

THE EASTERN CARIBBEAN SUPREME COURT

SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHCV2019/0012

BETWEEN

SHARON DOUGAN

Attorney on Record for Lawrence Samuel

Formerly of St. Vincent and the Grenadines
but presently residing in the United Kingdom

CLAIMANT

AND

EDEN JOHN

DEFENDANT

Before: The Hon. Mde. Justice Esco L. Henry High Court Judge

Appearances:

Mrs. Kay Bacchus-Baptiste for the claimant.

Ms. Samantha Robertson for the defendant.

2020:May 6

2021:Mar. 9

May 18

JUDGMENT

BACKGROUND

[1] **Henry, J.:** Mr. Lawrence Samuel brought this claim¹ through his lawful attorney on record Ms. Sharon Dougan. Mr. Samuel claimed that he is the executor named in a Will made by Dorothy Samuel deceased in April 2003. He pleaded that after her death he learnt that the deceased reportedly made another Will in 2008 naming Ms. Eden John as one of the executors. Mr. Samuel claimed that by 2008 the deceased was seriously ill and had been bed-ridden for an extended period. He

¹By Fixed Date Claim Form on 17th January 2019.

contended she stayed at Ms. John's house for one month and was 'unduly influenced in her infirmed and fragile state' to make that second Will.

[2] Ms. Eden John and Mr. Tyrone John are named as defendants. Mr. Samuel asserted that Ms. John is the deceased's sister while Mr. John is Ms. John's grandson. He subsequently withdrew the claim against Mr. John. Mr. Samuel seeks a declaration that the Will dated April 4th, 2003 is the deceased's last Will and an injunction restraining Ms. John from applying for probate of the 2008 Will. He sought alternatively reimbursement of all funeral expenses paid by him; interest on damages and costs. Ms. John filed no defence. She submitted that Mr. Samuel has not made out a case of presumed undue influence against her.

[3] Mr. Samuel provided no evidence that he has been prevented from applying for probate of the 2003 Will or that anyone has applied for probate of the 2008 Will. He supplied no direct evidence about the circumstances under which either Will was executed or from which the court can find that the 2008 Will was invalidly made. His allegations of undue influence are not made out. His claim is dismissed.

ISSUES

[4] The issues are:

- 1) Whether Eden John secured the execution of the 2008 Will by Dorothy Samuel deceased through undue influence?
- 2) To what remedies is Lawrence Samuel entitled?

LAW AND ANALYSIS

Issue 1 – Did Eden John secure the execution of the 2008 Will by Dorothy Samuel deceased through undue influence?

[5] Mr. Samuel pleaded that Dorothy Eunice Samuel deceased ('the testatrix') executed her Last Will. on April 4th 2003 in the presence of attorney at law Errol Layne and solicitor's clerk Agnes De Roche. Neither attesting witness testified at the trial. The sole witness Sharon Dougan gave no evidence regarding the circumstances under which the said Will was executed. While the 2003 Will was attached to the claim form it was not produced in evidence.

[6] Mr. Samuel pleaded further that in 2008 when the testatrix was seriously ill, she stayed for one month at Ms. John's house in Sion Hill, Saint Vincent and the Grenadines. He claimed² that during this time the testatrix was 'unduly influenced in her infirmed and fragile state to make a second will which appointed herself and (Tyrone John) as executors of same' and dispossessed him in favour of a grandnephew. Mr. Samuel submitted that the 2008 Will cut him out completely. The 2008 Will was not tendered into evidence. Mr. Samuel outlined in his submissions, the gifts that he claimed were devised by the 2003 and 2008 Wills. He did not set out that information in his statement of case.

[7] He pleaded expressly in the Statement of Claim:

'1. The Claimant ... is the executor of the estate of Dorothy Eunicey Samuel by virtue of her last will and testament dated 4th April 2003. ...'

2. ...

3. Dorothy Eunicey Samuel deceased (hereafter the testator) executed the said will and same was witnessed by attorney at law Errol Layne and solicitor's clerk Agnes De Roche. A copy of the said will is hereto attached and marked "L.S.2"...

5. ... he (Lawrence Samuel) subsequently discovered that another will was prepared in 2008 which purported to be the last will and testament of the testator. ...

7. In 2008 the testator's health had seriously deteriorated as she was afflicted with hypertension and a serious case of diabetes and in 2009 to compound things she developed a cancerous lump on her left breast for which same had to be removed. As such, the testator's ongoing medical issues were such that she was in an impressionable state of mind and she was unable to fully understand what she was doing, so she could not have legitimately attested to any document including the said purported will that was supposedly prepared appointing the Defendants as executors of same. ...

8. The Claimant and the testator were very close. In fact she regarded him as her son rather than her brother because he was so young. It was the Claimant who substantively supported the testator and their relationship was as such that she will not dispossess the Claimant for a grand nephew. The testator was very close with

²Para. 6 of the Statement of Claim.

Claudette Dougan who also supported her and whom she treated as her daughter.
She would not in her right mind dispossess the two persons who supported her most.'
(Underlining supplied)

[8] In the succeeding paragraphs, Mr. Samuel supplied further particulars as follows:

'PARTICULARS OF UNDUE INFLUENCE

a) ...

b) The ... Defendant used the opportunity in 2008 knowing that the testator was seriously ill and staying at the ... Defendant's home at Sion Hill in Saint Vincent and the Grenadines to unduly influence her to prepare a purported will which named herself ... her grandson as testators of same inexplicably cutting out the Claimant and niece.' (Underlining supplied)

[9] It is to be noted that at paragraph 7 of the Statement of Claim, and sub-paragraph b) of the particulars, Mr. Samuel charged that the testatrix appointed Ms. John and Tyrone John respectively as her executors and testators in the 2008 Will. Those assertions contain no complaint that the Johns were named as beneficiaries. Paragraph 8 of the Statement of Claim implies that Mr. Samuel was somehow dispossessed by a gift to 'a grandnephew'; and further that he and Claudette Dougan were dispossessed by one or more subsequent gifts to some person or persons unnamed. The particulars in sub-paragraph b) do not advance such claim of 'dispossession'. It is merely alleged that Ms. John and Tyrone John were named as testators in the 2008 Will. Such lack of specificity or inadvertence in the drafting of the pleadings does not offer a pleaded basis which supports any claim that Ms. John or Tyrone John were beneficiaries under the 2008 Will.

[10] Nevertheless, Mr. Samuel made submissions that by the 2003 Will the testatrix left her sole real property in Prospect, St. Vincent to her niece Claudette Dougan, her nephew Tyrone John and to him in equal shares; while the 2008 Will contained no gift to him and left that real property to Ms. John and Tyrone John. This was not pleaded. No evidence, no matter how comprehensive can cure this defect (of omission) in the pleadings. In any event Ms. Sharon Dougan provided no such testimony. Her account about the contents of the Wills was very sketchy. Moreover, the impugned 2008 Will was not before the court to allow for examination.

[11] Ms. Dougan testified that she is the testatrix's niece. She pointed out that the deceased has several relatives including Mr. Samuel whom she treated as her son. This biographical data about members of the family served as the background against which the court was invited to evaluate the alleged testamentary changes.

[12] Ms. Dougan explained that the testatrix Dorothy Samuel, Lawrence Samuel, Elwyn Wyllie and Eden John are respectively her aunts and uncle. She averred that as a child, Lawrence Samuel was cared for by her mother and the testatrix. She added that Lawrence Samuel had no children and that a special bond had developed between him and her (Ms. Dougan). She stated that she and Claudette Dougan are sisters; that she is Tyrone Dougan's second cousin and that Claudette's mother was the testatrix's twin sister. She testified that the testatrix lost a child around the time that Claudette was born and therefore played the role of mother to Claudette from the time she was 3 months of age. She asserted that the testatrix took care of all of Claudette's needs until the latter migrated to the United Kingdom.

[13] She indicated further that even though Tyrone did not live with the testatrix initially, she nevertheless assisted him with supplies. At some point Lawrence Samuel went to live with the testatrix at her home in England. Tyrone later moved in with them. Ms. Dougan said that the testatrix treated Tyrone as her child as she had done with Claudette. He and the testatrix returned to Saint Vincent in 1992 where the former built a house at Prospect. Mr. Samuel remained in England at the address they had shared until 2015. The testatrix facilitated this by signing over the lease to him.

[14] Mr. Samuel visited Saint Vincent and the Grenadines from time to time. On his visit in 2003 he stayed partly at the testatrix's house and the rest of the time at Ms. Dougan's house. On that trip he carried out repairs to the deceased's house. Ms. Dougan testified that after Mr. Samuel returned to England from Saint Vincent in 2003, he and Claudette sent money to the testatrix on a regular basis. Ms. Dougan averred that the testatrix told her on more than one occasion that what she had was for Lawrence, Claudette and Tyrone. She said that this was common knowledge in the family because of the maternal relationship the testatrix maintained with those three.

- [15] Throughout her testimony Ms. Dougan referred to Ms. John by several aliases. She said that Ms. John is married to Elwyn Samuel also known as Elwyn Wyllie. She explained that Eden Tash Samuel, Eden Wyllie, Eden Samuel John and Eden John is the same person. She used those names interchangeably.
- [16] Ms. Dougan maintained a close relationship with the testatrix. Ms. Dougan testified that the deceased would seek advice from her in connection with matters which did not seem right to her. She recalled that the testatrix telephoned her in the first week of April 2008 and notified her that Ms. John was surveying lands belonging to Claudius Wyllie (her deceased father). Later that week Ms. Dougan contacted Ms. John about the survey and was told that she was busy. Ms. John completed the survey the land and placed her name - Eden Wyllie - 'to the lands'. Ms. Dougan remarked that Claudius Wyllie prepared a Will leaving all of that land to his three children, yet Ms. John placed everything in her name.
- [17] She noted that her own mother had paid the land taxes in respect of those lands up to her death in 2003 and since that date she continued to make the payments. She has provided no information linking this anecdote to the assertions made by Mr. Lawrence that undue influence was exerted to effect execution of the 2008 Will. I fail to see the relevance of this testimony to the issues. It is therefore disregarded.
- [18] Ms. Dougan recounted that in early 2008 Dorothy Samuel telephoned to find out from her whether it was necessary to produce one's identification card and birth certificate for the purposes of opening a bank account. The testatrix told her that Eden Tash Samuel (Ms. John) had recommended that they open a joint account at NCB to facilitate the payment of her (testatrix's) bills. Ms. Dougan advised her that the identification documents were needed by the bank because of issues with money laundering. She however reminded the testatrix that she already had an account at NCB and she only had to complete a withdrawal slip as needed.
- [19] The testatrix confided in Ms. Dougan that Ms. John told her that if Lawrence were to die, Ms. Dougan would place her in a care home because she had Power of Attorney. She explained to the testatrix that this was not possible because the Power of Attorney was ineffective on the donor's death and further that two persons would benefit from that account on her passing – Tyrone and

Ms. John. Ms. Dougan surmised that Ms. John made that comment to the testatrix because she had not opened the second bank account to enable Ms. John to do as she pleased with the monies in the account. The court refrains from drawing such an inference or conclusion. I make no finding that Ms. John had any such motives.

[20] Ms. Dougan testified that at the end of each month when the testatrix collected her pension from the UK, Ms. John and her husband took her to Kingstown to pay her bill. She said that the testatrix confided in her that she got tired of this because when she travelled with them to town, she had to fill the vehicle tank with gas, give them a change and provide them with something to eat. Ms. Dougan told her that she was being taken advantage of. The testatrix started taking a taxi into Kingstown as it was cheaper for her to do so. On one occasion the testatrix informed Ms. Dougan that she got hit by a vehicle while in Kingstown, as she was walking to meet Eden Tash. The testatrix informed her that it was not too serious and again that she fell at home but was okay.

[21] Ms. Dougan attested that Dorothy was 'intimated' (presumably 'intimidated') by her sister Eden John 'to the extent that she would cry in the manner in which she spoke to her'. She continued 'If she did not want Dorothy to repeat anything that she would of said, she would threatened her by saying if she called her name to anyone else she would burst her flipping lips.'

[22] Ms. Dougan testified that she tried to call the testatrix in 2009 but got no response. When she eventually reached her by phone, she was told that everything was okay. The testatrix told her that she had gone into town. The testatrix had surgery in 2009. Ms. Dougan's sister reported to her that she had tried without success to get Ms. Samuel on the phone and further that the last time she had spoken with her the testatrix informed her that she had a doctor's appointment in March 2009. Ms. Dougan remarked that her aunty Dorothy was taken for surgery and no one (not even her sister or Lawrence) were notified.

[23] She met Ms. John in Kingstown subsequently and was informed that the testatrix had surgery and was staying at her house. It is not clear if this happened in March or sometime later. Ms. Dougan told Ms. John that she was unaware of the surgery and mentioned to her that Claudette (Dougan's sister) had tried to call the testatrix numerous times without success. Ms. John responded that she would let Ms. Samuel know, but did not disclose her telephone number. Ms. Dougan added that

Ms. Samuel had no cellular telephone. Ms. Dougan said that she told Claudette about her encounter with Ms. John. Claudette was very upset because even though the testatrix had told her about her doctor's appointment, she did not tell her that she had to undergo surgery. She wanted to know why because Lawrence was also not notified until after the fact and only when assistance was needed.

[24] Ms. Dougan testified that after the surgery in March 2009, Ms. John wanted Lawrence Samuel to return to Saint Vincent to take care of her because she wanted to return to Canada. However, this could not be arranged. Ms. John therefore made arrangements for the testatrix to go to the UK. Ms. Dougan testified 'Eden John returned to Canada leaving Eden Tash to accompany Dorothy to Barbados where she travelled on her own to the United Kingdom.' The testatrix made the trip from Barbados to England unaccompanied. She died in England two days later. It is not clear if the Eden Tash who accompanied her to Barbados is different from Eden Tash Samuel.

[25] Ms. Dougan asserted that Eden John wrote a letter to Mr. Lawrence Samuel falsely stating that she was in Canada for the entire year of 2008. No such letter was produced. For her part, Ms. Dougan averred that she saw Ms. John in 2008 and spoke to her in April of that year when she surveyed the land for Claudius Wyllie.

[26] Regarding the 2003 and 2008 Wills, Ms. Dougan stated that after Dorothy Samuel's burial, Lawrence Samuel told her that he was 'coming home to sort things out as he knew about Dorothy will of 2003.' He told her that Eden John had cursed him out and informed him that nothing was left to him because Dorothy had changed her will in 2008. Mr. Samuel told Ms. Dougan that the testatrix would not have done so without informing him and explaining to him why she made a change.

[27] Ms. Dougan testified that she met Ms. John in Kingstown at some point, that 'Eden Tash Samuel' greeted her but she (Dougan) responded that she does not need her hello because they were too dishonest. She said that Eden Tash Samuel replied 'so is not the truth? Jane (Dorothy) changed her will she asked me to collect it and hold it until Eden (John) returned from (sic) Mr. Layne (lawyer Layne) and that is what I do, I gave it to Eden.' Ms. Dougan testified that she did not reply

to Ms. Samuel. She reasoned 'that being the case, it meant that Dorothy never saw that will therefore could not be the one to sign that will also.' She averred that she has no interest or anything to gain in this matter and just hoped to see justice for those involved in the 2003 Will.

[28] On Mr. Samuel's instructions, Ms. Dougan obtained a copy of the Wills. She referred to them as '... a 2003 copy for Lawrence Samuel, Claudette Dougan and Tyrone John and the other a 2008 copy for Eden Samuel-John, Tyrone John and Elwyn Samuel.' She notified Mr. Samuel of her findings. He asked her to get a lawyer to contest the will and she did so. He then took the matter to court.

[29] Ms. Dougan added that Mr. Samuel contacted her about the funeral expenses. He ended up paying £10,000.00 for the testatrix's funeral - monies he obtained through a loan. Ms. John who had contributed £1,000.00 asked to be reimbursed and he obliged. Ms. Dougan remarked that the testatrix's property was rented from 2013 to 2018 for \$500.00 monthly and has not been repaired.

[30] She asserted that she strongly believes that the testatrix knew nothing about the 2008 Will, for several reasons. She stated that when the deceased signed her name for business, she wrote out her full name - 'Dorothy E. Samuel' as on her 2003 Will. She remarked that the 2008 Will contained only the name 'D.E. Samuel'. She reasoned that even if the testatrix were to remove 'Lawrence and Claudette name' from her Will, she would not have replaced those names with 'Eden Samuel-John and Elwyn Samuel ... stating exactly what each individual received.' She supplied no details of the basis of her beliefs.³ No evidentiary weight is attached to her surmisations in that regard.

[31] She opined further that the testatrix was a second mother to Claudette Dougan, Lawrence Samuel and Tyron John and would not remove any of those names and replace them with others. She noted that 'Elwyn Samuel/Elwyn Wyllie' would have already inherited a property and lands from her mother Delcene Samuel. She added that Ms. John took everything even though her (Ms. Dougan's) grandmother⁴ had stated that two other grandchildren that she raised on her own should each inherit a plot of land. She added that Eden John already owned property at Kingstown Hill.

[32] It is not clear to me how a previous benefit by Ms. John of property belonging to Delcene Samuel would invalidate or render questionable, provisions of the 2008 Will. Neither Mr. Samuel nor Ms.

³In accordance with CPR 29.5(1)(e).

⁴ Presumably, Delcene Samuel.

Dougan pointed to any legal principle which supports such a conclusion. Her reasoning is without merit in law. In any event, as already indicated the absence of both wills makes it impossible to determine what gifts were made in either.

[33] Ms. Dougan's reference to the testatrix's customary signature does not without more, establish that the 2008 Will was not executed by the testatrix or that it was not valid. Her bald statement of opinion that the testatrix would not have replaced 'Lawrence and Claudette' with Ms. John and Tyrone John is speculative. It affords no empirical basis for such finding. Furthermore, even if the names were changed, the pleaded case is that those names merely replaced the previous executors and testators. It was not part of the pleadings that the Johns were beneficiaries under the 2008 Will. This part of Ms. Dougan's testimony is therefore not admissible or determinative of any issue.

[34] Mr. Samuel submitted that the 2008 Will was discovered after the close of the pleadings and was attached to a witness summary of Claudette Dougan. He contended that Claudette Dougan's witness summary was not allowed because it was filed one week later. He submitted that nonetheless the court should take judicial notice of it because it is before the court as part of the parties' duty to disclose all relevant documents. He advanced no legal authorities as the basis of how judicial notice can be taken of the 2008 Will in those circumstances. The Will not having been admitted into evidence is excluded from the court's consideration.

[35] It is a matter of record that the witness summary of Claudette Dougan was filed on 17th April 2020, made no reference of the 2008 Will and was not accompanied by the usual Certificate of Exhibits. Also included in the case file is a document marked 'B' dated 9th May 2008 described as the Last Will and Testament of Dorothy Eunicy Samuel which appears to have been lodged at the court office on April 17th, 2020. It is not accompanied by any affidavit or statement indicating by whom it was lodged or the circumstances under which it was being provided.

[36] It has not gone unnoticed that on the one hand, the pleadings refer to the impugned will being made in 2008, while on the other hand, Ms. Dougan's account attest to the impugned will being made around March 2009 after the testatrix's surgery. This inconsistency between the pleadings and evidence is irreconcilable and strikes at the heart of Mr. Samuel's case. In similar vein, Ms.

Dougan's testimony paints the testatrix as a woman who was up and about throughout 2008, conducting her own personal business including going into Kingstown to pay bills. That narrative is at odds with the description of a bed-ridden Dorothy in the statement of case. In this regard, those aspects of Mr. Samuel's case are incompatible. The evidence does not support the case in those material respects.

Be that as it may, the court will consider the submissions filed by each party.

[37] At the close of his case, Mr. Samuel submitted that he had pleaded and was relying on presumed undue influence. He argued in his written submissions that his case is one of actual and presumed undue influence. I will address them sequentially.

Presumed and Actual Undue Influence

[38] Mr. Samuel submitted that he 'pleaded undue influence which includes both actual and presumed undue influence.' He contended that Ms. John exerted undue influence over the testatrix because the deceased was living in her house and was intimidated by her influence over her. He submitted 'because the deceased will not dispossess her "children" it could only be Eden John's undue influence over the deceased who lived in her house and even complained of her threats causing her to cry!' He contended that that should be regarded as unfair and improper.

[39] Ms. John countered that Mr. Samuel's case is grounded in the allegation that she unduly influenced the testatrix 'to attest to a purported will'. She submitted that Mr. Samuel failed to exhibit a purported will and therefore there is no evidence of the same.

[40] In assessing the merits of Mr. Samuel's claim based on undue influence, the court is required to consider the pleadings and the evidence in light of the applicable principles of law. In particular, the court must examine whether presumed and/or actual undue influence was pleaded. The learned authors of **Halsbury's Laws of England**⁵ provide guidance on what is to be included in pleadings where undue influence is alleged.

[41] They state:

⁵(Volume 102 (2021), para. 878.

'878. Contents of statements of case.

In a probate claim, the claim form must contain a statement of the nature of the interest of the claimant and of each defendant in the estate. Further, if a party disputes another party's interest in the estate he must state this in his statement of case and set out his reasons. Additionally, any party who contends that at the time when a will was executed the testator did not know of and approve its contents must give particulars of the facts and matters relied on and any party who wishes to contend that:

- (1) a will was not duly executed;
- (2) at the time of the execution of the will the testator lacked testamentary capacity; or
- (3) the execution of the will was obtained by undue influence or fraud, must set out the contentions specifically and give particulars of the facts and matters relied on.

A statement of case should make clear the general nature of the case of the party whose statement it is, and should be a concise statement of the facts on which he relies. ... A claimant or counterclaiming defendant must specifically set out in his particulars of claim, among other things, any allegation of fraud, and any details of unsoundness of mind or undue influence where he wishes to rely on them in support of his claim.' (Underlining supplied)

[42] 'Probate claim' is described in the Civil Procedure Rules 2000 ('CPR') as "a claim for a grant of probate of the will, or letters of administration of the estate, of a deceased person or for the revocation of such a grant or for a decree pronouncing for or against the validity of an alleged will, not being a claim which is non-contentious or common form probate business;". The instant claim being one for among other things, an order pronouncing against the validity of the 2008 will, qualifies as a probate claim. In considering whether undue influence was properly pleaded; the court will look to see whether the pleadings contain the essential elements of undue influence.

[43] Mr. Samuel contended that the law relating to undue influence has been outlined in several cases including **Barclays Bank Plc v O'Brien and another**⁶ where the court identified 2 categories of

⁶ [1993] 4 All E R 417.

undue influence (actual and presumed) and described their distinguishing features. The court noted that presumed undue influence is characterized by certain relationships. It opined:

'Undue influence

A person who has been induced to enter a transaction by the undue influence of another (the wrongdoer) is entitled to set that transaction aside as against the wrongdoer. Such undue influence is either actual or presumed. In *Bank of Credit and Commerce International SA v Aboody* (1988) [1992] 4 ALL ER 955 at 964, [1990] 1 QB 923 at 953 the Court of Appeal helpfully adopted the following classification.

Class 1: actual undue influence. In these cases it is necessary for the claimant to prove affirmatively that the wrongdoer exerted undue influence on the complainant to enter into the particular transaction which is impugned.

Class 2: presumed undue influence. In these cases the complainant only has to show, in the first instance, that there was a relationship of trust and confidence between the complainant and the wrongdoer of such a nature that it is fair to presume that the wrongdoer abused that relationship in procuring the complainant to enter into the impugned transaction. In class 2 cases therefore there is no need to produce evidence that actual undue influence was exerted in relation to the particular transaction impugned: once a confidential relationship has been proved, the burden then shifts to the wrongdoer to prove that the complainant entered into the impugned transaction freely, for example by showing that the complainant had independent advice. Such a confidential relationship can be established in two ways, viz:

Class 2A. Certain relationships (for example solicitor and client, medical advisor and patient) as a matter of law raise the presumption that undue influence has been exercised.

Class 2B. Even if there is no relationship falling within class 2A, if the complainant proves the de facto existence of a relationship under which the complainant generally reposed trust and confidence in the wrongdoer, the existence of such relationship raises the presumption of undue influence. In a class 2B case therefore, in the absence of evidence disproving undue influence, the complainant will succeed in setting aside the impugned transaction merely by proof that the complainant reposed trust and confidence in the wrongdoer without having to prove that the wrongdoer exerted actual undue influence or

otherwise abused such trust and confidence in relation to the particular transaction impugned.⁷ (Underlining added)

[44] Mr. Samuel submitted that the categories of undue influence are not closed. He argued that the sister/sister relationship created the level of trust required. Ms. John countered that the authorities make clear that the class 2A category limits the relations to which presumed undue influence can apply and further that the relationship between sisters is not one of them. Mr. Samuel contended that the circumstances of the gift in the 2008 will requires an explanation in light of the testimony adduced in this case. He further submitted that there is no reasonable explanation for the testatrix to suddenly change her mind about 'her children'. He argued that the signature in the 2008 will is suspicious and the burden shifted to Ms. John to rebut the presumption and she did not. He submitted that as propounder of the 2008 Will Ms. John 'must prove it'.

[45] He also cited the cases of **Indira Salisbury v M. R. Thomas**⁸, **James Johnson v Amos Eno and others**⁹ and **William Keith Thomas v Joseph Fenton**¹⁰. In the **William Keith Thomas** case the learned trial judge adopted the explanation of Sir James Hannen from the decision in **Wingrove v Wingrove 1885 11PD 81**. There, Sir James stated:

'To be undue influence in the eyes of the law there must be –to sum it up in a word – coercion. It must not be a case in which a person has been induced by means such as I have suggested to you to come to a conclusion that he or she make a will in a particular person's favour, because if the testator has only been persuaded or induced by considerations which you may condemn, really and truly to intend to give his property to another, though you may disapprove of the act, yet it is strictly legitimate in the sense of its being legal. It is only when the will of the person who becomes a testator is coerced in to doing that which he or she does not desire to do that it is undue influence. 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

⁷ At page 423, per Lord Browne-Wilkinson.

⁸ No citation supplied.

⁹ SVGHCV2002/199A.

¹⁰ MNIHCV2013/0017

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. These illustrations will sufficiently bring home to your minds that even very immoral considerations either on the part of the testator, or of someone else offering them, do not amount to undue influence unless the testator is in such condition, that if he could speak his wishes to the last, he would say 'this is not my wish, but I must do it'. There remains another general observation that I must make, and it is this, that it is not sufficient to establish that a person has the power unduly to overbear the will of the testator. It is necessary to prove that in the particular case that power was exercised, and that it was by means of the exercise of that power, that the will such as it is, has been produced.'¹¹ (Underlining supplied)

[46] Mr. Samuel quoted extensively from the referenced cases. They all underscored the main elements.

of undue influence (being coercion which induce the making of the impugned document); the two types of undue influence and their components. Mr. Samuel commended the pronouncement in **James Johnson v Amos Eno and others** as being instructive. There the court opined:

'It is settled law that the burden of proving undue influence is on the party alleging undue influence. What amounts to undue influence on a testator was explained by Sir James Hannen P. in *Wingrove v Wingrove* (1885) 11 P.O. p. 81 in the following manner: "There is only undue influence if the testator is in such a condition that if he could speak his wishes to the last, he would say, this is not my wish, but I must do it.'¹²

[47] Ms. John submitted that Mr. Samuel's submission (at the end of the trial) was that his case was one of presumed influence. She argued that in **Della Vallery Nolan Nee Jude et al v Diane Jude et al**¹³ the Court of Appeal has provided a precise description of the circumstances giving rise to presumed undue influence. The Court of Appeal stated:

¹¹ Rehearsed at para. 42 of the William Keith Thomas decision (MNIHCV2013/0017).

¹² At para. 64.

¹³ SLUHC VAP2017/0025.

‘Presumed undue influence arises where there is a relationship between two people from which the law presumes that one party has influence over the other party and a transaction takes place between the two parties in which the benefit to the party with the influence is so substantial (or otherwise of such a nature) that it cannot prima facie be reasonably accounted for on the ground of the ordinary motives on which ordinary men act.’

[44] This formulation, in terms of the nature of the transaction attracting the presumption of undue influence, is derived from the judgment of Lindley LJ in the English Court of Appeal in the case of *Allcard v Skinner* where he spoke of a gift of a small amount made to a person standing in a confidential relationship to the donor not attracting the presumption of undue influence, and then went on to say: ‘But if the gift is so large as not to be reasonably accounted for on the ground of friendship, relationship, charity or other ordinary motive on which ordinary men act, the burden is upon the donee to support the gift...’.

[45] The party claiming presumed undue influence need not prove that undue influence was actually exerted, or even that the party influenced actually reposed trust and confidence in the other party; it is sufficient for him to prove that the transaction took place and the existence of the type of relationship from which undue influence can be presumed. The burden of proving that the transaction took place and that the relationship existed at the time rests with the complainant, after which the burden shifts to the party against whom the claim has been made to prove that the complainant obtained independent advice. Relationships to which the doctrine of presumed undue influence has been applied include those between parent and child, lawyer and client, doctor and patient, and trustee and beneficiary; the list though is not exhaustive.’¹⁴

[48] Ms. John submitted further that she did not dispute that another will was executed after the 2003 Will. However, she contended that by not producing the 2008 will, Mr. Samuel failed to satisfy the burden on him to prove that the transaction (execution of a 2008 will by the testatrix) had taken place. She submitted further that there is nothing to prove that she has benefitted in anyway because of alleged undue influence. She reasoned that the court cannot be invited to surmise as to

¹⁴ Paras. 43 – 45.

what is contained in a purported document and make a finding as to the existence of the terms of such purported Will. She argued that Mr. Samuel has not established his claim and it should be dismissed.

[49] She contended further that the pronouncement of the Court of Appeal in **Joseph Fenton et al v William Keith Thomas**¹⁵ is instructive. There, the court approvingly considered other pronouncements in the **Wingrove case**:

‘And what is undue influence? Sir James Hannen in **Wingrove v Wingrove and Others** described undue influence as follows: -

“...[T]here is no subject upon which there is a greater misapprehension...We are all familiar with the use of the word “influence”; we say that one person has an unbounded influence over another, and we speak of evil influences and good influences, but it is not because one person has unbounded influence over another that therefore when exercised, even though it may be very bad indeed, it is undue influence in the legal sense of the word. To give you some illustration of what I mean, a young man may be caught in the toils of a harlot, who makes use of her influence to induce him to make a will in her favour, to the exclusion of his relatives. It is unfortunately quite natural that a man so entangled should yield to that influence and confer large bounties on the person with whom he has been brought into such relation; yet the law does not attempt to guard against those contingencies.”¹⁶

[50] Citing the **Della Vallery Nolan case**, Ms. John submitted that undue influence may be defined as the influence exercised by one person over another, in circumstances such as would cause a court of equity to determine that a transaction done (directly or indirectly) by the person acting under the influence of the other, was not produced by the exercise of his free and independent will. She added that the doctrine of undue influence applies to transactions where influence is acquired and abused or where confidence is reposed and betrayed at the time of the impugned transaction. Ms. John echoed the submissions of Mr. Samuel as to the types of undue influence and the classes of presumed undue influence relationships. She cited in support the case of **Ingrid Skerret et al v**

¹⁵ MNIHCVAP2018/0004.

¹⁶ At para. 13 of the Fenton v Thomas case- a quote taken from pp. 82 of the Wingrove decision.

Ernest Valmont¹⁷.

[51] The parties have rehearsed the principles which guide a factual and legal evaluation of the elements

of presumed undue influence. Mr. Samuel has also identified the defining features of actual undue influence. One of the seminal cases which set out those principles is **Allcard v Skinner**¹⁸. The Court of Appeal highlighted that authority in the **Della Vallery Nolan** case referred to by Ms. John. The learned Justices of Appeal opined:

'Undue influence may be defined as the influence exercised by one person over another, in circumstances such as would cause a court of equity to determine that a transaction done (directly or indirectly), by the person acting under the influence of the other, was not produced by the exercise of his free and independent will. The doctrine of undue influence applies to transactions where influence is acquired and abused or where confidence is reposed and betrayed at the time of the impugned transaction. In National Commercial Bank (Jamaica) Ltd v Hew and Ors, the Privy Council stated that the doctrine 'arises whenever one party has acted unconscionably by exploiting the influence to direct the conduct of another which he has obtained from the relationship between them'. The question which the court must ask in determining whether there was undue influence is not whether the party influenced knew what he or she was doing at the time, but how the intention to do it was produced. The touchstone for whether an intention was produced through an exercise of undue influence is whether – in the words of Lord Nicholas in the case of Royal Bank of Scotland plc v Etridge (No. 2)¹⁹ – 'the consent thus procured ought not fairly to be treated as the expression of a person's free will...'.¹⁹(Underlining added)

[52] As to presumed undue influence, the Court continued:

'Although the wisdom of the longstanding practice of doing a classification of cases of undue influence has been questioned, I take the view that a distinction should be drawn between actual undue influence and presumed undue influence. In the case of actual

¹⁷ SLUHCv2012/0816.

¹⁸(1887) 36 Ch D 145 at 181, CA.

¹⁹ At para. 40.

undue influence, something has to be done to direct the mind of a complainant (like securing his consent to a transaction by abuse of the trust and confidence he has reposed in you), whereas in the case of presumed undue influence it is more a situation of something which has not been done (like ensuring that independent advice is available to the complainant

before he enters into the transaction).²⁰(Underlining added)

[53] The Court of Appeal provided additional useful guidance as to the issue of presumed undue influence in the case of **Clement Lawrence and Cleopatra Ballantyne v First St. Vincent Bank Limited**²¹. Webster JA [AG.] explained:

‘Whether a transaction was brought about by undue influence is a question of fact and the evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship, and all the circumstances of the case. ... In **Murray v Deubery and Another**, Sir Vincent Floissac CJ explained the doctrine in the following way: “The doctrine of undue influence comes into play whenever a party (the dominant party) to a transaction actually exerted or is legally presumed to have exerted influence over another party (the complainant) to enter into the transaction. According to the doctrine, if the transaction is the product of undue influence and was not the voluntary and spontaneous act of the complainant exercising his own independent will and judgment with full appreciation of the nature and effect of the transaction, the transaction is avoidable at the option of the complainant. This means that the complainant may elect to have the transaction rescinded if he has not in the meantime lost his right of rescission. The modern tendency is to classify undue influence under two heads, namely class 1 (actual undue influence) and class 2 (presumed undue influence). Class 2 is further classified under two sub-heads. The first subhead is class 2(A) which is descriptive of the legal presumption which arises from legally accredited relationships such as those existing between solicitor and client, medical adviser and patient, parent and child and clergyman (or religious adviser) and parishioner

²⁰At para. 41.

²¹SVGHCVAP2014/0016.

(or disciple). The second sub-head is class 2(B) which is descriptive of the legal presumption which arises from a relationship whereunder the complainant generally reposed trust and confidence in a dominant party.”²²

[54] The learned Justice of Appeal noted that with class two cases ‘the relationship between the parties at the time of or shortly before entering into the impugned transaction must be such as to give rise to a presumption of influence.’ In this regard, he highlighted the classifications set out by Lord Browne-Wilkinson in **Barclays Bank Plc v O’Brien and Another** and outlined above.

[55] The Court of Appeal also considered the statement of Mitchell JA [Ag.] in the case of **Hilda Elisabeth Stoutt et al v FirstBank Puerto Rico**, where he said:

‘The mere fact that a transaction is improvident or manifestly disadvantageous to one party is not sufficient by itself to give rise to a presumption that it has been obtained by the exercise of undue influence. But, where it is obtained by a party between whom and the complainant there is a relationship like that of mother and son which is easily capable of developing into a relationship of trust and confidence, the nature of the transaction may be sufficient to justify the inference that such a development has taken place. It becomes unavoidable when the mother in question is proven to be elderly and suffering from a psychotic condition that leaves her mentally incompetent. Where the transaction is so extravagantly improvident that it is virtually inexplicable on any other basis, the inference will be readily drawn.’²³

[56] Further guidance is contained in **Halsbury’s Laws of England**²⁴. The learned authors described the categories of presumed influence type scenarios as follows:

‘20. Presumed undue influence.

Presumed undue influence arises out of a relationship between two persons where one person has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage. In these cases the influence one person has over

²² At para. 26.

²³ BVIHCVAP2010/016 (delivered 13th February 2012, unreported).

²⁴Volume 47 (2014), (Lexis Nexis Edition)

another provides scope for misuse without any specific overt acts of persuasion. The typical case is where one person places trust in another to look after his affairs and interests, and the latter betrays this trust by preferring his own interests. The principle is not confined to cases of abuse of trust and confidence; other expressions used in an endeavour to encapsulate the essence include reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other, but none of these descriptions is perfect.

Whether a transaction was brought about by the exercise of what is commonly called 'presumed undue influence' is a question of fact and the burden of proving it rests upon the person who claims to have been wronged. The evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personalities of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship and all the circumstances of the case. Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof. The court may then infer that the transaction was procured by undue influence. This situation is conventionally described as one in which a presumption of undue influence arises, the use of the word 'presumption' being descriptive of a shift in the evidential onus on a question of fact.

The evidential presumption described above must be distinguished sharply from a different form of presumption which arises in some cases. The law has adopted a sternly protective attitude towards certain types of relationship in which one party acquires influence over another who is vulnerable and dependent and where, moreover, substantial gifts by the influenced or vulnerable person are not normally to be expected. In these cases the law presumes, irrebuttably, that one party had influence over the other. The complainant need not prove he actually reposed trust and confidence in the other party; it is sufficient for him to prove the existence of the type of relationship. Well-established categories of such a relationship are those between parent and child, guardian and ward, trustee and beneficiary, solicitor and client, doctor and patient, and religious superior and inferior.²⁵

²⁵ Para. 20

Pleaded case – Actual and Presumed Undue Influence

[57] In evaluating the pleadings therefore the court is looking to see whether actual or presumed undue influence is pleaded and particularized in accordance with the foregoing principles. For ease of reference, relevant paragraphs from the pleadings which were quoted earlier will be set out again. On the matter of undue influence, Mr. Samuel asserted in his statement of case:

- '2. The ... Defendant is the sister of Dorothy Eunicey Samuel deceased. ...
3. Dorothy Eunicey Samuel deceased (hereafter the testator) executed the said will and same was witnessed by attorney at law Errol Layne and solicitor's clerk Agnes De Roche. A copy of the said will is hereto attached and marked "L.S.2"
4. The testator died on the 14th June 2009 after she took seriously ill and as a consequence was bed-ridden for quite some time.
5. ... he (Lawrence Samuel) subsequently discovered that another will was prepared in 2008 which purported to be the last will and testament of the testator. ...
6. The Claimant discovered that in 2008, at which time the testator was in Saint Vincent and the Grenadines and seriously ill, the testator stayed at the home of the ... Defendant at Sion Hill for a month during which time the testator was unduly influenced in her infirmed and fragile state to make a second will which appointed herself and ... as executors of same. The testator was afflicted with hypertension and diabetes which made her constantly weak and fatigued and the ... Defendant used this to her advantage to coerce the testator to make a second will.
7. In 2008 the testator's health had seriously deteriorated as she was afflicted with hypertension and a serious case of diabetes and in 2009 to compound things she developed a cancerous lump on her left breast for which same had to be removed. As such, the testator's ongoing medical issues were such that she was in an impressionable state of mind and she was unable to fully understand what she was doing, so she could not have legitimately attested to any document including the said purported will that was supposedly prepared appointing the Defendants as executors of same. A copy of the medical report is hereto attached and marked "L.S.5".
8. The Claimant and the testator were very close. In fact she regarded him as her son rather than her brother because he was so young. It was the Claimant who

substantively supported the testator and their relationship was as such that she will not dispossess the Claimant for a grand nephew. The testator was very close with Claudette Dougan who also supported her and whom she treated as her daughter. She would not in her right mind dispossess the two persons who supported her most.
(Underlining added)

[58] He supplied particulars of the undue influence in succeeding paragraphs as follows:

‘PARTICULARS OF UNDUE INFLUENCE

- a) The testator was ill for a long time including in 2008 where her health has seriously deteriorated.
- b) The ... Defendant used the opportunity in 2008 knowing that the testator was seriously ill and staying at the ... Defendant’s home at Sion Hill in Saint Vincent and the Grenadines to unduly influence her to prepare a purported will which named herself ... her grandson as testators of same inexplicably cutting out the Claimant and niece.
- c) In 2008 the testator’s health and fragile condition was such that she could not have legitimately attested to any document including the purported will that was supposedly prepared in that year.
- d) The testator was unduly influenced in her infirmed state to attest to the purported will prepared in 2008 which as a consequence invalidates same.

[59] In summary, the foregoing pleadings allege that the testatrix’s health in 2008 and 2009 was so severely compromised that she was in an impressionable state of mind and unable to understand or fully comprehend during that period or when she signed the purported 2008 will what she was doing. Ms. John is also accused of coercing her to execute that impugned will when she was staying at her home for a month during her illness. The claim also charged that the testatrix could not have been in her right mind at that time. The nucleus of the pleadings is that Ms. John used the testatrix’s physical weakness and impaired mental ability to her advantage to intentionally and deliberately coerce her to make changes in her Will; with the result that the ‘executors and testators’ were replaced. He also implied that a grandnephew and others were dispossessed by the change of executors and testators. He appears to have conflated the events of 2008 with those of 2009 when addressing the issue of undue influence.

[60] His pleaded assertions that the testatrix was at the time seriously ill, suffering from hypertension, diabetes and cancer; of an impressionable mind and unable to understand what she was doing further buttress his contentions that actual undue influence arises in this case. He signaled an intention to rely on a medical report to establish illness and perhaps lack of mental capacity. He thereby met the pleading threshold for actual undue influence as articulated in **Halsbury's Laws of England**.

[61] Mr. Samuel did not expressly plead that the sisters' relationship was characterized by such trust and confidence from the testatrix to Ms. John. It is however implied. Mr. Samuel's claim is therefore two-pronged – alleging actual and seemingly presumed undue influence. The pleadings do not allege that Ms. John unduly influenced the testatrix to make her or another person a beneficiary of the 2008 will and did not aver expressly that any person received a substantive benefit under the will as a direct result of such undue influence. It is not clear from the pleadings what if any disadvantage it is alleged was occasioned to the testatrix or any beneficiary or Mr. Samuel by such undue influence. This is important.

[62] Mr. Samuel pleaded that the intention and effect of the undue influence was:

1. The appointment of Ms. John and Tyrone John as executors in his place.²⁶
2. The appointment of Ms. John and Tyrone John as testators²⁷, and thereby 'inexplicably cutting out him and 'niece'.

[63] Further, without affirmatively claiming that anyone was dispossessed and in respect of what gift, he pleaded that the testatrix would not:

1. dispossess him for a grandnephew; or
2. in her right mind, dispossess the two persons who supported her the most. (He did not name them).

Mr. Samuel did not claim that by such dispossession someone else had benefitted from the gift which the dispossessed ones were bequeathed under the earlier Will. Significantly, he did not aver that such gift was substantial or substantive. This was compounded by his failure to attach the 2008

²⁶ Paragraphs 6 and 7 of the Statement of claim filed on 17th January 2019.

²⁷ Sub-paragraph b) of the Particulars of Undue Influence - Statement of claim filed on 17th January 2019.

Will to the Claim Form. Doing so would have provided the mechanism whereby Ms. John would have been placed on notice of the full case against her – an indispensable and integral linchpin of civil justice delivery. It would also have formed the basis for evidence to be adduced about the specifics of the gifts.

[64] It is important to note that Ms. Dougan's witness summary was filed on 26th March 2020, respectively a year and 2 months, and 10 months after the filing and service of the Fixed Date Claim Form and 2 months before the trial started. Neither will was exhibited to it. In his Standard Disclosure filed on 27th February 2020 Mr. Samuel listed the following as those documents which were in his possession and available for inspection:

1. Power of Attorney
2. Will of Dorothy Eunicy Samuel
3. Receipts
4. Application of Probate
5. Survey Plan
6. Quantity of letters from Lawrence Samuel.

It is not clear if the Will there disclosed is the 2003 or 2008 will. Even if it was the latter, it is not before the court and would not cure any related deficiency in the pleadings. At the time of service of the claim form and supporting documentation the 2003 Will which was attached would have been available to Ms. John. Not so the 2008 will.

[65] Mr. Samuel argued that in the 2003 Will, Tyrone John and Claudette John were alternate executors. Mr. Samuel further submitted that in the 2008 Will 'she purports to devise the real property to Eden Samuel-John the defendant and Tyrone John as tenants in common in equal shares.' He submitted that Tyrone retains the NCB account and the RBTT account goes to Eden, Tyrone and Elwyn with Tyrone getting ½ share and the others ¼ share each; the residual estate going to Tyrone Edon and Elwyn equally. This is not pleaded and is not discernible from the pleadings. Ms. Dougan gave no evidence of such matters. The court is constrained to disregard those submissions.

[66] It is to be noted that the mere appointment as the executor of a Will confers no gift to such executor. Likewise, no testator may constitute someone else as a testator. The status of testator arises by operation of law when someone executes his or her last Will and testament. Moreover, a statement

purporting to constitute an individual as testator cannot in law dispossess or deprive another person of a bequest or devise under a Will. Accordingly, those paragraphs in the statement of claim which complain about Ms. John being appointed as executor and testator do not provide a factual or legal basis to ground a claim of presumed or actual undue influence. They are therefore disregarded.

[67] Neither Mr. Samuel nor Ms. John addressed the matter of pleadings. In case of actual undue influence the claimant must show that the defendant exerted undue influence on the testatrix to get her to enter into the particular transaction which is thereby invalidated;²⁸ and in the case of presumed undue influence what is required in class 2B situations is proof that the nature of the transaction justifies the inference that the relationship has become one of trust and confidence where the transaction is 'so extravagantly improvident that it is virtually inexplicable on any other basis'.²⁹ It follows that in respect of presumed undue influence, the pleadings must particularize those elements:- trust and confidence coupled with an allegation of a transaction conferring some benefit to the trusted party or a third party.

[68] While Mr. Samuel did not use the words 'trust and confidence' he implied that such a relationship existed between the sisters. However, the pleadings are devoid of any averment that a benefit accrued to anyone as a result of the influence that Eden John exerted over her sister to get her to change her will. Mr. Samuel's submission that presumed undue influence was pleaded is not supported by the explicit language used in his pleadings.

[69] Mr. Samuel's failure to plead what benefit or gift he or a third person would have received under the 2003 Will and what they lost by the changes made in the 2008 Will; and the will's omission from the pleadings seriously undermine his case. Without those details in broad terms, he cannot rely on any testimony which seeks to introduce such specifics. His pleadings thereby lack an essential feature of presumed undue influence – what gift or benefit accrued to another because of the undue influence which cannot be 'reasonably accounted for on the ground of the ordinary motives on which ordinary men act'. Alternatively, how is it alleged that the testatrix suffered some disadvantage? The pleadings are devoid of such claims and are therefore deficient in that regard.

²⁸Halsbury's Laws of England, Vol. 88 (2019) para. 452; Lexis Nexis online.

²⁹Halsbury's Laws of England, Vol. 88 (2019) para. 454; Lexis Nexis online.

- [70] Procedurally, Mr. Samuel has also overlooked and circumvented mandatory steps stipulated by CPR 68.5 and 68.8 which govern what must be included in a probate claim. Pursuant to CPR 68.8, Mr. Samuel was obliged to deny any interest that he alleged Ms. John held in the deceased's estate and state his reasons for doing so. He was also required to present an affidavit to the court (in accordance with rule 68.5) describing any testamentary script of the deceased, of which he has knowledge. Furthermore, he or the person in possession was duty bound to lodge such testamentary script or a copy of it at the court office before the first hearing. The duty to make such an affidavit extends to a defendant who files an acknowledgment of service, within 14 days of such filing.
- [71] 'Testamentary script' is defined as 'a will or draft thereof, written instructions for a will to be made by or at the request or under the instructions of the testator and any document purporting to be evidence of the contents, or to be a copy, of a will which is alleged to have been lost or destroyed.' The 2008 Will is caught in this definition.
- [72] Ms. John filed no acknowledgment of service and so avoided the obligation to file such an affidavit. Mr. Samuel's failure to file such affidavit and lodge the 2008 testamentary script is detrimental to his case, because it is a central feature of his claim. The rationale for the requirement that a claimant present all testamentary scripts including impugned ones to the court as part of his case is glaringly obvious. A court should not be asked to pronounce on the validity or contents of such a document without having sight of it. In my opinion, that would for obvious reasons be inimical to the due administration of justice.
- [73] For the foregoing reasons, I find that whilst the core of Mr. Samuel's statement of case incorporates presumed undue influence, it omits vital details of that equitable concept; particularly mention of the benefit(s) and beneficiaries in the 2003 will that he implies were changed in the 2008 Will. The foundation on which to erect the evidentiary aspects of his case was therefore faulty. His pleadings were lacking in this regard. This is compounded by the lack of evidentiary details of those matters.
- [74] Ms. Dougan gave no specifics about the beneficiaries named in the 2003 will and who if anyone, replaced them in the 2008 will. Her description of the relationship between the testatrix and Ms. John was not one in which the testatrix was said to repose trust and confidence in Ms. John but

rather one in which it was alleged that the former was intimidated and threatened by the latter. It cannot be said that Mr. Samuel has properly pleaded presumed undue influence. I hold that he has not.

Actual undue influence—Evidence

[75] I turn now to consider whether Mr. Samuel has proved his claim of actual undue influence. He argued that there was a special bond among him, Sharon and the testatrix. He submitted that the 2003 will is in keeping with the often expressed wishes of Dorothy Samuel. He contended that Eden Tash was coercing Dorothy to open a bank account in her name also.

[76] Mr. Samuel argued that the 2008 will is totally contrary to Dorothy's very often expressed intention and determination to leave her property for her 'children' Lawrence, Claudette and Tyrone. He submitted that Dorothy was being influenced by Eden Tash to change her will, by speaking ill words about Sharon. He added that Dorothy was upset with Eden for surveying their father's land and putting her name alone on it. Sharon Dougan did not give evidence of the testatrix being upset. I therefore reject that submission as being unsubstantiated.

[77] Mr. Samuel argued that Dorothy would often cry because she felt intimidated by Ms. John's treatment of her and the manner in which she spoke to her. He submitted that she often threatened to burst the testatrix's lips. Sharon Dougan's exact testimony was that Eden John 'did not want Dorothy to repeat anything that she would of said, she would threaten her by saying if she called her name to anyone she would burst her flipping lips.' I do not interpret this account as alleging or proving that such exchanges took place frequently. While Ms. John might have addressed the testatrix in such manner there is no basis for finding that it took place often. In fact, Ms. Dougan did not aver that it took place frequently.

[78] Mr. Samuel submitted that Dorothy took ill and had to undergo surgery as evidenced by the medical certificate disclosed in this matter. No medical certificate was produced. It is not clear from the evidence exactly what medical procedure the testatrix underwent in 2009. There is therefore no medical evidence probative of Ms. Dougan's averments that Dorothy had surgery or suffered from other physical or mental impediments. In any event, by March 2009 the 2008 will had already been executed and could not have been spawned by undue influence which ensued in 2009.

[79] Mr. Samuel submitted that 'they' were not close with Ms. John and further that she kept Dorothy at her house where Claudette could not reach her. He argued that they were unable to contact the testatrix because she had no phone and Eden withheld her number from Sharon. This implies that it was requested and denied. The evidence does not support such a finding. Ms. Dougan was silent about any such request. Mr. Samuel argued further that Sharon and Claudette tried to reach Dorothy early in 2009 but could not and further that Ms. John later revealed to him that Dorothy had surgery and was staying at her house. This is not accurate. Ms. Dougan's testimony was that after failing to reach the testatrix by phone in 2009, she contacted her later at an unspecified date and time and the testatrix told her that all was well.

[80] Similarly, in relation to Claudette, no date and time was given as to when she was unable to reach the testatrix. Likewise, Ms. Dougan never stated that Ms. John communicated to Mr. Samuel that the testatrix had undergone surgery. My own observations are that Ms. Dougan gave no indication of the dates that the testatrix could not be reached by phone, how often they tried to contact her, or any difficulty Ms. Dougan had visiting her at Sion Hill. For some reason, the testatrix did not tell them of the impending surgery. Ms. John cannot be blamed for this non-disclosure by the testatrix. Presumably, she had her reasons.

[81] It is accepted that the testatrix had some medical procedure and stayed with Ms. John for a period afterwards. Ms. Dougan did not state exactly when the testatrix stayed with Ms. John and for how long. It is not clear if the surgery was invasive and was followed by hospitalization or whether it was minor and allowed for same day or early release. The timing of the surgery and the period of the testatrix's stay at Ms. John's house are uncertain as is the level of the testatrix's physical capacity or lack thereof during that time. I am satisfied that the testatrix underwent a medical procedure in March 2009. Presumably, she stayed at Ms. John's house after the surgery - the year after the 2008 will was made.

[82] Mr. Samuel argued that Eden John exerted undue influence over the deceased. He submitted that she did this because the deceased was living in her house and she was intimidated by her influence over her. He contended that because the deceased will not dispossess her 'children' it could only

be Eden John's undue influence over her who lived in her house and even complained of her threats causing her to cry. Ms. John argued that much of Sharon Dougan's evidence consisted of information that she gleaned from other persons and was not from her personal knowledge.

[83] There is no evidence in this case that the testatrix complained of threats made to her by Ms. John. I do not accept that characterization. At any rate, any intimidation which might have occurred while the testatrix was staying with Ms. John would have been pre-dated by the execution of the 2008 will

and could not amount to exertion of undue influence on the testatrix to cause her to make that will.

[84] Actual undue influence is punishable as an equitable wrong. It is established by proof that a dominant party exerts influence against another person to make a transaction which the law considers to be unconscionable for the dominant party to enforce.³⁰ It generally comprises some behaviour by which the innocent party's will is overpowered and need not be physical. It is established by proof that the testatrix did not willingly and voluntarily enter the transaction but was induced to do so by the dominant party's influence which was unduly exerted over her. Unlike presumed undue influence, actual undue influence does not require the existence of a special relationship between the dominant party and the other (in this case the testatrix).

[85] In the **Della Vallery Nolan Nee Jude case** the Court summarized the distinction between actual undue and presumed influence as follows:

'Actual undue influence arises when a person ("A") gains the trust and confidence of another person ("B") and abuses that trust and confidence reposed in him to cause B to enter into a transaction with him, which transaction is so advantageous to A and disadvantageous to B as to call for at least an explanation. There needs be no pre-existing relationship between A and B in order to give rise to a claim of actual undue influence, but the burden of proving the claim of undue influence rests, and remains throughout, on the person making the claim. When oral evidence is given, the issue for the court is whether

³⁰ Halsbury's Laws of England Vol. 47 (2014) para. 19, Lexis Nexis online.

on the totality of the evidence, including any appropriate inference, it finds that the transaction was in fact brought about by undue influence.’³¹ (Underlining added)

[86] Mr. Samuel pleaded that Ms. John coerced the testatrix to make a second Will. He alleged that Ms. John preyed on the testatrix’s infirm state and diminished mental acuity. In assessing whether Mr. Samuel has made out his claim of actual undue influence against Ms. John, I must ask myself whether he has demonstrated that the testatrix reposed such trust and confidence in Ms. John and entered into a transaction which calls for an explanation.

[87] Ms. Dougan supplied scant evidence that the testatrix reposed trust and confidence in Ms. John in relation to her financial affairs or general business arrangements. On the contrary, her testimony is that the testatrix was cautious about opening a joint bank account with Ms. John and displayed an independent approach to management of her business. In this regard, she determined to use a taxi to run her errands instead of relying on Ms. John and her husband to take her into town for such purposes. All of this transpired in 2008 - the year the impugned will was allegedly executed. Similarly, the evidence is that Ms. John had surgery in March 2009 and spent one month at Ms. John’s house while she was recuperating. Later in 2009 the testatrix travelled from Barbados to England on her own.

[88] Interestingly, the date of the testatrix’s death given in the pleadings is 14th June 2009. No evidence was led to confirm or contradict that statement. The court is therefore not able to make a finding of fact on that matter. Suffice it to say, if the death took place in June as pleaded, it begs the question under whose care was she between March/April 2009 after she left Ms. John’s home (following her one-month stint there post-surgery) and when she travelled to England. Ms. Dougan testified that she died within 2 days of arriving in the UK. This was not addressed in the evidence. The vagueness of this part of the testimony is unsettling and remarkable.

[89] Just as importantly, if the testatrix travelled to England in March 2009 in a bed-ridden condition and mentally unable to comprehend ordinary transactions, how was she able to navigate the travel-related obligations? Ms. Dougan’s account omits those particulars. Ms. Dougan’s testimony that

³¹ At para. 42.

the testatrix travelled unaided to the United Kingdom in or about March 2009 belies the assertion that she was bedridden, infirm and unable to comprehend what she was doing in 2008 and 2009. Moreover, Ms. Dougan did not testify that she was so incapacitated or mentally compromised. Mr. Samuel's pleadings while rife with those assertions, were not borne out by the evidence. He has failed to establish on a balance of probabilities that the testatrix lacked the requisite mental capacity.

[90] The law presumes mental capacity until the contrary is proven.³²Mr. Samuel supplied no medical evidence of the testatrix's physical illnesses as alleged and none as to any psychological or mental deficiency experienced by her during the period 2008 to 2009. From the account provided by Ms. Dougan, before her surgery in March 2009, the testatrix spoke to Ms. Dougan's sister in March 2009 and mentioned that she had a doctor's appointment. At some point that year, Ms. Dougan spoke to the testatrix by telephone after a period of being unable to contact her. The testatrix notified her that she was well and had been in town when the calls had gone unanswered.

[91] Ms. Dougan recounted two incidents which shed some light on the testatrix's mental acuity. The first took place in early 2008 when the testatrix inquired whether an identification card and birth certificate are required to open a bank account. The second reportedly occurred in April 2008 when the deceased telephoned to notify Ms. Dougan that Ms. John was about to survey lands belonging to Claudius Wyllie. From Ms. Dougan's recollection, the conversations were lucid and unforced (my characterization). On the strength of Ms. Dougan's testimony, it is evident that between 2008 and March 2009, the testatrix was capable of addressing her mind to everyday matters and make such inquiries to inform her conduct on financial matters affecting her personal business.

[92] It is reasonable to infer that the testatrix stayed with Ms. John in March 2009 because she wanted to have some support or assistance while she recuperated from her surgery. Mr. Samuel submitted that Ms. John took the testatrix to live with her, abused and intimidated her. He submitted further that she lied in a letter she wrote to him claiming that she was in Canada for the entire 2008, the

³²Halsbury's Laws of England Vol. 11 (2020), para. 736; Vol. 75 (2013) at para. 598.

year the purported will was made. He argued further that Sharon saw her in Saint Vincent and spoke with her in 2008.

[93] He contended that Eden Tash Samuel, the wife of Elwyn was coercing Dorothy to open a bank account in her name also. He submitted that Dorothy was being influenced by Eden Tash to change her will, by speaking words of Sharon, his attorney on record. Mr. Samuel submitted that Ms. John filed no Defence and therefore the evidence adduced is uncontroverted. That is indeed the case. The court is nonetheless precluded from drawing adverse inferences from the failure of a defendant to appear at proceedings or give evidence where she is accused of having exerted undue influence over a testatrix.³³ Mr. Samuel's case is so riddled with contradictory assertions particularly regarding what transpired in 2008 that it would be unsafe to rely on the evidence. There are any number of reasons why the testatrix might have made changes to her 2003 Will, if she did so. I therefore draw no adverse inferences against Ms. John.

[94] The authors of **Halsbury's Laws of England** note:

'To constitute undue influence there must be coercion; 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. The mere fact that the testator was knowingly highly dependent upon the person against whom undue influence is alleged, ..., may not be enough to provide evidence of undue influence, by itself; ...'.³⁴

[95] I do not accept the evidence that the testatrix was incapacitated as alleged in 2008 or when she stayed with Ms. John after surgery in 2009. I am satisfied that the testatrix was capable at all material times of exercising her own independent will in relation to making a will in 2008. The presumption of testamentary incapacity has not been rebutted. Furthermore, there is simply no adequate evidentiary basis on which to conclude that the testatrix generally reposed trust and confidence in Ms. John in the management of her affairs which could legally support a claim of actual undue influence. Mr. Samuel has not established that either any such trust and confidence

³³Killick v Pountney [1999] All ER (D) 365.

³⁴ Vol. 102 (2021) para. 56, Lexis Nexis online.

was reposed in Ms. John by the testatrix or that Ms. John exerted any pressure or otherwise coerced the testatrix into making the 2008 will. I make no such finding.

[96] Moreover, neither the pleadings nor the testimony lays out the circumstances under which the 2008 will was executed. Ms. Dougan expressed her belief as to what she thinks transpired. She testified that she strongly believes that the testatrix knew nothing about the 2008 Will. She suggested that the court should find that the testatrix did not sign the Will. Without expert testimony as to the signature on the Will or other compelling reasons for so finding, this court cannot speculate as to what happened and cannot infer that the will was signed by someone other than the testatrix. Furthermore, the absence of the wills from evidence also makes it impossible for the court to make a finding as to their contents.

[97] I make no finding that between 2008 and 2009 (up to the time of her death) that Dorothy Samuel deceased was bedridden, severely ill or mentally incapable of understanding the nature, quality and effect of the purported 2008 will or any will. Mr. Samuel failed to establish on a balance of probabilities that Ms. John coerced the testatrix to make the 2008 will or that Ms. John exerted undue influence over her in any other way. For the foregoing reasons, Mr. Samuel's claim of actual undue influence is not made out. It is dismissed.

Presumed undue influence – Evidence

[98] Mr. Samuel highlighted the relationship between the testatrix and Ms. John as being critical to his case. He appears to rely on this to invite a conclusion that there existed a class 2 type relationship between them and/or presumably one in which the testatrix reposed trust and confidence in Ms. John. He argued that a category 2 relationship existed between the sisters which gives rise to the presumption of undue influence, which is to be rebutted by Ms. John.

[99] An essential ingredient of class 2A presumed undue influence has to do with the nature of the relationship between the donor and the person accused of exerting the undue influence. I agree with Mr. Samuel that the classes are not closed. However, I am not satisfied on the evidence and the law that the sibling relationship between the testatrix and Ms. John without more, creates the legal presumption. The classic class 2A relationships outlined by Lord Browne-Wilkinson do not include or extend to sister/sister generally and does not in this case.

[100] Mr. Samuel sought to rely on an assertion that at some point in time Ms. John threatened the testatrix with physical violence if she repeated anything she said or mentioned her name to anyone. This accusation was bereft of specifics as to time, the surrounding circumstances and so vague as to not be probative of the claim. I attach little weight to it. Further, I draw no inference from that statement about whether the alleged intimidation was exerted over the testatrix in 2008 or 2009 or habitually so as to reduce the testatrix to a posture of reliance on or disadvantage in relation to Ms. John. I am of the considered opinion that the relationship between the testatrix and Ms. John does not fit into the class 2A presumed undue influence type. Therefore, the relationship that the testatrix had with

Ms. John does not qualify for inclusion in that class. I so hold.

[101] The authorities demonstrate that to fit into the 2B category, the relationship must be one in which the testatrix reposed trust and confidence in the defendant. Much analysis has been undertaken of the relevant pleadings and testimony in respect of the ingredient of trust and confidence. Without repeating them, those considerations are relevant to evaluation of whether the testatrix and Ms. John's relationship met the standard requirements for the class 2B types described by Lord Browne-Wilkinson. It is to be noted that in his pleadings, Mr. Samuel did not say that Ms. John was a beneficiary of the 2008 will.

[102] In paragraphs 6 and 7 of the Statement of claim, he alleged that Ms. John unduly influenced the testator to make a new Will appointing herself and Tyrone John 'as executors of the same'. In paragraph 8 reference is made to conferment of an unspecified benefit under the Will on a grand nephew and dispossessing 'the two persons who supported her the most.' In the particulars of undue influence Mr. Samuel pleaded that Ms. John unduly influenced the testator to appoint her and Tyrone John as testators of the Will 'inexplicably cutting out the Claimant and niece.' He submitted that Ms. John received a substantial benefit under the 2008 will in the form of a 1/3 share of the Prospect property and 1/4 share of the bank accounts. At no time did he charge in the pleadings that Ms. John or someone else received a substantial benefit under the 2008 Will. Ms. Dougan's subsequent description of such gifts is not caught by the pleadings. This lacuna cannot be mended by evidence. It follows that the pleadings do not contain a critical particular of the doctrine of undue influence (i.e., the benefit). This is fatal to Mr. Samuel's claim of class 2B

presumed undue influence. The evidentiary underpinning takes this aspect of his case no further. It is therefore dismissed.

Miscellaneous

[103] Mr. Samuel contended that the maker of the 2003 will is a lawyer who also witnessed the will. He submitted that the second will 'does not show that the instructions were given to a solicitor himself unlike the 2003 will.' He submitted that he has proven the efficacy of the 2003 will and that no one has controverted him as no defence has been filed. He submitted further that Ms. John has failed to prove that Ms. Dougan deceased knew and approved the contents of the 2008 Will. He argued that the Wills Act of St. Vincent and the Grenadines, section 12 provides how a will is to be signed and attached.

[104] Placing reliance on the **James Johnson v Amos Eno case**, Mr. Samuel highlighted paragraphs 43, 53, 55, 56, 65 and 70 where *inter alia* the court observed:

'... No Will shall be valid unless (a) it is in writing and signed by the testator, or by some other person in his presence and by his directions; (b) it appears that the testator intended by his signature to give effect to the Will; (c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the time; and (d) each witness either: (i) attests and signs the Will; or (ii) acknowledges his signature in the presence of the testator (but not necessarily in the presence of any other witnesses; but no form of attestation shall be necessary." The burden of proving that the testator had testamentary capacity is on the propounder of the Will. The propounder of the Will must also prove that the testator knew and approved the content of the Will at the time of execution of the Will.'

'What amounts to the requisite testamentary capacity is outlined in Halsbury Laws 4th Edition Volume 50 paragraph 324 as follows: Soundness of mind, memory and understanding are vital to the issue of validity. It is necessary for the validity of a Will that the testator should be of sound mind, memory and understanding, words which have consistently been held to mean sound disposing mind and to import sufficient capacity to

deal with and appreciate the various dispositions of property to which the testator is about his fix his signature.'

'... in Hansen v Barker-Denfield [2006] ALL ER (D) 253 the Court stated at paragraph 41 as follows: "The essential requirements for testamentary capacity are well known and contained in a passage from the judgement of Cockburn CJ in Banks v Goodfellow (1870) L.R. 5 OS p. 549: "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 delusions 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." "The Standard of mental capacity to be shown is not required to be especially high. Even if the testator's mental faculties have been impaired by age or physical infirmity, capacity to make a Will can still remain. See per Cockburn CJ in Banks v Goodfellow at p. 566.' and

'In Craig v Lawrence 1920 A.C. p. 349 the Court explained undue influence as follows: "As was said in the house of Lords when Bovse v Rossborough (1856) 6 H.L.C. p. 249 was decided, in order to set aside the Will of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis. Undue influence in order to render a Will void must be an influence which can justly be described to have caused the execution of a paper pretending to express a testator's mind, but which really does not express his mind, but something else which he did not really mean.'

[105] Mr. Samuel submitted³⁵that this case raises the issue of whether the 2003 or 2008 will is the valid will. The Court is unable to make such a determination without conclusive evidence as to the making of the Wills. In response to questions from the court, Ms. Dougan stated that Mr. Samuel

³⁵Pretrial Memorandum filed on 17th April 2020.

applied for probate of the 2003 Will in 2013 or 2019. She indicated that she did not know whether anyone applied to prevent him from obtaining probate of the 2003 Will. She averred that as far as she knows no one has applied to the court for Probate of the 2008 Will. If this is the factual position, it appears to me that this claim was unnecessary. It is unclear why Mr. Samuel has not proceeded with his application for probate. He may well be able to complete it without let or hindrance.

[106] The evidence led by Ms. Dougan contains no affirmative averments as to the circumstances under which either will was prepared or to whom instructions were given for preparation of the same. In any case, Mr. Samuel's challenge to the validity 2008 will necessitated compliance with certain statutory directives under Part 68 of the CPR. In this regard, rule 68.8 stipulates that a party who pleads that at the time when a will, the subject of the proceedings, was alleged to have been executed the testatrix did not know or approve of its contents, must specify the nature of the case on which he intends to rely, and no allegation which would be relevant in support of a plea that the will was not duly executed may be made by him unless set out in his statement of case. Mr. Samuel did not in his pleadings charge that the testatrix gave no instructions for preparation of the 2008 will and did not sign it. His non-compliance in these respects irremediably weakened his case. I therefore make no finding that either will was made in compliance with or contravention of the Wills Act or is otherwise legal, valid, illegal or invalid.

[107] Mr. Samuel contended that he applied for probate of the 2003 Will. He argued that the application and all the necessary documents are affixed to his claim form. He submitted that even though she had notice of the application Ms. John lodged no caveat to stop the probate of the estate and made no application in relation to the 2008 Will. He argued that Ms. John's inaction speaks volumes.

[108] He submitted further that he complied with rules 5 and 8 of the Non-contentious Probate and Administration of Estate rules 2017 in the application made by lawyer Mr. Olin Dennie deceased. He submitted further that he has not filed the affidavit by a witness. He argued that in the premises rule 17 (b) may apply. He submitted that 'we may file an affidavit of the handwriting of the deceased – but that is not in dispute.' He argued that rules 49, 50 and 51 may apply to Ms. John. He submitted that rule 59(4) may apply to him giving notice for application to any person interested

in the grant; and that rules 62-65 are not applicable as no caveat has been filed. The court takes note of those submissions and refrains from making a determination in respect of any probate application filed for consideration by the learned Registrar. Those matters do not arise for consideration in the case.

Issue 2 – To what remedies is Lawrence Samuel entitled?

[109] Mr. Samuel has not established his case against Ms. John. He grounded his prayer for relief in the singular cause of action of undue influence which has been dismissed. Accordingly, his prayers for a declaration that the 2003 will is the testatrix's last Will and Testament; and injunction to restrain her from applying for probate of the 2008 Will; reimbursement of all funeral expenses paid by him; interest on damages are denied.

Costs

[110] The parties were invited to address the court on costs. They represented that they had agreed costs of \$3000.00.

ORDER

[111] It is accordingly ordered: -

1. Lawrence Samuel's claim is dismissed.
2. Lawrence Samuel shall pay to Eden John agreed costs of \$3000.00.
3. A penal notice in terms of CPR 53.3(b) is to be endorsed on this order.

[112] I am grateful to counsel for their submissions.

**Esco L. Henry
HIGH COURT JUDGE**

By the Court

Registrar