

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

GRENADA

CLAIM NO. GDAHCV2023/0588

**IN THE MATTER OF THE SUPREME COURT (NON-CONTENTIOUS
PROBATE AND ADMINISTRATION OF ESTATES) RULES**

AND

**IN THE MATTER OF THE EASTERN CARIBBEAN SUPREME COURT CIVIL
PROCEDURE RULES (REVISED EDITION) 2023, PART 68 THEREOF**

AND

**IN THE MATTER OF AN APPLICATION BY THE CLAIMANT HEREIN AS THE
SOLE EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF FITZROY
BOATSWAIN, DECEASED, DATED THE 12TH DAY OF SEPTEMBER 2022, FOR
THE GRANT OF PROBATE**

BETWEEN:

JERRY EDWIN

Claimant

and

**[1] DENISE BOATSWAIN
[2] JOSEPH BOATSWAIN**

Defendants

Before:

The Hon. Mde. Justice Agnes Actie

High Court Judge

Appearances:

Ms. Denneil Larmond for the Claimant

Mr. Ian Sandy for the Defendants

2024: November 5th, 12th (Closing Submissions);
2025: February 25th

JUDGMENT

- [1] **ACTIE, J.:** This case concerns the validity of a will dated 12th September 2022 and the caveats entered by the defendants who are siblings and beneficiaries under the said will.

Background

- [2] Fitzroy Boatswain of Beausejour, St George (hereinafter interchangeably referred to as “the testator” or “the deceased”), executed two Wills dated 17th June 2022 (hereafter referred to as “the June Will”) and 12th September 2022 (hereafter referred to as “the September Will”) respectively. The testator died on 29th September 2022.
- [3] The claimant, Jerry Edwin, an Attorney- at- Law, was appointed the sole executor to both Wills. The two witnesses of both wills were employees of the claimant. The defendants are the deceased's siblings and beneficiaries under both Wills.
- [4] In the June Will, the deceased bequeathed the sum of \$175,000.00 to each of the defendants which sum was reduced to \$10,000.00 each in the September Will. Of further note is a significant increase in a devise in the sum of \$30,000.00 in the June Will to the sum of \$300,000.00 in the September Will to Joycelyn Thomas.
- [5] The claimant made an application for a grant of probate on or about 21st November 2022. The defendants on 28th November 2022 and 26th May 2023 filed caveats against the estate of the deceased.
- [6] On 20th July 2023, the claimant filed a warning to the defendants who in turn filed an acknowledgement of service of the said warning on 27th July 2023.
- [7] The claimant filed a fixed date claim on 15th November 2023 seeking an order that the September Will be pronounced in solemn form and for a Grant of Probate. The claimant asserts that the September Will satisfies all the legal requirements, and that

the testator was of sound mind, memory and understanding when he executed the September Will.

Defendants' case

[8] The defendants dispute the September Will and state that the June Will is the true Last Will and Testament of the deceased. The defendants state the deceased was not of sound mind, memory and understanding at the date of the September Will and contend as follows:

- (1) The testator at the age of 67 years was suffering from advanced metastatic prostate cancer and painful severe open bed ulcers which affected his cognitive functions.
- (2) The deceased was bedridden and his memory was bad. He was confused and not oriented as to person, place and time and was not able to converse properly.
- (3) The deceased's poor mental state was exacerbated by the fact that he was malnourished and emaciated.
- (4) The deceased was not, at the time of the execution of the alleged Will, in such a condition to understand the nature of the act and its effect, or the extent of the property of which he was disposing, or to comprehend and appreciate the claims to which he ought to give effect.
- (5) Approximately two weeks prior to the execution of the September Will the deceased seldom spoke and would just watch persons who spoke to him without any reaction.

[9] The defendants' counterclaim for an order pronouncing against the validity of the September Will and seek an order pronouncing in favour of the June Will as the true and final Will of the testator.

Legal Analysis

Whether the September Will is valid

- [10] The September Will contains a revocation clause in accordance with **Section 15** of the **Wills Act**¹. The issue then is whether the September Will is valid and so effectively revokes the June Will.
- [11] The claimant contends that the deceased at the time of the execution of the Will, was of sound mind, memory and understanding, and that the Will satisfies all the legal requirements and formalities necessary under the Wills Act. The defendants rebut the validity of the September Will and state that testator lacked the requisite mental capacity.
- [12] In **Aubrey Edwards v Rolston Rawlins**², referred to by counsel for the claimant, Her Ladyship Blenman J as she then was stated as follows:

“In order for a will to be valid, the Court should be satisfied that the testatrix understood three matters: the testatrix must understand the broad effect of her wishes being carried out; the extent of the property she is disposing and the claims to which she ought to give effect. The testatrix must have testamentary capacity at the time when she executes the will. See *Banks v Goodfellow*. This requires the Court to be satisfied that the testatrix had the following – (a) The nature of the act and its effects; (b) The extent of the property of which he is disposing; (c) The claims to which he ought to give effect.

The legal burden of proof always lies upon the person seeking to propound a will to prove that the testatrix had the testamentary capacity at the time. If that person fails to do so, the will would not be admitted to probate. The testatrix must have known and approved of the contents of the will. The will must be

¹ CAP 340

² ANUHCV2005/0513

that of a free and capable testatrix exercising her genuine free choice and not a result of undue influence by another.”

- [13] Accordingly, the burden of proof of the testator’s knowledge and approval lies on the claimant who is the party in this case setting up the Will³. The burden is discharged prima facie by proof of capacity and due execution⁴. The evidential burden then shifts to the objector to raise a real doubt about capacity, and if so raised, the evidential burden shifts back to the party setting up the Will to establish capacity⁵.
- [14] The sole issue to be determined is whether the testator’s mind and memory was sufficiently sound to enable him to know and understand the nature and effect of the September Will and that it fully reflects his wish and intentions at the time of the execution of the said will.
- [15] Counsel for both parties rely on the case of **Den v Joseph Vancleve**⁶ which was cited with approval by our Court of Appeal in **Anne-Marie Mac Leish Lynette Rooker v Avison Albert Marryshow**⁷, in judgment delivered by Pereira JA, as she then was, in the following terms:

"The testator must, in the language of the law, be possessed of sound and disposing mind and memory. He must have a memory; but his memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons or the families of those with whom he has been intimately acquainted... and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigour of intellect to make and to digest all parts of a contract, and yet be competent to direct the distribution of his property

³ Barry v Butlin (1838) 2 Moo PCC 480 at 482

⁴ Barry v Butlin (1838) 2 Moo PCC 480

⁵ Re Key (deceased) [2010] EWHC 408 (Ch)

⁶ (1819) 2 Southard 589

⁷ GDAHCVAP2010/0012

by will...The question is not so much what was the degree of memory possessed by the testator? as this: Had he disposing memory? Was he capable of recollecting the property he was about to bequeath; the manner of distributing it; and the objects of his bounty? To sum up the whole in the most simple and intelligible form, were his mind and memory sufficiently sound to enable him to know and understand the business in which he was engaged at the time he executed his will?"

The Claimant's Evidence

- [16] Evidence in support of the validity of the September Will and the testamentary capacity of the deceased is given by the claimant, Ms. Aninah Brathwaite and Mr. Atiba John.

Jerry Edwin

- [17] The claimant, Jerry Edwin, is an Attorney-at-Law. Mr. Edwin both in his witness statement and at trial states that he received a telephone call from the testator sometime in September 2022, indicating his desire to execute a new will. Mr. Edwin in cross examination stated that he spoke with the testator at length, and the testator informed him that he discovered that his siblings had been using funds from his bank account without his consent and wanted to make changes to the June Will. Mr. Edwin states that he called his clerk, Ms. Aninah Brathwaite, in his office and had her edit the June Will by tracked changes according to the testator's instructions.
- [18] Counsel for defendants, Mr. Ian Sandy, in cross examination asked Mr. Edwin when in September did the testator gave the instructions for the preparation of the September Will. Mr. Edwin in response stated that he was unsure of the exact day but asserts that twenty-four hours had not passed between the instructions and the execution of the Will. Mr. Edwin stated that he took notes, but his notes did not form part of the evidence before the court, and further that no one was present at the

testator's home during the telephone conversation he had with the testator for the preparation of the September Will.

- [19] Mr. Edwin in cross examination stated that he was aware that the testator had a leg injury but was not aware that he had cancer. Mr. Edwin went further to state that the testator did not evince any pain, and he was sure that the testator did not have any diminished mental capacity. However, the court notes that Mr. Edwin in the filed reply to the defendant's defence and counterclaim admits that he was aware that the testator was suffering from advanced metastatic prostate cancer with painful bed ulcers which he averred did not affect his cognitive functions.

Aninah Brathwaite

- [20] Ms. Aninah Brathwaite is an employee of the claimant and a witness to both Wills. Ms. Brathwaite states that she was present at the claimant's legal office when the testator called the claimant and gave instructions for the preparation of the September Will.
- [21] Ms. Brathwaite in cross examination states the testator called the office with instructions in early September, probably in the beginning of the month, but some days prior to 12th September 2022 which is contrary to the claimant's evidence with respect to 24 hours not having passed. Ms. Brathwaite states that she was instructed by the claimant on the 12th September 2022 to return to the testator's home to execute the September Will.
- [22] Ms. Brathwaite states that the testator was home alone at the time of the execution of the Will. He spoke clearly and appeared to be of sound mind with no form of distress and neither did he make any complaints about his health. She states that the testator was more light spirited, relaxed and talkative than he was in June. She states that the testator specifically asked that his instructions to prepare the September Will remained confidential. She states that the testator offered both herself and Atiba John juice and mangoes which were on a nearby table.

Atiba John

- [23] Mr. Atiba John witnessed both Wills. He gave similar version of facts as Ms. Brathwaite. He states that the testator appeared normal, in good spirit and did not seem to be pressured by anything at the time of the execution of the September Will.
- [24] Mr. John in cross examination denied Ms. Brathwaite's evidence that the testator offered juice and mangoes. However, at paragraph 13 of his witness statement he states that:

“Mr. Boatswain spoke clearly and he appeared very relaxed and offered us some juice and asked if we wanted some fruit.”

The Defendants' evidence

- [25] The defendants' case was presented by Denise Boatswain and Joseph Boatswain who are siblings of the testator.

Denise Boatswain

- [26] Denise Boatswain states that the deceased was in too much pain and distress in September 2022 to give instructions or execute a Will. She states that the testator had stopped eating, was emaciated and stopped talking due to the severity the pain.

Joseph Boatswain

- [27] Joseph Boatswain states that the deceased's senses were “going and coming”. He states further that by September 2022, the deceased's physical and mental conditions were diminished.

The Medical Evidence

- [28] In **Zorbas v Sidiropoulos (No 2)**⁸, a matter before the Court of Appeal of New South Wales and relied on by our Court of Appeal in the above referred case of **Anne Marie Mac Leish & Anr v Avison Marryshow**⁹, it was observed that:

“Medical evidence as to the medical condition of a deceased may of course be highly relevant, and may sometimes directly support or deny a capacity in the deceased to have understanding of the matters in the Banks v Goodfellow criteria. However, evidence of such understanding may come from non-expert witnesses.”

- [29] The testator’s medical condition at the time of the execution of the September will is further complicated by the apparent conflict in the two medical reports filed by the parties.

- [30] Evidence of the testator’s medical competency was led by Dr. Francis Martin on behalf of the claimant and Dr. Jude Antoine on behalf of the defendants.

Dr. Francis Martin

- [31] Dr. Francis Martin in his medical report dated 13th November 2023 stated that he was the medical practitioner for the deceased from 2021 up to his death in September 2022. Dr Martin stated that the deceased was of sound mind up to his demise. Dr. Martin stated that the testator was in good spirits, and he did not observe the deceased to be in a heightened state of distress when he did a home visit in July 2022.

- [32] Dr. Martin also stated that he did a second house call in September 2022 to perform a debridement of an ulcer on the testator’s foot. He stated that the testator was lucid and not in distress at that time. He stated that the deceased was alert and oriented to time, person and place.

⁸ [2009] NSWCA 197

⁹ GDAHCVAP2010/0012

- [33] Dr. Martin's evidence at trial is that while the testator was suffering from metastatic prostate cancer, the cancer would usually spread to the bone and liver, not the brain. He stated that while the testator's cause of death was found to be sepsis and multiple infected ulcers, a person's body becoming sepsis would usually occur a few days, or hours before their death and not for a prolonged period.
- [34] Dr. Martin's report did not provide the exact dates that he visited the testator, neither was he able to provide any notes or a record of the dates he did the house calls.

Dr. Jude Antoine

- [35] Dr. Antoine states that he knew the testator personally and had been his medical doctor from 2014. He conducted a mental status examination when he visited the testator on 15th July 2022. He found the deceased to be oriented to person and place but not to time. Dr. Antoine visited the testator again on 11th August 2022 and found that the deceased was oriented to person and place but not to time.
- [36] Dr. Antoine also observed that the deceased was in pain at the time of his visit which was likely due to a combination of an ulcer and the prostate cancer. Dr. Antoine states that he last visited the testator on 2nd September 2022 and noted that the testator's cognitive functions had quickly deteriorated at which time he was not oriented to person, place nor time. He observed a large sacral ulcer which was sepsis. He states the testator was in pain and distress and did not respond when he spoke to him. He states that the testator was bedridden and not eating. Dr. Antoine concluded that based on his assessment and examination it was highly unlikely that the testator had the mental capacity to understand and to give instruction to prepare a will.

Expert Report of Dr. Burkhardt

- [37] Dr. Dirk Burkhardt was jointly appointed an expert by the parties to give evidence as to the deceased's cognitive functions when he executed the September Will, having regard to the conflicting reports of the two medical doctors.

[38] At the commencement of the trial, Mr. Ian Sandy counsel for the defendants raised a preliminary objection to the expert report filed on 28th October 2024. Counsel requested that the report be either struck out or no reliance be placed on it for the following reasons, which have been succinctly reproduced for the purposes of this decision:

- (1) The certificate pursuant to Part 32.14 (2) of the CPR 2023 did not form part of the report.
- (2) The written instructions given to the expert (and any other instructions given to him) did not form part of his report as required by Part 32.14 (3) of CPR 2023.
- (3) The expert failed to answer any of the questions put to him on his report pursuant to Part 32.8 of CPR 2023.
- (4) Reliance is placed on medical records not annexed to the report.
- (5) The report is biased to the claimant's case.
- (6) The report relies on the truth of untested evidence.
- (7) The report makes findings of facts.
- (8) The report fails to mention the pathology reports submitted for consideration.

[39] It is necessary to reproduce some of the salient subheads from the expert report from Dr. Burkhart to put the challenges into proper context:

Key Events and Medical Context

Second Will : 12th September 2022, executed after Fitzroy's siblings allegedly withdrew money from his bank account without his consent

...

Instructions regarding secrecy: Fitzroy explicitly instructed Aninah Braitwaite, Attiba John and Jerry Edwin (executor) not to inform his siblings about the second will, indicating a clear intent and understanding of the sensitive nature of his decision

Pain Medication and cognitive impact:

At the time of his declining health, Fitzroy was under the influence of strong pain medication, including pethidine and co-codamol, both of which are known to potentially impair cognitive function. However, none of the Medical or Nursing professionals who assessed Fitzroy during this period- including Dr. Martin, Ingrid Green, and Dr.

Hercules- reported any significant alteration in his mental state due to these medications. Their observations suggest that his cognitive function remained sufficiently intact for decision-making even while on these medications.

Additional observations regarding cognitive function:

Between June and September 2022, Fitzroy's cognitive status was largely stable, with only Dr. Antoine reporting disorientation on 2nd September due to sepsis, which likely contributed to a temporary cognitive decline. This sepsis episode likely influenced Fitzroy's cognition at the time, but by 12th September (the date of the will's execution), multiple observations from different witnesses confirmed that his mental clarity had returned.

Fitzroy's mistrust of his siblings, due to their alleged embezzlement of funds from his bank account may have also influenced how he interacted with them during this time. This change in behaviour could have been misinterpreted by his siblings as cognitive decline, further complicating their perception of his mental state.

Context of family conflict:

Fitzroy changed his will after discovering that his siblings had withdrawn funds from his bank account without his consent. This incident, followed by his deliberate decision to alter the will and instruct confidentiality, suggests a clear and rational thought process, highlighting his intent and awareness.

Legal considerations of mental capacity:

Full orientation is not required to execute a Valid Will:

While complete orientation to time, place and person is an ideal standard, the ability to understand the nature and consequences of making a will, as well as who the beneficiaries are and what assets are involved, is sufficient for legal capacity. Fitzroy demonstrated these abilities through his coherent instructions regarding his estate, his explicit direction to witnesses, and his decision to amend the Will based on specific grievances.

Cognitive Function and Will making capacity:

With the exception of Dr. Antoine's report of disorientation during a brief episode of sepsis 10 days prior to the execution of the Will, all other professional assessments – including those from Dr. Francis Martin, Ingrid Green and Dr. Hercules – indicated that Fitzroy was mentally alert and oriented. His cognitive function was described as normal and capable of making reasoned decisions, and he exhibited no signs of confusion on the day of the will's execution.

The evidence strongly supports that Fitzroy Boatswain was mentally competent when he executed his second will on 12th September 2022. Despite a brief cognitive decline associated with sepsis earlier that month, his mental state had improved by the time the will was made, as confirmed by the multiple medical and nursing professionals.

His deliberate decision to keep the will confidential from his siblings further indicates that he was fully aware of his actions and their implications.

Analysis:

The statements by Fitzroy's siblings, Denise and Joseph Boatswain, claiming mental incapacity, are questionable, particularly Joseph's contradictory account. While Joseph mentioned Fitzroy's fluctuating condition, he simultaneously asserted that Fitzroy was not capable of making a will, an assertion that lacks support from medical records and independent witnesses. Joseph's and Denise's potential financial motives further undermine the credibility of their claims.

Conclusion:

Based on the medical reports, witness statements, and the circumstances surrounding the second will, Fitzroy Boatswain possessed the mental capacity to execute his will on 12th September 2022. His ability to understand the nature of his actions express his intentions clearly and instruct witnesses to maintain confidentiality indicates that he met the legal requirements for making a valid will. There is no compelling evidence to suggest that he lacked the mental capacity at the time of signing the will, and any claims to the contrary appear to be driven by familial disputes over inheritance. Although he was under the influence of pain medication, his cognitive abilities remained intact as supported by the assessment of independent professionals."

- [40] The report of Dr. Burkhardt calls into question the extent to which he has provided an objective and unbiased opinion. The expert describes the September Will as "executed after Fitzroy's siblings allegedly withdrew money from his bank account without his consent." Although the claimant stated in his evidence that he was informed by the deceased of the use of the deceased's bank account by the defendants without his consent, the truth of this allegation was not tested at the trial. Further, the expert states that the deceased gave instructions to the executor and witnesses to the September 2022 Will not to inform the defendants of the Will, as if he had knowledge of such information.
- [41] In addition, the expert gave his opinion on the reliability of testimony of lay witnesses. He referred to evidence of Ingrid Green and Dr. Hercules, nursing and medical professionals who were not witnesses before the court.

[42] The court takes judicial notice of the decision of the Privy Council in **Myers, Brangman and Cox v The Queen**¹⁰, in reference to the case of **R v Harris**¹¹ on duties and responsibilities of expert witnesses in civil cases where it was stated that:

“(1) Expert evidence presented to the court should be and seen to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.

(2) An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of advocate...”

[43] Further, the Judicial Committee of the Privy Council in **Pora v The Queen**¹², stated:

“It is the duty of an expert witness to provide material on which a court can form its own conclusions on relevant issues. On occasions that may involve the witness expressing an opinion about whether, for instance, an individual suffered from a particular condition or vulnerability. The expert witness should be careful to recognise, however, the need to avoid supplanting the court’s role as the ultimate decision-maker on matters that are central to the outcome of the case.”

[44] Counsel for the defendants asks that based on these reasons, the expert report be given absolutely no reliance. No authority being produced or relied on by counsel for the defendants, the court takes judicial notice of the dicta of Ventose JA in a decision of our Court of Appeal in **Electrical Associated Limited et al v Sunrod Property Inc.**¹³ where he states that striking out should not be the first step when there is a breach of Part 32 unless that breach is such that the impartiality of the expert is questioned. The Court held that the question is whether the lack of impartiality and objectivity had so coloured or tainted the report that it should not be admitted at all.

¹⁰ [2015] UKPC 40

¹¹ [2005] EWCA Crim 1980

¹² [2015] UKPC 9

¹³ SLUHCMAP2024/0001

The court must be satisfied that the expert has so failed in his duty that his report can be of no assistance to the court in relation to any matter within the expertise of the witness.

- [45] Given the inclusion of unsubstantiated evidence found in the expert's report, the court cannot rely on the findings of the expert for their objectivity. The expert referred to witnesses and hospital records which were not before the court, and failed to disclose how these records were obtained. The witnesses referred to in his report were not witnesses in the claim. The parties were not given an opportunity to cross examine the witnesses neither were they given an opportunity to test the veracity of those medical records referred to by the expert. The expert made both findings of fact and law regarding their evidence. The expert made conclusions based on unchallenged nursing and hospital reports.
- [46] In his report, the expert assumed roles of an advocate and of a court, by giving his opinion on the credibility of witness testimony and the fulfilment of legal requirements for the execution of a will. It is the law that an expert must be impartial in the presentation and assessment of the evidence and must explain the basis of his or her evidence when it is not a personal observation or sensation. The expert's mere unsubstantiated assertions cannot influence the court's decision.
- [47] The expert was appointed to assist the court in determining which of the two medical reports would be more conclusive in determining the ultimate issue which is mental capacity of the testator at the time of the execution of the September Will. The court is of the view that the expert, in giving reasons why the testator made the September Will, has acted beyond the remit of his appointment.
- [48] Further, the expert reached a conclusion that the testator's inability to speak or being nonresponsive as stated by both Dr Antoine and first defendant, was because of the testator's dissatisfaction with his siblings unlawfully withdrawing his funds and not due to the effect of the potent medication which he himself admits could affect one's

cognitive capacity. The expert failed to explain how the combined pain medication, including pethidine and co-codamol would only have temporarily impaired the testator's cognitive capacity in light of the evidence that the testator's health was deteriorating rapidly. It is a reasonable assumption that the prescribed combined medication would have been administered due to his declining health which could have further impaired the testator's cognitive capacity.

[49] The court is of the view that the process of reasoning which led to the expert's conclusion, including the premises from which the reasoning proceeds, were not matters known to the expert or if known, the expert failed to establish how they became known to him. The expert has accordingly failed to demonstrate impartially, which is critical.

[50] The expert was not called to give evidence at trial by either of the parties and accordingly could not be cross examined on his report. The real issue is whether the expert report fell within the remit of the terms of reference or whether it went beyond those terms. One of the four considerations which governs admissibility of expert evidence is whether the expert witness is impartial in his or her presentation and assessment of the evidence. An expert's bald statement of his opinion is not of any real assistance. The report included evidence which was not before the court in reaching the conclusion.

[51] The court is of the view that the expert went beyond his remit and failed in his duty to assist the court impartially. It has been held that expert assistance does not extend to supplanting the court as the decisionmaker. The conclusion reached by the expert as to the possible reason why the testator may have changed his mind should have been left to the court. However, this was not an issue to be determined on the pleaded case. Accordingly, the court does not place any reliance on the expert report, and it is accordingly struck out.

[52] The court therefore having read the two medical experts does not accept the evidence of Dr. Martin that the severity of the testator ulcers did not cause any pain to affect his cognitive function, which is in direct contrast with Dr. Jude Antoine.

[53] The court accepts Dr. Jude Antoine's evidence that the testator was not oriented to person, place nor time when he did his last visit on 2nd September 2022. The court also accepts Dr Antoine's evidence that the testator was only muttering and not speaking to anyone which is in keeping with the first defendant's evidence.

Analysis of the evidence

[54] In relation to the claimant's evidence, the starting point is that the claimant, Mr. Jerry Edwin, who is the named executor of the September Will was not present at the execution of the Will and cannot give any evidence in relation to the state of mind of the testator at the time of the execution of the September Will.

[55] Secondly, the claimant cannot prove the veracity of his statement that there was no one present during the telephone call when the testator gave instructions for the preparation of the September Will. It is the evidence of Denise Boatswain that there was always someone present with the testator due to his deteriorating health as he could not help himself. However, the claim is solely based on capacity of the testator at the time of the execution of the Will and not undue influence.

[56] Further, there is contradictory evidence as to the date that the testator purportedly gave the claimant instructions for the preparation of the September Will. It is the claimant's evidence at trial that the September Will was prepared and executed within twenty-four hours of the instructions, however as indicated above, his evidence was contradicted by his employee Ms. Brathwaite, whom he said was present when the testator called. It is Ms. Brathwaite's evidence that the instructions were given days before the execution of the will.

[57] The two witnesses to the September Will contradicted each other in cross examination. Ms. Brathwaite spoke of a conversation with the testator and the fact that he offered herself and Mr. John mangoes and juice when they attended his home for the execution of the September Will. This was categorically denied by Mr. Atiba John in cross examination, although it is stated in his witness statement that the deceased offered them juice and fruit. Moreover, Mr. John said that the testator sat to sign the Will which is contrary to the evidence that the testator was unable to sit as he had multiple ulcers and especially a sceptic painful sacral ulcer on his back.

[58] The court takes judicial notice of the following statement made by Robert Goff LJ, as he then was, in **The Ocean Frost**¹⁴:

“It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth.”

[59] The court having heard the claimant and his witnesses is somewhat hesitant to accept the evidence of the mental capacity of the testator at the time of the execution of the September Will. The court is of the view that the identical or nearly identical content of the witness statements of Ms. Aninah Brathwaite and Mr. Atiba John are wholly lacking in credibility. There is no evidence in their witness statements or on the Will that the contents were read over to the testator at the time of the execution of the September Will. The court is of the view that the claimant's evidence is contrived to present the testator as a normal, sound and strong individual at the time of the execution of the Will which is contrary to the medical evidence of Dr Antoine.

[60] Given the evidence propounded at the trial, the court finds that the claimant both on his evidence and the medical evidence has failed on a balance of probabilities to satisfy that the testator had the mental capacity at the time of the execution of the

¹⁴ [1985] 1 Lloyd's Rep 1 at 57

September Will. The court accepts the medical evidence of Dr. Antoine that the testator lacked cognitive capacity to understand the nature and effect of the September Will.

[61] In closing, counsel for the defendants in submissions further argues that the September Will ought to have observed the 'Golden Rule'. In addition, counsel for the claimant in submissions argues the involvement of the defendants and the undue influence of the defendants on the claimant in the June Will. It is basic rule that parties are bound by their pleadings and therefore both parties having failed to plead cannot change their case in filed submissions.

Conclusion

[62] Given the above circumstances, the court finds that the claimant has failed to prove his case on balance of probabilities and the claim stands dismissed. The defendants succeed on their counterclaim

ORDER

[63] It is therefore ordered and directed as follows:

- (i) The claimant's claim to deem the Will dated 12th September 2022 as the last true will and testament of the deceased stands dismissed.
- (ii) The defendants succeed in their counterclaim and accordingly the Will dated 17th June 2022 is deemed to be the last Will and Testament of the testator.
- (iii) The claimant, Jerry Edwin, is the sole executor of the Will of the deceased dated 17th June 2022 and is entitled to a Grant of Probate in solemn form of the June Will.

- (iv) The claimant shall pay the defendants prescribed costs in the sum of \$10,000.00 within thirty (30) days of today's date.

Agnes Actie
High Court Judge

By the Court

Registrar