would have to leave their homes and businesses to travel to Nassau to attend the trial in person. In addition to the cost of travel between Eleuthera and Nassau, they would require accommodation, transportation and food to be provided while in Nassau, at the Claimants' expense.

[26.] Dr. Jessica Moss resides in Eleuthera and is the Medical Director at the Clinic where Mrs. Scrimgeour was seen and treated in the months and days prior to her execution of the 2021 Will and ultimately her death. As an active medical practitioner, the time that Dr. Moss would be required to be away from the Clinic and her duties there would cause unnecessary hardship for her and expense in traveling to Nassau and remaining in Nassau until the completion of the trial or her evidence.

[27.] Apart from the significant expense to the Claimants of requiring the attendance in person of all eleven (11) of their witnesses who do not reside in Nassau, it would cause hardship for the majority of these witnesses to be required to disrupt their lives in order to travel to Nassau to attend the trial in person when the majority of them have no interest in the outcome of these proceedings and simply acted as witnesses to the Testatrix's signature over a decade ago.

[28.] John Bethell is the uncle of the Claimants, and he resides in Nassau. Mr. Bethell is elderly and has been in deteriorating health for some time. It is uncertain whether he will be able to give evidence at the trial at all, even remotely, but if he is able to do so, he would not be able to attend court in person due to physical frailty.

[29.] It is submitted that given the circumstances of the witnesses referred to above, and the expense that would be incurred in bringing them to Nassau as well as their medical conditions and apprehensions about air travel to The Bahamas, it would significantly save costs and be appropriate to order that the evidence of Audrey Overbaugh, Roger Sansom, Robert Atwater, Alexander Atwater, MacGregor Scrimgeour, Susan Charlow, Nicole Thompson, Dr. Jessica Moss and John Bethell be given by video link at the trial.

Application for Specific Disclosure and Inspection

[30.] Counsel for the Applicants submitted that they have not received from the Defendant the original 2021 Will, handwritten notes, fee note(s), memoranda and other documents of Peter Fletcher, the attorney who prepared the 2021 Will and Agatha Bethel, who supervised the execution of the 2021 Will. These documents the Applicants alleged ought to have been disclosed in the Defendant's List of Documents and produced to the Claimants for inspection. The Claimants allege that these documents are important because they relate to the probate action that is before this Court which is the validity of the 2021 Will.

[31.] **It is stated in the claimants' submissions that:**

"37. Subsequent to the filing of this application, an Order was made on the 14th April, 2025 giving liberty to the Defendant to file witness statements for Peter Fletcher and Agatha Bethel on or before 14th May, 2025. The Order at paragraph 2 further directed

those individuals to produce to Counsel for both parties all documents in their possession relating to this matter...

38. Witness Statements were filed for Peter Fletcher and Agatha Bethel on 14th May, 2025 but only a selection of emails forwarded from Peter Fletcher to the Defendant's Counsel were attached to his Witness Statement. No original emails were produced for inspection and no other documents were produced by either Peter Fletcher or Agatha Bethel by the date set out in the Court Order. Subsequently, Peter Fletcher produced a document purporting to be a handwritten note of his meeting with the Testatrix and a draft of the 2021 Will that was attached to an email addressed to the Testatrix. To date, the Defendant still has not produced the original 2021 Will, the subject matter of these proceedings, for the inspection of the Claimants.

40. The Claimants' attorney has not been permitted to inspect any original documents.

41. None of the emails produced for inspection were printed from the inboxes of their senders or their recipients. All emails were instead forwarded to a third party, thereby compromising the accuracy or validity of the email correspondence as forwarded emails are subject to editing to remove or insert content. This is not a technical objection as subsequent emails attached to the Witness Statement of Peter Fletcher do show that an important email was deleted from the email thread produced for inspection by the Defendant. That deletion was made possible by the forwarding of emails to a third party.

42. Not even the original 2021 Will that is the subject of these proceedings has been disclosed. The Claimants further submit that the Defendant has not to date permitted the inspection of more than 50% of the original documents disclosed in the Defendant's List of Documents filed on 5th December 2024.

44. The Defendant is therefore not entitled to rely at trial on any documents that were not disclosed either in his List of Documents, or produced by Peter Fletcher and Agatha Bethel or that the Claimants' attorney was not permitted to inspect.

45. Further the Defendant has not complied with paragraph 2 of the Order of 14th April, 2025 to produce documents to the Claimants and is not entitled to rely on the Witness Statements of Peter Fletcher and Agatha Bethel at the trial."

DEFENDANT'S SUBMISSIONS

[32.] The Defendant does not oppose the Claimants' right to call Robert Morrison Atwater and Samuel Morrison Atwater ("the Atwaters"), as witnesses in principle, the mode of their testimony is a matter that falls squarely within the Court's discretion. It is submitted that in-person attendance is essential in the present circumstances to preserve the fairness of the trial and the Court's ability to fully assess the credibility of the evidence.

[33.] The legal framework governing applications for remote evidence is derived from both the CPR and persuasive English authorities, including **Mobile Telecommunications Company KSCP v Al Saud** [2024] EWHC 3459 (Ch), **Deutsche Bank AG v Sebastian Holdings Inc.** [2023] EWHC 2234 (Comm), and **Polanski v Conde Nast Publications Ltd** [2005] UKHL 10.

[34.] The starting point is that the Court has a wide discretion to control the manner in which evidence is given, including whether a witness may give evidence remotely. The Claimants' Application is made pursuant to Rule 29.3 of the Supreme Court Civil Procedure Rules, 2022 ("CPR"), which permits the Court to direct that a witness may give evidence through a video link or by other means. However, the Court is not obliged to permit remote evidence when requested.

[35.] The Court's discretion must be exercised in accordance with the overriding objective and in accordance with established principles and case law. The principles relevant to applications for remote evidence were set out at paragraph 10 of the Al Saud judgment:

- "i) A direction should be given only where there is a good reason and the direction serves a legitimate aim.*
- ii) The court should consider the guidance provided by Annex 3 to Practice Direction 32, which recognizes that having a witness present by video is not as ideal as having the witness physically present in court and its convenience should not be allowed to dictate its use. A judgement must be made not only as to whether it will achieve an overall cost saving, but also as to whether its use will be beneficial to the efficient, fair and economic disposal of the litigation, having regard in particular to the recognition that the degree of control a court can exercise over a remote witness may be more limited than that which it can exercise over a witness physically before it.*
- iii) Convenience should not be considered to carry much weight.*
- iv) The court should be satisfied that the remote location proposes an appropriate venue, that appropriate technology will be available and that there will be sufficient safeguards in place to ensure the integrity of the trial process."*

[36.] In **Deutsche Bank AG v Sebastian Holdings Inc and Mr. Alexander Vik** [2023] EWHC 2234 (Comm) at paragraph 48, the Court noted that Annex 3 to Practice Direction 32 remains good law. Paragraph 2 of Annex 3 to Practice Direction 32 reads:

"It is, however, inevitably not as ideal as having the witness physically present in court. Its convenience should not therefore be allowed to dictate its use. A judgment must be made in every case in which the use of VCF is being considered not only as to whether it will achieve an overall cost saving but as to whether its use will be likely to be beneficial to the efficient, fair and economic disposal of the litigation. In particular, it needs to be recognized that the degree of control a court can exercise over a witness at the remote site is or may be more limited than it can exercise over a witness physically before it."

[37.] The continued relevance of the limitations identified in Annex 3 is underscored in **Polanski v Conde Nast Publications Ltd** [2005] 1 WLR 637 at paragraph 84. The Court also endorsed the reasoning of *Simon Brown LJ* in the Court of Appeal (at paragraphs 27-29 of the judgment reported at [2004] 1 WLR 387), who set out that "VCF evidence is less ideal even than usual in a case like this".

[38.] It is submitted that permitting the Atwaters to give evidence remotely would materially undermine the Defendant's right to a fair trial for the reasons set out below.

[39.] There is no evidence that the Atwaters would be unable to attend in person or that travel would cause disproportionate hardship. Courts have repeatedly declined to grant such

applications where no evidence is offered of insurmountable barriers to attendance (*Jackson v Hayes and Jarvis (Travel) Ltd* [2022] EWHC 453 (QB); *Martin v Herbert Smith Freehills LLP* [2024] EWHC 1485 (KB)).

[40.] Allowing remote evidence in these circumstances would expose the Defendant to real risks:

“i. Technical failures (such as bandwidth issues and time lags) remain a persistent concern, despite advances in technology (Deutsche Bank AG at [98]).

ii. Cross examination over video link is less effective, particularly where matters of credibility are central. Witnesses may experience a “disconnect,” impacting their demeanour and engagement with the Court.

iii. The Court’s ability to maintain procedural control over the evidence is diminished when the witness is remote (Polanski, at [84]).”

[41.] Applying the principles in *Al Saud*, *Deutsche Bank AG* and *Polanski*, the Claimants have failed to show a good reason why the Atwaters’ evidence must be given remotely or that the proposed arrangement would ensure a fair and effective trial. There is no evidence of logistical or personal hardship preventing their attendance. The Court is therefore left with a request for convenience, which the authorities make clear carries little weight. When balanced against the seriousness of the allegations, the centrality of their testimony, and the credibility issues arising from their prior conduct, it is respectfully submitted that the application must be refused.

[42.] In light of the foregoing, it is submitted that the Claimants, having brought these serious allegations, bear the burden of proving their case. The allegations against the Defendant are of the most serious nature and go to his integrity. It would be manifestly unfair to deny him the opportunity to fully defend himself in person while those making the accusations are permitted to do so from abroad, thereby subjecting the Defendant to the added difficulty of conducting his defense over the video link. The volatile nature of their testimony, together with the history of adversarial conduct, raises a real risk of prejudice to the Defendant if their evidence is not tested robustly and in person. The Atwaters have a pre-existing agenda against the Defendant, having engaged in a sustained campaign directed at him, the merits of which have previously been tested and dismissed. They have pursued a sustained campaign against the Defendant, the legitimacy of which has already been rejected by the Italian courts. Their attempt to re-litigate matters now under the cloak of these proceedings must be approached with caution.

The Witnesses Are Not Neutral Participants

[43.] The Atwaters are not disinterested witnesses. They are the Defendant’s siblings and have initiated a series of hostile legal proceedings against both the Defendant and their mother, Ms. Marina Mattiazzo, in Italy, most of which have been dismissed or discredited.

[44.] The conduct of the Atwaters gives rise to substantial credibility issues. It is essential that the Defendant be given the opportunity to test their evidence thoroughly and in person. Their testimony is not peripheral; it strikes at the heart of factual disputes likely to arise at trial.

Risk of Prejudice to The Defendant

[45.] Remote testimony would unfairly limit the Defendant's ability to confront the Atwaters face to face. This is particularly prejudicial given:

- i. Their established hostility towards the Defendant
- ii. The likelihood that their evidence will contain character allegations and assertions of disputed fact;
- iii. The critical need to assess their demeanour and reliability under pressure, which is far more difficult via remote link.

[46.] While modern technology can facilitate remote testimony, it cannot wholly replicate the solemnity of physical courtroom proceedings, nor can it fully preserve the adversarial process where the credibility of the witness is in dispute.

Diminished Authority and Reach of the Court

[47.] There is also a jurisdictional concern. The Court's coercive powers – such as for perjury, contempt, or costs orders – are more difficult to enforce against witnesses outside the jurisdiction, particularly where (as here) there are ongoing foreign proceedings involving the same parties.

[48.] The Atwaters reside outside the jurisdiction and are presently operating in a manner inconsistent with obligations of full and frank participation in legal proceedings. Permitting them to give evidence remotely risks enabling them to avoid the full rigor and control of the Court while delivering potentially self-serving or unreliable testimony.

[49.] The default position under current authority is that witnesses should give evidence in person unless there are compelling reasons to depart from this, as noted by the Court in *Jackson v Hayes and Jarvis (Travel) Ltd* [2022] EWHC 453 (QB).

[50.] In the absence of demonstrable hardship, unavailable travel options, health or safety risks substantiated by evidence, or any identifiable advantage in remote testimony to the just disposal of the case, the application must fail.

[51.] As stated in paragraph 13 of the Skeleton Arguments of the Defendant dated 14th April 2025

“With regard to the Claimants’ applications to call Robert Morrison Atwater and Samuel Morrison Atwater, the Defendant does not object to the Claimants’ right to call any witnesses that they may wish to call. However, the evidence of these witnesses will be heavily contested at trial and fairness will require that the Defendant be given an opportunity to present evidence in response to the evidence of these witnesses. In addition, it is essential that they give evidence in person. Allowing such witnesses to testify remotely would unfairly prejudice the defendant who is entitled to a full and proper opportunity to cross-examine these witnesses face-to-face, observing their demeanour and credibility under direct questioning. In person testimony also ensures that these witnesses are physically present within the jurisdiction of the court, which carries the authority to

enforce the obligation of truthfulness under oath and to impose appropriate sanctions in cases of perjury or contempt. Remote testimony, by contrast, diminishes the court's control over the proceedings and allows an untruthful witness (or a witness intending to be untruthful and to maliciously malign the character of others) the latitude of operating beyond the reach of the court and outside of the solemn confines of the witness box."

[52.] In light of the foregoing, Counsel submits that the evidence of the Atwater is central and will be contested at trial, the fairness of the proceedings requires that such evidence be given in person, remote testimony would prejudice the Defendant's right to confront these witnesses properly, particularly given their adverse relationship and pending litigation abroad, the Court's ability to enforce its authority over their evidence would be significantly impaired.

ISSUES

[53.] The issues to be considered by this Court are:

- a. Should the Court accede to the Claimants' application and allow the witnesses Audrey Overbaugh, Roger Sansom, MacGregor Scrimgeour, Nicole Thompson, Susan Charlow, Dr. Jessica Moss, John Bethell, Robert Morrison Atwater and Alexander Morrison Atwater evidence to be given by video link or in person at the trial?
- b. Did the Defendant make full and frank disclosure of the documents requested by the Claimants?

THE LAW

[54.] Rule 29.3 of the Civil Procedure Rules (2022) (as amended) permits the Court to receive evidence by video link. This section provides:

"29.3 Evidence by video link or other means. The Court may allow a witness to give evidence without being present in the courtroom, through a video link or by any other means."

[55.] Practice Direction No. 3 of 2020 sets out the factors that the Court ought to consider in determining whether to allow a remote hearing:

"4. The method by which all hearings, including Remote Hearings, are conducted is always a matter for the presiding judicial officer, operating in accordance with applicable law, Rules, Protocols and Practice Directions. In determining whether there should be a Remote Hearing, the judicial officer must have regard to the interests of justice, public health issues and the ability to maintain appropriate physical distancing attendance in courtrooms. Further, when considering the suitability of a Remote Hearing, judicial officers must consider issues such as the nature of the matters at stake during the hearing, any issues which the use of video/audio technology may present for participants in the hearing, the individuals'/witnesses' needs and any issues around public access to or participation in the hearing."

[56.] Under CPR r. 1.1 (1) the overriding objective of the Civil Procedure Rules (2022) is to enable the Court to deal with cases justly and at proportionate cost.

[57.] Rule 1.1 (2) specifies that dealing justly with a case includes, so far as is practicable:

- “(a) ensuring that the parties are on an equal footing;
- (b) saving expense;
- (c) dealing with the case in ways which are proportionate to —
 - (i) the amount of money involved;
 - (ii) the importance of the case;
 - (iii) the complexity of the issues; and
 - (iv) the financial position of each party;
- (d) ensuring that it is dealt with expeditiously and fairly;
- (e) allotting to it an appropriate share of the Court’s resources, while taking into account the need to allot resources to other cases; and
- (f) enforcing compliance with rules, practice directions and orders.”

[58.] Further, CPR r. 1.2 provides:

- “(1) The Court must seek to give effect to the overriding objective when —
 - (a) exercising any powers under these Rules;
 - (b) exercising any discretion given to it by the Rules; or
 - (c) interpreting these Rules.
- (2) These Rules shall be liberally construed to give effect to the overriding objective and, in particular, to secure the just, most expeditious and least expensive determination of every cause or matter on its merits.”

[59.] CPR r. 1.3 concludes that:

- “(1) It is the duty of the parties to help the Court to further the overriding objective.
- (2) In applying the Rules to give effect to the overriding objective the Court may take into account a party’s failure keep his duty under paragraph (1).”

SPECIFIC DISCLOSURE AND INSPECTION

[60.] Specific Disclosure is governed under Rule 28.5 of the CPR. This rule provides:

- “(1) An order for specific disclosure is an order that a party must do one or more of the following things —
 - (a) disclose documents or classes or categories of documents specified in the order;
 - (b) disclose documents relevant within the principles relating to discovery of documents, or, alternatively, directly relevant, to a specified issue or issues in the proceedings;”

[61.] Rule 28.11 gives a party the right to inspect and copy listed documents.

“(1) When a party has served a list of documents on any other party, that party has a right to inspect any document on the list, except documents —

- (a) for which the right or privilege to withhold from disclosure is claimed; or
- (b) which are no longer in the physical possession of the party who served the list.”

[62.] The consequences of failing to make disclosure of documents are specified under r. 28.13 of the CPR:

“(1) A party who fails to give disclosure by the date ordered or to permit inspection, may not rely on or produce at the trial any document not so disclosed or made available for inspection.

(2) A party seeking to enforce an order for disclosure may apply to the Court for an order that the other party's statement of case or some part of it be struck out.

(3) An application under paragraph (2) relating to an order for specific disclosure may be made without notice but must be supported by evidence on affidavit that the other party has not complied with the order.

(4) On an application under paragraph (2) the Court may order that unless the party in default complies with the order for disclosure by a specific date that party's statement of case or some part of it be struck out.”

ANALYSIS AND DISCUSSION

[63.] The Court has a discretion under rule 29.3 of the CPR to allow a witness to give evidence via video link or by any other means. Further, Practice Direction No. 3 of 2020 also sets out the factors that the Court should consider in determining whether to allow a witness to give evidence by video link.

[64.] Having regard to the Practice Direction, it must be noted that this Direction was passed during the Covid-19 pandemic when Courts were required to hold virtual trials to adhere to the Emergency Powers Orders in place at the time and social distancing was mandatory. Public health issues and the ability to maintain appropriate physical distancing attendance in courtrooms are no longer an issue for the Court as normal hearings have resumed.

[65.] The nature of this matter is significant as this probate action concerns the validity of the 2021 Will. While the overriding objective is for the courts to swiftly deal with cases and to save costs, the Court must be in a position to hear the matter in full to make an informed ruling. The Court has to make a determination as to whether there was any undue influence or fraudulent calumny involved in the creation of the Will. Moreover, while the Court agrees that giving evidence remotely saves costs especially in the instant matter where the witnesses are residing outside of the jurisdiction, the facilities available to the Court are limited.

[66.] There are issues that can arise beyond the Court's control, which may slow down the process of the trial. These issues include a delay in connection to the Wi-Fi, freezing of the screen, and the Court possibly not being able to hear the person on the other side or vice versa. Additionally, it may be challenging for the court to assess the individual's demeanor during a

remote hearing as compared to an in-person hearing. Based on the existing plant conditions, this Court foresees some challenges which might possibly present at a remote hearing of this magnitude. However, it is anticipated that any such challenges might be resolved by the trial date of 22nd September, 2025. In any event, the court has the discretion to pivot and to change the mode of receipt of testimony. This was demonstrated in **Garet Finlayson**, which was one of the several authorities the Claimant's Counsel relied upon to argue her position.

[67.] In **Garet Finlayson**, the judge decided to continue the trial remotely as opposed to in person. The trial in that case commenced in person but was changed to remote access due to the COVID-19 pandemic. The present case is distinguishable in that Covid 19 is no longer presently an issue for the Court. The trial for this matter has not commenced. Further, the world has returned to normal standards of living, and in-person trials have resumed.

[68.] The Defendant's Counsel relied on a number of English authorities in support of her application. The principles in *Al Saud* are applicable. There must be good reasons given for the party to be allowed to give their evidence remotely.

[69.] The Court also considered the case of **Gubarev and another v Orbis Business Intelligence Ltd and another** [2020] EWHC 2167 (QB). This case was decided during the Covid 19 pandemic. Paragraphs 50 and 51 indicates the benefits of in person trials:

"50. During this pandemic, there have been temporary changes to the way in which parties and their representatives and others, including the media and the general public, have been permitted to obtain access to proceedings. Nonetheless, whether a court hearing is a remote hearing or a hybrid hearing, that is one that is partially face to face and partially remote, or a conventional face to face hearing, it must be conducted in a way that is as close as possible to the pre-pandemic norm.

51. In normal circumstances a judge can see and hear everything that is going on in court. The judge can see who is present, and whether a witness who is giving live evidence has been present in court observing and listening to the evidence of other witnesses. The judge can see whether someone is attempting to influence, coach or intimidate a witness whilst they are giving evidence... That a judge can see and hear everything that happens in court enables the judge to maintain order, discipline and control over what is done in court, and thus to maintain the dignity and the integrity of the proceedings as a whole. This control extends to the recording of images and sounds of what goes on in court and what is then used outside court."

[70.] In the instant matter the judge would be able to see, observe the evidence and the demeanour of the witness that is physically in attendance at the trial and make an informed decision in respect of this matter.

[71.] The Applicants are desirous of having their witnesses, Audrey Overbaugh, Roger Sansom, MacGregor Scrimgeour, John Bethell, Robert Atwater and Alexander Atwater, give their evidence remotely because they reside outside the jurisdiction. Additionally, the Applicants would like to have Nicole Thompson, Susan Charlow and Dr. Jessica Moss, residents of Eleuthera to also give their evidence remotely. The reason for the applications to have the witnesses testify remotely is

that it would be costly for all of the witnesses to travel to Nassau, The Bahamas, to attend the trial in person.

[72.] In relation to Roger Sansom and Audrey Overbaugh, their evidence appears to be limited to the execution of promissory notes made between the testatrix and her son, Harold Scrimgeour in 2007 and 2010, respectively. Mr. Sansom provided a letter indicating the reasons why he does not wish to appear in person for the trial. Those reasons given by Mr. Sansom are not sufficient for the Court; however, on reviewing his witness statement, his evidence is short and only applies to the execution of a promissory note and not the substantive issue of the 2021 Will. Ms. Overbaugh's medical letter, which outlined her diagnosis and other medical conditions, provides enough reasons for the Court to excuse her from being physically present at the trial. Also, due to their limited testimony, which will not prejudice the defendant in any way, the Court will allow them both to give their evidence remotely.

[73.] Similarly, MacGregor Scrimgeour submitted a letter from his physician requesting that he be excused from travelling due to medical issues, which were specified. MacGregor Scrimgeour's evidence is important to the claimant's case as he is the youngest son of the Testatrix contesting the 2021 Will along with his brothers; as such he ought to be present during the trial. However, taking into consideration the doctor's letters he provided, the Court will allow him to give his evidence remotely.

[74.] Regarding Robert Atwater's evidence, the Defendant, is of the view that in order to preserve the fairness of the trial and the Court's ability to fully assess the credibility of this witness, an in-person trial is fundamental. This court regards the reasons given by Robert Atwater's physician as sufficiently compelling to excuse his in-person appearance at trial. Therefore, the court will allow him to give evidence remotely.

[75.] Susan Charlow and Nicole Thompson witnessed the 2014 Will of the Testatrix and a second document known as the Maryland Advance Directive: Planning for Future Health Care Decisions. Their evidence is fundamental to the instant action that is presently before this Court. As such, their evidence must be given in person. Equally, Dr. Jessica Moss' evidence is critical and it speaks to the testatrix's medical capacity as the time of the execution of the 2021 Will. Further, none of the witnesses provided any documentation to provide good reasons why they cannot attend the trial in person. The Court understands the costs involved in travel from Eleuthera to Nassau, however, in the interests of justice and fairness, it is mandatory that they appear in person.

[76.] In relation to John Frederick Bethell "the Elder". It is stated at paragraph 17 of the Claimants' submissions that "... *One (1) witness although a resident of New Providence, is physically infirm therefore making his attendance in person at trial either hazardous or simply not possible due to physical frailty.*" The Court does not expect this elderly gentleman in this condition to attend the hearing in person. However, at paragraph 18 of the submissions, it is stated that "... *John Harold Bethell who resides in New Providence will also attend the trial in person.*" It has been clarified that there are in fact two (2) John Bethells, a younger and an elder." No request for remote testimony has been made for the younger John Bethel, so it is expected that he will attend in person. Given the critical nature of the testimony, the Court accepts that Harold Scrimgeour,

Haley Scrimgeour and Kevin Scrimgeour will be in attendance at the trial as expected and mandated.

[77.] The Court also noted that Alexander Atwater is also available to attend in person once the schedule for trial remains in September 2025.

SPECIFIC DISCLOSURE AND INSPECTION

[78.] On 14th April 2025, the Court made an Order for the Defendant to disclose all documents in connection with the preparation and execution of the 2021 Will of the Testatrix to the Claimants. The Order granted by this Court stated that:

“2. The Defendant is at liberty to file and serve witness statements for Peter Fletcher and Agatha Bethel on or before 14th May 2025. On or before 14th May 2025 Peter Fletcher and Agatha Bethel are to produce to the parties or their attorneys all documents, handwritten notes, memoranda, fee notes and emails in their possession, power and control relating to the instructions for, and the preparation and execution of the Last Will and Testament of Katharine Scrimgeour dated the 17th day of December A.D., 2021. Failure to file and serve the witness statements of Peter Fletcher and Agatha Bethel by that date or failure to produce the aforesaid documents by that date shall result in the exclusion of their witness statements and documentary evidence from the trial.”

[79.] The Claimants’ attorney avers that such disclosure has not been made in its entirety. The Defendant has not allowed the Claimants to inspect more than 50% of the documents listed in his List of Documents, which was filed on 5th December 2024. It should be noted, however, that a day before the 14th May, 2025, deadline for filing witness statements, Counsel for the Defendant filed and served a witness statement for Agatha Bethell on the Applicant’s attorney, and a witness statement for Peter Fletcher was served on the 14th May, 2025 Mr. Fletcher’s witness statement omitted relevant documents and exhibits.

[80.] The Defendant’s Counsel had a month from the date of the Order on 14th April 2025 to make the necessary disclosure of the Defendant’s List of documents to the Claimants Counsel. Upon reviewing the Third Affidavit of Christine Sweeting, the Court noted at paragraph 9 that:

“9. Miss Gonsalves- Sabola attended at the offices of the Defendant’s attorneys on 6th December 2025 for the purpose of carrying out inspection of the Defendant’s documents disclosed in the Defendant’s List of Documents. I am informed by Miss Gonsalves – Sabola and verily believe that she was not permitted to inspect the Defendant’s documents disclosed in the Defendant’s List of Documents. Instead, Miss Gonsalves – Sabola was only permitted to inspect a bound bundle containing photocopies of certain documents referred to in the Defendants List of Documents and photocopies of emails sent to Eltora Butcher which emails were not disclosed in the Defendant’s List of Documents. I am further informed by Miss Gonsalves – Sabola and verily believe that she was not permitted to inspect any of the original emails exchanged between the Defendant and Attorney Mr. Peter Fletcher that were disclosed in the Defendant’s List of Documents or any of the Defendant’s original documents.

10. That Miss Gonsalves – Sabola used an application on her cell phone to scan some of the documents contained in the bound bundle of documents provided to her for inspection and she emailed them to me from her personal email address...

11. Upon reviewing the documents that Miss Gonsalves – Sabola scanned and emailed to me, I noted that no original documents were provided for inspection. Further, there appeared to be omissions in the Defendant's List of Documents of other documents that were referred to in the emails forwarded to Eltora Butcher but were not disclosed or provided for inspection, namely the invoice for Attorney Mr. Peter Fletcher's fees for preparing the late Katherine Scrimgeour's Last Will and Testament and Mr. Fletcher's notes of his meeting with Mrs. Scrimgeour.

12. Further, in at least one instance where the Defendant was discussing with Mr. Fletcher who would be appointed as executor of Mrs. Scrimgeour's Will, the email exchange between the Defendant and Mr. Fletcher appeared to me to be missing a part of the conversation between the Defendant and Mr. Fletcher.


13. By letter dated 6th December, 2024, Miss Gonsalves–Sabola wrote to Mrs. Lockhart-Charles objecting to the denial of proper inspection of the Defendant's documents. On 9th December, 2024, Mrs. Lockhart-Charles replied, promising to respond to the objection but has not done so to date..."

[81.] Rules 28.5, 28.11, and 28.13 of the CPR and the Order of the Court are quite clear. If a party does not abide by an Order of the Court, it shall result in the witness statements being excluded from the trial. In these circumstances, the Order has not been adhered to as it relates to Peter Fletcher. The Court is therefore obligated to disregard the witness statement of Peter Fletcher. Agatha Bethel's witness statement shall be included for the trial and she must attend the trial in person.

CONCLUSION AND DISPOSITION

[82.] Considering the factual circumstances as set out in the relevant Affidavits, the submissions of Counsel, the relevant legislation and case authorities, the Court finds that: -

- a) Audrey Overbaugh, Roger Sansom, MacGregor Carter Scrimgeour and Robert Atwater and John Frederick Bethell "the Elder" are allowed to give their evidence at the trial via video link;
- b) Susan Charlow, Nicole Thompson and Dr. Jessica Moss are required to appear at the trial in person to give their evidence;
- c) Harold Scrimgeour, Haley Scrimgeour, Kevin Scrimgeour, John Harold Bethell and Alexander Atwater are required to appear in person at trial;
- d) Agatha Bethel is required to appear in person at trial;
- e) The witness statement of Peter Fletcher will be excluded as evidence in the trial due to the Defendant's non-compliance with the Order dated 14th April 2025;
- f) Costs of this application shall be in the cause.

Dated the 8th day of August, A.D., 2025


The Honourable Madam Justice C.V. Hope Strachan