BARBADOS **November 26, 2020**

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Civil Suit No: 1529 of 2006

BETWEEN:

JANAYE CAMILLA KARA BURGESS
(appointed by Order dated 18 November 2020
to represent the Estate of
PATSY AMABEL BROOKER, deceased) **CLAIMANT**

AND

SARAMESHA ELEANOR BROOKER
(appointed by Order dated 26 April 2017
to represent the Estate of
BAZEL LEO BROOKER, deceased) **DEFENDANT**

Before: The Hon. Madam Justice Margaret Reifer, Judge of the High Court

Date of Decision: 2020: November

Appearances:

Mr. Peter G Symmonds QC in association with Mr. Ryan J L Moseley for the Plaintiff/Claimant

Mr. Amilcar Branche in association with Mr. Floyd H. Phillips for the Defendant

DECISION

INTRODUCTION

[1] This is a contentious probate proceeding commenced under the 'Old' Rules of the Supreme Court, arising over a challenge by a son of his father's purported Last Will and Testament. The Will executed 1 December 2003 devised and bequeathed all his estate to his widow absolutely. In short, there was no inheritance for his adult children generally or specifically his son, the Defendant in these proceedings, giving rise to a not unfamiliar family dispute.

The Parties

[2] The Plaintiff is the widow and sole beneficiary, Executor and Trustee under the Will of the deceased Lionel Eversley Brooker who died on the 3 August 2004. The testator was age 77 at the date of his death, the Plaintiff age 70. The parties married in September 1983.

[3] The Defendant is the son of the said Lionel Eversley Brooker and the sole Executor of a previous Will executed in 2001. The Plaintiff is not his mother, she was the second wife of the deceased after he and the Defendant's mother divorced. It appears from the evidence that this marriage produced four (4) children one of whom had died when he married the Plaintiff. None of the other two siblings and/or their children participated in these proceedings.

[4] The testator made three Wills after his marriage to the Plaintiff, 1997, 2001 and 2003, respectively. The Plaintiff was the sole beneficiary of the 1997 and 2003 Wills.

The Death of the Parties

[5] This trial has been plagued by the health issues of witnesses as well as the death of the litigants. The Defendant Bazel Leo Brooker died on 19 February 2016 and Saramesha Eleanor Brooker, the Defendant's widow, applied to the Court in April 2017 pursuant to **Part 21.7** and **21.8** of **CPR** to be substituted as Defendant in this matter in place of the said Bazel Leo Brooker and to conduct the proceedings on behalf of his estate against the Plaintiff by virtue of the counterclaim. The order of the Court was made 26 April 2017.

[6] Unfortunately, before the trial of this matter could be resumed the Plaintiff died on 15 February 2018. Pursuant to an application filed on 16 November 2020 Janaye Camilla Kara Burgess, the attorney on record of Pauline Alicia Morris, this Court appointed the said Janaye Burgess as representative of the now deceased Patsy Annabel Brooker pursuant to **CPR 21.7** and **21.8** .

FACTUAL AND PROCEDURAL BACKGROUND

[7] The contentious proceeding was commenced by the filing of a Writ of Summons on 28 August 2006. Prior to this, the Plaintiff had applied to the Registrar of the Supreme Court for a Grant of Probate to her deceased

husband's estate on 9 August 2005. On 1 November 2005 the deceased's son filed a caveat to this application as a result of a probate advertisement appearing in the Daily Nation and on 28 November 2005, he entered an Appearance to Warning, which said Warning was filed on 10 November 2005. He claimed that a Will dated 8 August 2001 in which he was named as the sole Executor is the last valid Will.

[8] On 15 December 2006 the Plaintiff filed an affidavit in this matter. In summary, the case for the Plaintiff is that the Will of 1 December 2003 was validly executed in the presence of Mr. Harley SL Moseley QC and Ms. Brenda Alleyne, his secretary, at the home of the testator.

[9] A Defence was filed to the Writ and Statement of Claim on 22 June 2007 alleging the fraud of the Plaintiff. In short, it alleged that the Will dated 1 December 2003 was not executed by the deceased, but executed by the fraud of the Plaintiff "and of others acting with her whose names are at present unknown to the Defendant", such fraud being the affixing or causing the affixing of a signature which was not that of Lionel Eversley Brooker. The particulars of the alleged fraud were articulated as follows:

> "PARTICULARS
>
> The Affidavit of Attestation sworn to by Brenda Alleyne of Sion Hill in the parish of Saint James in this Island states inter alia that the signature Lionel Eversley Brooker at the foot of the alleged will dated 1st December 2003 is of the true handwriting of the

> deceased. The said signature at the foot of the said will dated 1st December 2003 is of the true handwriting of the deceased. The said signature at the foot of the said will is not that of the deceased Lionel Eversley Brooker as can be clearly seen by comparison of the signature LE Brooker at the foot of the will executed by the deceased on the 8th day of August 2001 referred to in the Affidavit of the Plaintiff sworn to on the 9th day of August 2005. The deceased due to physical incapacities was incapable of appending the bold signature which appears at the foot to the alleged will dated 1st December 2003 as stated in the said Affidavit of Attestation sworn to by the said Brenda Alleyne."

[10] The Defendant states that he puts the Plaintiff to proof that the alleged Will was duly executed. He counterclaims that the Court pronounce in solemn form of law for the Will of the deceased dated 8 August 2001.

[11] The Plaintiff filed a Reply and Defence to Counterclaim on 8 August 2007. She also filed an Affidavit of Testamentary Scripts on 4 September 2007 as part of the pleadings in this action. It exhibited the three Wills made by deceased Lionel Eversley Brooker.

[12] On 14 April 2011 the Defendant filed the Written Handwriting Expert's Report of Mr. Mervyn Holder pursuant to the order of Kentish J of 2 April 2009, amended by Reifer J on 20 January 2011. This Report concluded that the signature on the Will dated 1 December 2003 was a forgery. In contradiction of the same, the Plaintiff on 29 October 2012 filed the Witness Statement and Report of Nola A. Murphy, Forensic Document Examiner, which concluded that the signature was NOT a forgery.

ISSUES ARISING

[13] Has the Plaintiff proven on the balance of probabilities that the testator knew and approved of the Will dated 1st December 2003? In other words, that the Will of 1 December 2003 was duly and properly executed by the testator and was valid.

[14] Have circumstances of suspicion been revealed so as to cast doubt as to the due execution of the Will and/or the approval of the testator, and if so, have these circumstances been explained away and the burden discharged on a balance of probabilities?

[15] Has the Defendant proven fraud and/or forgery of the Will dated 1st December 2003? In other words, that the Will dated 1st December 2003 was not signed by the testator.

[16] An ancillary consideration in the final analysis, will be the question of costs and whether those costs should be payable from the Estate or by the losing litigant personally.

THE EVIDENCE

The Affidavit of Patsy Amabel Brooker

[17] This Affidavit was filed 15 December 2006 a few months after the filing of the Writ and Statement of Claim and clearly sought to establish the history and context of the Will dated 1 December 2003. It states as follows:

"I, PATSY AMABEL BROOKER of Haggatt Hall in the parish of Saint Michael in this Island MAKE OATH AND SAY as follows:

1. I am the widow of the late Lionel EversleyBrooker (copy of Death Certificate hereto attached).
2. The late Lionel Eversley Brooker and I were married on the 3rd day of September 1983. (copy of Marriage Certificate hereto attached).
3. Before my marriage to the late Lionel Eversley Brooker he was married to Cynthia Blackman who is the Defendant's mother.
4. In finalising the divorce proceedings the late Lionel Eversley Brooker paid the Defendant's mother and the Defendant a lump sum as settlement for their share in the matrimonial home.
5. That on the 22nd day of December 1997 my husband the late Lionel Eversley Brooker made a Will and bequeathed his whole estate to me.
6. When I was preparing to travel to the United States of America in 2001 I asked the Defendant to look after his father until I return to Barbados.
7. On visiting my son in the United States of America in August 2001 to have my eyes checked and on my return to Barbados my husband told me that the Defendant mentioned to him that I was out gallivanting and that he should transfer the property into his name and he had made another Will with Bazel. The Defendant consulted an attorney-at-law who prepared the Will dated the 8th day of August 2001.
8. Since the making of that Will dated the 8th day of August 2001 the late Lionel Eversley Brooker and his son had a falling out. The said Lionel Eversley Brooker who was my husband told me that he asked the Defendant to return his title deeds to his land at Haggatt Hall, Saint Michael and the Defendant returned the said title deeds.

> 9. The said Lionel Eversley Brooker handed the said title deeds to me and asked that I deposit them in a safety deposit box at the Bank.
> 10. Bazel's daughter who was at the time living in the Annex at Haggatt Hall, Saint Michael cursed the deceased and told him that he was stink. The deceased said that she could not inherit any of his property and that he was going to change his Will so that they will not get anything belonging to him."

[18] The content of this affidavit was not challenged in cross-examination.

[19] One of the agreed documents in this matter is a Conveyance dated 30 December 1980 between Cynthia Elaine Brooker as Vendor and Lyall Eversley Brooker as Purchaser in which the Vendor transferred all her estate right title and interest in the Haggatt Hall property for the amount of $65,000.00, which the Vendor certified to be the fair market value thereof. An apparent corroboration of paragraph 4 of the above affidavit.

[20] The inference clearly intended by the Plaintiff is that the testator was of the view that he had discharged his responsibility to the children of his first marriage, when he paid their mother $65,000.00 (a not inconsiderable sum in 1980) in full satisfaction of what appeared to be her share and interest in the matrimonial property.

Her Oral Evidence and Cross-Examination

[21] The Plaintiff gave oral evidence and was cross-examined extensively on 25 April 2013. In her evidence in chief she explained the circumstances

surrounding the making of the challenged Will. She spoke to the fact that her deceased husband was feeling very sick and told her to get a lawyer so that he could make a Will giving her (his wife of 20 years by this time) all that he owned, which was the property at Haggatt Hall in which they lived. Her husband was a diabetic and that illness grew progressively worse from 1991 (when he was first diagnosed) to 2004 when he died. Along the way he had to have a few toes amputated. He started using a wheel chair when he broke his knee not because he could not walk but, in her opinion, because he wanted to. She stood by the contents of the above-mentioned affidavit which was shown to her. In particular, she explained what was said to her by her husband as to why his children would not inherit his property.

[22] She stated further, that after her husband made his last Will, he told her to make sure that she had a copy of it and to see that it is registered.

[23] Her explanation of the circumstances of the making of the Will mirrored that of Harley Moseley QC in its material particulars. In cross-examination she stated:

> "I recall the first day of December 2003. Mr. Moseley and Ms. Brenda came into the house. We called Mr. Moseley and asked him to come and make a Will for him. That Will was made on the dining room table … I could not see what was happening at the dining room table. I was in the house. I was in the kitchen. I knew what they were doing. My husband was alright on that day. I opened the door for Mr. Moseley and my husband let them in."

[24] She was not asked to explain what she meant by the statement that "her husband let them in".

[25] The witness, despite the persistence of this line of cross-examination, denied that her husband's eyesight had deteriorated significantly in 2003 but agreed that his eyesight was failing just like hers. She stated in a matter-of-fact manner, that he "could see all that he wanted to see". She described him as a stubborn man who insisted that he wore the pants in their marriage. He never wore glasses and to her knowledge was never diagnosed as having cataracts, unlike herself. She denied in cross-examination that the deceased's vision was so poor that glasses were useless. She was the one living with him and she never had to direct him to see certain things.

[26] She stated that her husband signed his name, in her observation, in a number of different ways and identified his signature on all the specimens shown her by counsel for the Defendant, in particular the National Insurance cheques which he signed "L. Brooker". She was aware that he also signed Lionel Eversley Brooker and Lyall Brooker.

The Evidence of Brenda Alleyne

[27] Her evidence was that she knew the Plaintiff from when she came to the law office of her employer, but met her husband Lionel Eversley Brooker for the first time on 1st December 2003 when she went to his house with Harley

Moseley QC to have him sign his Last Will and Testament in their presence. She had had a conversation with him when he telephoned Mr. Moseley's law office.

[28] On the 1st December 2003 he signed two copies of his Will in the presence of Harley Moseley QC and herself. This was their practice in case one copy got lost. This is her account:

> "Mr. Moseley went to Mr. Brooker's house. We were allowed to enter. Mr. Brooker met us at the door, we accompanied him to a table in the dining room. Mr. Moseley asked if he is Lionel Eversley Brooker, he said Yes he was. Mr. Moseley handed him a copy of the Will for him to read, Mr. Moseley read it also to Lionel Brooker and asked him if this is what he wanted. He said Yes, the contents were true and correct. He said that Annex should not be in the document. He crossed out Annex where it appeared 3 times. Mr. Moseley said we would all have to initial where he crossed out. Mr. Moseley had handed him a roller ball Parker pen and that pen Lionel Brooker used to sign his Will."

[29] It was her opinion that a roller ball pen produces a very bold writing. This was unfortunately not put directly to the experts, but it is noted that the Plaintiff's expert Ms. Nola Murphy whose evidence is dealt with below explained in her evidence that pressure can be determined by writing surfaces, pen nibs, type of pen or how a person is sitting.

She continued:

> After that Mr. Moseley witnessed Mr. Brooker's signature and I witnessed his signature also."

[30] When asked in cross-examination if Lionel Eversley Brooker had any difficulty in reading the document she replied:

> "Answer: Not to my knowledge. He wasn't wearing any glasses. He had no difficulty in writing his signature.
>
> Question: Do you recall how his hand was when he was signing?
>
> Answer: To my knowledge his hand was strong, it was not shaking. He was sitting in the chair and his hand was resting on the table. He read the Will and Mr. Moseley told him to write his name as it appeared on the document."

[31] She only met the expert witness Nola Murphy when she was required to facilitate her examination of documents at the Registry.

The Evidence of Harley Moseley QC

[32] The evidence of Harley Sutherland Lewis Moseley QC of 38 Clermont in the parish of Saint Michael was taken ahead of the trial in view of his advanced age (91 years of age). This evidence was given on 20 January 2011.

[33] He gave evidence that he was an attorney and Queen's Counsel called to the bar since 1954 and at the date of his evidence he would have been at the Bar some 57 years. He was shown an affidavit dated 10 March 2008 which he identified as one prepared by him because he had prepared a Will for a Mr. Lionel Brooker which he had signed as a witness. He received the

instructions for the preparation of the Will by telephone from someone calling themself Mr. Brooker.

[34] It is important to review in detail his cross-examination by counsel for the Defendant in so far as it is his evidence that he witnessed the signing of the impugned Will by the person he knew as Lionel Eversley Brooker; and it is the case for the defence that the signature affixed to the Will under challenge is not that of Lionel Eversley Brooker, but they do not challenge the veracity and integrity of Harley Moseley QC.

[35] He stated in cross-examination that he knew the deceased from when he (the witness) was a magistrate, when it was put to him that he did not know him. I understood him to be saying that he recognized the testator Lionel Eversley Brooker, when he visited the Haggatt Hall home, as a man who had once appeared before him when he was a magistrate. When asked to describe him this is his evidence:

> "He appeared as an accused person. He was a light skinned man, he was of average height. I do not recall the year I encountered him as a magistrate. I was a magistrate from 1962 to 1967. The man I met when the Will was executed was a light skinned man. He was sitting at the time so I cannot describe his height. I cannot remember him greeting me at the door when I arrived. I was with my secretary Brenda Alleyne and possibly Mrs. Brooker. I cannot remember these details (who opened the door). My recollection is that my secretary took the call, transferred it to me in my office and I spoke to Mr. Brooker. He gave me instructions for his Will. I cannot remember the year. It was sometime before 2003. I do not remember how long I took to prepare the Will. I

cannot recall where the accused lived at the time that he appeared before me.

Question: Do you recall where you went to sign the Will?

Answer: Yes, it was Haggatt Hall.

Question: What were the instructions that person gave you?

Answer: I cannot remember word for word but I reproduced them as I remembered them at that time.

Question: Did you write down the instructions?

Answer: I cannot remember.

Question: Were you in the habit of speaking to Mr. Brooker over the telephone.

Answer: I was not in the habit of doing so. I might have spoken to him more than once but I do not remember.

Question: Were you in the habit of seeing Mr. Brooker?

Answer: I don't think so. No.

Question: How are you sure that this is the same person who came before you when you were a magistrate?

Answer: Because we had a conversation and we discussed the occasion when he was an accused person charged with parking illegally. I heard the evidence and dismissed the case.

Question: I am suggesting that the Lionel Brooker you saw was not the Lionel Brooker who appeared before you as a magistrate.

Answer: He was the same person. As far as I know it was the same person. We discussed the same matter.

Question: I am suggesting that the real Lionel Brooker would not sign his name to a Will given his physical condition.

Answer: I had no reason to believe otherwise, that he was the same person.

Question: I am suggesting that Lionel Eversley Brooker was in such poor physical condition in December 2003

by virtue of diabetes and weakness in his hands that he could not sign the Will himself.

Answer: I can't agree or disagree.

[36] The above exchange ended the cross-examination.

[37] The Affidavit of 10 March 2008 forming part of the record in this action, provided evidence of similar import, the core feature being the case for the Plaintiff, namely, that the Will of the deceased of 1 December 2003 was executed in the presence of Mr. Harley Moseley QC and his secretary Ms. Brenda Alleyne and was executed in accordance with the Wills Act. And most importantly for these purposes, that the signature "Lionel Eversley Brooker" on the Will is the true handwriting of the said Lionel Eversley Brooker.

The Evidence of the Defendant Bazel Brooker

[38] This witness had no direct knowledge of the circumstances surrounding the execution of the Will and in consequence his evidence was primarily formal and his personal opinion, his case being that the Will was a forgery. He did express however his non-expert opinion as to why he thought the Will was a forgery but stated that his case relied exclusively on the reporting of his expert witness. His purported intention was to establish to this Court on a balance of probabilities that the deceased was not the author of the Last Will and Testament dated 1 December 2003.

[39] He grew up knowing his father as Lyall Eversley and Lyall Eversley Brooker. When shown the Will of December 2003 he purported that he was familiar with his father's signature and stated categorically:

> "I do not know that signature as the signature of my father … His signature was L. Brooker. I would say that this was his consistent way of signing. At least for the last ten years before he died he signed L. Brooker."

[40] However, he did admit that he was aware that his father had in the past signed his name in different ways. He revealed that earlier in his life his father had a very good handwriting and took pleasure in signing in different ways. In cross-examination he maintained that he knew his father as Lyall Brooker and Lyall Eversley Brooker, but has only become aware of his other names since this forgery case with respect to the Will of 2003. In short, he was stating that this was the first time that he ever saw the name "Lionel". It was however adroitly pointed out to him by counsel for the Plaintiff that the August 2001 Will prepared by his attorney while signed L E Brooker was prepared in the name of Lionel Eversley Brooker.

[41] He also stated:

> "I am shocked that my father signed this document knowing the condition he was in in his latter years, he could hardly see. I had to deal with him at close quarters when his supposed wife went away for long periods of time."

[42] He was insistent that he challenged this Will because it was not his father's signature and not because his father left him nothing under the said Will.

[43] It was his evidence that his father started out signing as Lyall Brooker, then he brought it down to L. E. Brooker and then lastly, L. Brooker, feebly. When asked about his father's condition in 2001 when he signed a Will making him the beneficiary, he stated:

> "My father was in a wheelchair, he could not walk. He lost his toes to amputation, he could hardly see, my father was a feeble man. He had a strong voice, that was all."

[44] This contrasts with the evidence of his wife the Plaintiff that although he had toes amputated in 1991, which is when he discovered that he had diabetes, he continued walking and working up to the time he had his knee broken. It was then that he started using a wheelchair. No precise data was given for this event.

[45] Ironically, the witness was not alert to the negative inferences that could arise as to the testamentary capacity of the testator as it related to the 2001 Will. On the question of his father's eyesight, this was his evidence:

> "When he was there by himself I would take his meals to him daily. Mostly he would recognize me by my voice and when I got near him. I remember one day I took a bowl of soup to him. It had on a cover and he took the spoon and was trying to go through the cover of the container. When I drew it to his attention he said: 'Boy the eyes, the eyes.' … His words to me were: "Bazel boy you would not understand. I could hardly see.' This was around 2003. I asked him if I could carry him to the optician

> he said: "Bazel boy don't bother with that. No glasses can help me. In my recollection that was the Tuesday and he died the Thursday."

[46] The evidence only speaks to the Defendant providing his father's meals in 2000/2001. This bit of evidence raises a potential inconsistency that was not explored.

[47] When cross-examined as to the unnamed persons referenced in his Defence and Counterclaim, who would have assisted the Plaintiff in obtaining a forged document, the Defendant replied as follows:

> "We are working to get it 100% clarified."

[48] This very interesting exchange followed:

> "Question: Are you prepared to tell this Court that Mr. Harley Moseley is not part of the fraud?
>
> Answer: His office, ma'am. Someone in his office."

[49] When pressed by counsel for the Plaintiff, he repeated this statement. Similarly, he denied that Ms. Brenda Alleyne was a party to the alleged fraud, but his attitude and that of his counsel showed some ambivalence on this issue.

> Question: Can you tell this Court that Ms. Brenda Alleyne was not party to fraud?
>
> Answer: Not prepared to say so. I never said that she committed fraud."

[50] The other interesting fact revealed by this witness is that he briefly consulted two other attorneys including the one who prepared the 2001 Will, as well as Sergeant Nola Murphy the Plaintiff's expert.

[51] He was challenged on his statement that he visited his father often and knew his physical condition intimately as he appeared, even as a diabetic himself, not to know the amount of insulin his father was required to take.

THE EXPERT EVIDENCE

The Report and Evidence of Handwriting Expert Mervyn C Holder

[52] Handwriting expert/Handwriting Analyst/Forensic Document Examiner Mervyn C Holder, a retired Assistant Commissioner of Police of the Royal Barbados Police Force, produced two documents dated 12 March 2011, the first filed 14 April 2011, the second 23 April 2013. In the first document he relates that he was retained by the Defendant Mr. Bazel L Brooker. His credentials as an expert in this area are outlined by him in the document filed 23 April 2013 as follows:

> "I am a trained Forensic document examiner. I received my introductory instructions in this discipline by means of correspondence from the Institute of Applied Sciences 1920 Sunny Side Ave. Chicago Illinois USA in the late 1950, after which I underwent extensive and intensive hands-on training in the United Kingdom for a period of approximately 2 years at the Glasgow Police Forensic Science Laboratory in Glasgow Scotland and at the Home Office Forensic Science Laboratory at Llanishen, Cardiff, Wales …

> (2) As a result of my training I am familiar with the methods of identifying handwriting and typescript and I specialize in these fields among other matters relating to the authenticity of documents.
>
> 3) On my return from training I became the officer in charge of the Forensic Section of the Royal Barbados Police Force for over two decades which time I have given evidence on several occasions relating to the identification of handwriting in the Courts of Barbados in Civil and Criminal Matters and also in the Courts of other Eastern Caribbean Countries viz Trinidad and Tobago, Dominica, Montserrat and St. Lucia to name a few."

[53] Ironically, the production of this Report was initially delayed by this expert's health issues with his eyes, to be specific, the cutting of his cataracts. Thereafter he sought time to examine an extensive list of specimens, all copies but in his stated opinion all capable of analytical examination and comparison in the absence of originals. Subsequent to this the witness sought further time to examine the originals of several of these documents. Page 4 of the Trial Record usefully enumerates the fifteen documents examined by this witness, consisting primarily of title deeds, copies of the several Wills and inclusive of twelve (12) National Insurance Benefit Payment Cheques (counted as one category of document for these purposes). He produced to the Court four (4) sets of documents inclusive of a chart of the specimen signature, copies of specimen signatures compiled by him together with the two Reports above-mentioned.

[54] He explained his method which was, to examine the specimen of known handwriting attributed to Lionel Eversley Brooker and concluded that they were all the handwriting of a single individual, despite findings of considerable natural variation in the handwriting with deterioration and some breakdown in the handwriting structure over the passage of time. He found that despite this, the basic character of the handwriting remained. He amplified this point in his oral evidence when in response to the suggestion from counsel Mr. Branche that a person may write their signature ten times in one day and they all look different, he stated:

> "I say to some extent they write their signature and it looks different because a person is not a machine. There's a thing called natural variation which comes into play when you write. And so your signature will fall within this natural variation. The scope of this variation varies slightly but it can still be seen to be yours depending on a number of factors which are to be found in the handwriting such as the size of the handwriting, the slope of the handwriting, the shape of the letters, number of other things such as the crossing of the Ts and the dotting of the Is. Where these apply they can help the expert to determine if it's the same person who wrote the different signatures."

[55] Next, he examined the questioned signature of the 1 December 2003 Will and compared it with the handwriting of documents of a contemporaneous nature from among the specimens attributed to Lionel Eversley Brooker. His conclusion was that he:

> "… found significant differences and variations in the two handwritings as all of these specimen signatures written about

> the time of the date on the questioned Will were all written LE Brooker or L Brooker and thus did not fulfill the criteria for a total comparison."

[56] He however found the questioned signature similar, in his words, bearing "an uncanny resemblance" to a deed of charge dated 15 December 1980, one of the specimens examined. This caused him to examine the original of both documents and to conclude as follows:

> "I compared the questioned signature from the Will dated 1st December 2003 with the signature from the deed of charge dated 15 December 1980 together with other handwriting specimens attributed to LE Brooker and a comparison of certain letters and letter groups of the handwritings reveals significant differences between the two handwritings, together with other factors of the handwriting such as the slope, the ratio, letter endings and linkages. They all reveal a number of significant differences between the two signatures, the combination points away from the two being of common authorship and cannot be reconciled on the basis of natural variation. Finally, the Rhythm of the questioned handwriting differs significantly as the questioned handwriting is slowly written.
>
> The handwriting of the questioned signature appears to be a free hand simulation of a signature of Lionel Eversley Brooker. In my opinion the signature on the Will dated 1st December 2003 is a Forgery."

[57] The Second Report was titled Supplemental Handwriting Expert's Report and was filed 23 April 2013. It was a more expansive document basically covering the same ground of relevant chronology and process and reaching the same conclusion as above. Unlike the first Report it exhibited a list of the fifteen (15) documents examined.

[58] In his oral evidence Mr. Holder amplified his written evidence going into greater detail on his process and conclusion. It became clearer that in this expert's opinion the questioned Will was forged using the signature on the 23 year old Deed of Charge as a guide. The questioned document, in his opinion, was better written, stronger and conveyed the signature of a more youthful person than the deceased would have been at the date of the signature; much stronger than the handwriting on the specimens attributed to the deceased testator between 1980 and 2003. To elucidate, he stated as follows in evidence in chief:

> "I found it difficult to contemplate of an elderly person whose handwriting has started to show sign of breakdown would go back to a three part format in the writing of his signature such as "Lionel Eversley Brooker" where in the 20 years between his writing that signature and the present time of 2004. 2003 he wrote the signature leaving out the written out section, the written out name and he wrote it instead "LE Brooker" or "L. Brooker".

And later:

> "What struck me was that an aging person would not be … an aging person who had for some time been writing above the line even where there was the presence of a line, I could not see that person writing so correctly on the line in a situation like this. I would have seen him doing the usual-putting his signature above the line as he had done in other similar documents, legal documents."

[59] These were all factors that he considered when coming to his conclusion.

[60] When asked by the Court whether his response was the same if hypothetically the testator had been asked to write his full name, he was still of the view that there were other factors which supported his finding that the document was a forgery. He stated as follows in response:

> "Yes I would. I would examine the handwriting for the veracity to see if there was any veracity from my examination that was so, but when I examined the handwriting I saw other flaws which suggest otherwise and that the handwriting may have been or was in fact a forgery. And not merely a change by instructions."

[61] In cross-examination the witness admitted that at the time he wrote the report he never contemplated that the testator may have been asked to write out his name in full, but insisted that it would have made no difference to his conclusion.

[62] These other flaws, he explained, related *inter alia* to differences in the size, ratio and formation of the character and letter groupings, the strength of the handwriting, the natural rhythm and slope of the handwriting. He was challenged in cross-examination to the effect that there was no analysis of these factors in his Report. The witness insisted that he did analyse these factors and that evidence of this would be in a book he keeps for this purpose. Such a book was not part of the documents presented to the Court, nor was an application made for its admission to evidence, (was inferentially not part of the …… of documents).

The Report and Evidence of Forensic Document Examiner Nola A Murphy

[63] This witness, like the Defendant's expert witness, was also a police officer, at that time a Station Sergeant and trained Forensic Document Examiner. She was engaged in June 2011 by Harley S L Moseley QC to conduct a handwriting analysis, the results of which was contained in a Report dated 20 June 2011, but not produced until 25 April 2013.

[64] Her credentials, set out at paragraph 1 of the said Report are as follows:

> "I am a Sergeant of Police of the Royal Barbados Police Force and a Forensic Document Examiner. I have been engaged in the field of Document examination for over fifteen (15) years. I specialize in the identification of handwriting typewriting, hand printing and counterfeit detection. Between the year 1989 and 1990, the United States Department of Justice trained me in Questioned Documents Examination. After successfully completing this training, I received a certificate in Questioned Documents Examination. I have analysed over five thousand handwriting exemplars. In October 2002, I completed an internship program in Questioned Documents Examinations at Dr. Sidney Weinberg Centre for Forensic Sciences, Suffolk County, Long Island, USA. In 2006, I attended an Advanced Counterfeit Detection Course at Thomas De La Rue Overton, England. I am a member of the International Association of Identification. I have testified in the Law Courts of Montserrat, British Virgin Island (Tortola and Virgin Gorda), St. Lucia, St. Vincent, Dominica, Grenada, St. Kitts and Nevis, Antigua, Bermuda and Barbados."

[65] The documents submitted and examined by her for the purposes of her Report to determine the authentic signature of Lionel Eversley Brooker were:

1. The Will dated 1 December 2003, the Questioned Document;

2. Identification on documents attributed to Lionel E Brooker namely NIS benefit payment numbers 2388965, 238966, 280539, 280540, 300971 and 300972;
3. One (1) signature attributed to L E Brooker on a piece of paper;
4. A copy of the Will dated 8 August 2001; and
5. One handwritten Will dated 22 December 1997.

[66] This expert examined specimen signatures of the deceased from 1997 to 2003. She stated in the Report that "These specimen signatures reflect a mature legible signature style that has undergone few modifications overtime. However, I have noted that at some point earlier, the signature alignment of Lionel E Brooker changed its formation, this suggests deterioration in eyesight or health, but pen movements continued to be rapidly and fluently executed." Despite several fundamental variations in letter formation between the specimens examined, referenced at paragraph 11 of the Report, this expert concluded that:

> "Variations noted above are sufficient to conclude that the signature of "Lionel Eversley Brooker" on the disputed document Last Will and Testament, was written by the author of the predated signatures."

Her oral evidence and cross-examination

[67] This occurred on 17 June 2013. As with the expert Mervyn C Holder she articulated her process/method and her conclusion. She also started with copies of documents but requested sight of a number of the originals, inclusive of the 1997 and 2003 Wills. She conducted her examination and analysis on

9 signatures, in her words, "a microscopic side by side analysis of the questioned document and the known specimens".

[68] Interestingly, she gave evidence that she met the Defendant on two occasions after she was asked by two of his former attorneys to examine the same documents which Mr. Moseley subsequently asked her to examine. Since it was not put to her that her opinion then was different from the one advanced in her Report and oral evidence, there are certain inferences that can be drawn from this evidence, namely, that her professional/expert opinion has been consistent throughout.

[69] She gave evidence that after examining the questioned documents she reached the following conclusion:

> "From my analysis of the questioned documents from the Registry and from Mr. Moseley's office, on comparing signatures and assessing signatures attributed to Lionel Eversley Brooker/ Lyall Brooker/L Brooker, these signatures were written by the same author."

[70] When asked about the authorship of the 2001 will she replied as follows:

> "The signature on this document L.E. Brooker, and the signatures on the questioned documents of 2003 were written by the same author."

[71] When shown the 1997 Will:

> "I also examined this document. From the original analysis the signature L Brooker on the original of this document was written by the author of the questioned documents. The author of this handwritten will L Brooker was also the author of the questioned

> documents dated December 2003 (the original of which was seen at the Registry and the office of Mr. Moseley)."

[72] This witness's cross-examination gave an insight into one aspect of the Defendant's case when she was cross-examined extensively on the difference between traced handwriting and free handwriting and her conclusion that the handwriting on the questioned document was free; in other words it was not traced. Both experts are in full agreement on this point. She was also challenged on her finding that, barring natural variations, the testator's handwriting has not varied much in style and shape. She could not say and would not say that those natural variations were the result of poor health and eyesight. Also significant was her opinion that evidence of heavy pressure in the writing specimen does not mean that it was written with a firm hand. She stated as follows in response to this line of cross-examination:

> "You can only make an assessment between a firm and a weak hand if you see a tremor in the handwriting which I did not see."

[73] This witness was not shaken in her testimony and conclusions.

THE PARTIES SUBMISSIONS

The Plaintiff's Submissions in Summary

[74] These are that:

1. It is possible in law for persons to make a valid Will even if they are old and infirm or in receipt of help from those they wish to

benefit: see in this regard the recent authority of **Julia Hawes v Elizabeth Burgess and Another [2013] EWCA Civ 74** per Lord Justice Mummery; and **Re White [1948] 1 DLR 573** where it was held that testamentary capacity is compatible with a paralytic condition affecting the testator's power of speech and of physical movement. In such circumstance, signature can be affected by a mark and a guided hand.

2. The burden on the party propounding the Will is discharged by proof of capacity and the fact of execution, from which the knowledge of and assent to the contents of the will are assumed. Testamentary capacity and want of knowledge and approval are critical to assist in propounding a Will and remove any suspicion of the contents of a Will: this on the authority of **Barry v Butlin** (infra)**, Fulton v Andrew HL 1875 and Tyrrell v Painton and Another [1894] P. 151.** The Will dated 1st December 2003 has been proven to be properly executed.

3. He who alleges fraud must prove it and the standard of proving fraud is high even though based on the balance of probability. The elements of gravity of an issue are part of the circumstances which have to be weighed when deciding as to the balance of probabilities:

see **Hornal v Neuberger Products Ltd (1956) 3 All ER 970** and **Regina v Ewing (1983) 2 All ER 645.** The Defendant has not proven fraud in the execution of the questioned Will.

The Defendant's Submissions in Summary

[75] The Defendant's case is that the execution of the Will dated 1st December 2003 was obtained by the fraud of the Plaintiff (see particulars above at paragraph [9]) and in the absence of proof of fraud, suspicious circumstances surrounding the execution of the said Will, which cast doubt as to the due execution of the Will and/or the approval of the testator.

[76] The Defendant's submissions are set out in extenso in his counsel's Written Submissions which I shall not attempt to reproduce here, but the key arguments are as follows:

1. That the attesting witnesses failed to satisfy themselves as to the correct identity of the individual on the telephone and before them by means of a form of identification;
2. The appearance of the word "Annex" in the text of the Will and which had to be corrected, was a suspicious circumstance suggesting that the testator was not the person who gave his address to the attorney at law for the preparation of his Will. "The deceased would not have said his address was annex as it was not";
3. The fact of the signing of "Lionel Eversley Brooker" as opposed to L E Brooker or L Brooker which was his customary signature at the time of his death, was suspicious circumstance;
4. The issue of how many copies were signed on the 1st December 2003, whether two or three, is a suspicious circumstance.

5. That the court should reject the evidence of Harley Moseley QC, Brenda Alleyne and Patsy Brooker and accept that of the Defendant Bazel Brooker and his expert witness Mervyn Holder. Mr. Holder's evidence is more credible and provable on a balance of probabilities.
6. The Plaintiff's expert should be discounted because she only examined the specimens provided her while the Defendant's expert requested an extensive array of specimens. None of the specimens examined by her comprised of a three part signature. Her conclusion relied too heavily on the formation of letters which cannot be an accurate or adequate conclusion.
7. On a balance of probabilities the Plaintiff has failed to prove the due execution of the will given the suspicious circumstances raised.

DISCUSSION AND ANALYSIS

The Law

The Burden and Standard of Proof

[77] Counsel for the Plaintiff argued on the old authority of **Barry v Butlin 12 ER 1089 (1838) 2 Moo. P.C 480**, that the *onus probandi* or onus of proving a Will lies in every case upon the party propounding it; and he must satisfy the conscience of the Court that the instrument so propounded is the Last Will of a free and capable testator. In other words, that the testator knew and approved of that Will.

[78] Counsel for the Defendant makes the same argument in different terms. Counsel conceded that in a probate action there may well be shifts in the burden of proof. He argues, however, that before that arises, where the issues

raised in the suit include those arising out of the alleged condition, act or omission of the testator (for example, lack of testamentary capacity, want of knowledge and approval or lack of due execution), the burden of proof on those issues is primarily upon the party propounding the Will. In this regard, he relies on the authority of Haynes JA in the case of **Eillen Sumintra Bankay and others v Sukdai Sukhdeo (1975) 24 WIR 9 (Sumintra Bankay Case)** at page 13, where he adopted the statements of law of the Rt Hon. Sir John Patterson in the Privy Council case of **Devine v Wilson (1855), 10 Moo P.C 502** at **P. 531** as follows:

> "… in a civil case the onus of proving the genuineness of a deed (and so of a will) is cast upon the party who produces it, and asserts its validity. If there be conflicting evidence as to the genuineness either by reason of alleged forgery, or otherwise, the party asserting the deed (or will) must satisfy the jury (or judge) that it is genuine. The Jury (or Judge) must weigh the conflicting evidence, consider all the probabilities of the case, not excluding the ordinary presumption of innocence and must determine the question according to the balance of those probabilities."

[79] The shifting burden is explained by Lindley LJ in **Tyrell v Painton & Another** as follows.

> "The rule in **Barry v Butlin**, **Fulton v Andrew and Brown v Fisher** … extends to all cases in which circumstances exist which excite the suspicion of the Court; and wherever such circumstances exist, and whatever their nature may be, it is for those who propound the will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud

> or undue influence, or whatever else they rely on to displace the case made for proving the will."

The Burden and Standard of proof where there is an allegation of Fraud

[80] It is generally accepted that the standard of proof where there is an allegation of fraud is a high one. The burden of proving fraud shifts as outlined by Lindley LJ above. Counsel for the Plaintiff in his written submissions cited the case of **Hornal v Neuberger Products Ltd (1956) (Denning LJ, Hodson LJ & Morris LJ) 3 All ER 970** in which Hodson LJ repeated the comments of Denning LJ in **Bater v Bater (1951) P. 35** as follows:

> "… So also in civil cases; The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature; but still it does require a degree of probability which is commensurate with the occasion."

[81] The standard of proof in civil proceedings is on the balance of probabilities as provided by **section 133** of the **Evidence Act** as follows:

> "133. (1) In a civil proceeding, a court shall find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
>
> (2) In determining whether it is satisfied as mentioned in subsection (1), the matters that the court shall take into account include the nature of the cause of action or defence, the nature of

> the subject matter of the proceeding and the gravity of the matters alleged."

Suspicious Circumstances

[82] The several authorities cited by the Plaintiff and Defendant speak to the question of the onus or *onus probandi*, where a Will is prepared under Suspicious Circumstances: see **Barry v Butlin**; **Tyrell v Painton & Another** (supra). This trespasses somewhat on the issue of burden and standard of proof discussed above, insofar as the applicable principle established by the above cases appears to be that wherever a Will is prepared and executed under circumstances which raise the suspicion of the Court, it ought not to be pronounced unless the party propounding it adduces evidence which removes such suspicion and satisfies the Court that the testator knew and approved of the contents of the instrument.

[83] These legal principles have been carefully explored in the regional cases of **Eileen Sumintra Bankay and Others v Sukdai Sukhdea** (supra); **Lucky v Tewari (1965) 8 WIR 363**; **Re: Hollygan's Estate Wilson and Another v Parris (1983) 35 WIR 224**; **Lewis v Eleazer (1996) 51 WIR 159**; **Gurton Goddard v Jane Jack (1959) 1 WIR 169.**

[84] In the context of this case, this requires this Court's examination of the particular circumstances insofar as it is called on to make a finding of fact that Lionel Eversley Brooker knew and approved the contents of the Will dated

1 December 2003. Such a determination turns on whether this Court accepts the evidence of Harley Moseley, Brenda Alleyne and Patsy Brooker that the person who signed the questioned Will was Lionel Eversley Brooker. In short, are there circumstances therein which excite the suspicion of the Court. **See Barry v Butlin** (supra). I have borne in mind as expressed by Haynes JA in the **Sumintra Bankay Case** that mere belief of the witnesses to the preparation and due execution of the Will does not necessarily dissipate well-founded suspicions.

Expert Evidence and Determination

[85] It is a feature of judicial adjudication that a judicial officer may be called upon to evaluate expert evidence generally and particularly, as in this case, must make findings of fact in the face of competing/conflicting expert testimony; in short, to resolve the conflict in evidence of the experts. This Court faced this dilemma in a case of medical negligence which was ultimately ruled on by our Court of Appeal in the case of **Dr. James Boyce v Corine Lorde and Stephen Lorde Civil Appeal No. 20 of 2008** delivered 16 August 2011.

[86] In that case, this Court was guided in this exercise, that is resolving the conflict in evidence of the experts, by the authority of **Loveday v Renton and Wellcome Foundation Ltd [1990] 1 Med LR** by Justice Stuart Smith who

spoke to the proper approach to be taken by the court in examining the evidence of expert witnesses in the following terms:

> "… The Court has to evaluate the witness and the soundness of his opinion. Most importantly, this involves an examination of the reasons given for his opinions and the extent to which they are supported by the evidence. The judge also has to decide what weight to attach to a witness' opinion by examining the internal consistency and logic of his evidence; the care with which he considered the subject and presented the evidence; his precision and accuracy as demonstrated by his answers; how he responds to searching and informed cross-examination and in particular the extent to which a witness faces up to and accepts the logic of a proposition put in cross-examination or is prepared to concede points that are seen to be correct; the extent to which a witness has conceived an opinion and is reluctant to re-examine it in light of later evidence, or demonstrates a flexibility of mind which may involve changing or modifying opinions previously held; whether it is biased or lacks independence."

[87] Also pertinent is the observation of Bingham LJ in **Eckersley v Binnie (1988) 18 Con LRI** as follows:

> "In resolving conflicts of expert evidence the judge remains the judge, he is not obliged to accept evidence simply because it comes from an illustrious source, he can take account of demonstrated partisanship and lack of objectivity. But save where an expert is guilty of a deliberate attempt to mislead (as happens only very rarely), a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal, unless it can be discounted for other good reason."

[88] The **Evidence Act Cap. 121 (Cap 121)**, in particular **section 152** provides some further guidance in this matter as follows:

> "152. In any trial, civil or criminal, comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute."

[89] Guyana's section 19 of their Evidence Act Cap 5:03 appears to be *'in pari materia'* with our **section 152** and its import is discussed by Haynes JA in the **Sumintra Bankay Case**. He rightly concludes that it is for the judge to determine what weight he/she places on the expert evidence and it is consequently important for the expert to give reasons or grounds for his conclusion and that section 19 (our **section 152**) requires that the comparison authorized by it, is to be carried out in court. This enables the Court to test the accuracy of his opinion and satisfy itself about the disputed writing in reliance on "the evidence of its own eyes" if it chooses so to rely.

[90] Division 2 of **Cap 121 sections 64** to **67** deals with Opinion Evidence, inclusive of lay opinions and opinions based on specialized knowledge and also offers some additional guidance in this matter. These provisions provide as follows:

> "64. (1) Evidence of an opinion is not admissible to prove the existence of a fact as to the existence of which the opinion was expressed.
>
> (2) Where evidence of an opinion is relevant otherwise than as mentioned in subsection (l), that subsection does not prevent

the use of the evidence to prove the existence of a fact as to the existence of which the opinion was expressed.

65. Where

(a) an opinion expressed by a person is based on what the person saw, heard or otherwise noticed about a matter or event; and

(b) evidence of the opinion is necessary to obtain an adequate account of the person's perception of the matter or event,

the opinion rule does not prevent the admission or use of the evidence.

66. Where a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not prevent the admission or use of evidence of an opinion of that person that is wholly or substantially based on that knowledge.

67. Evidence of an opinion is not inadmissible by reason only that it is about

(a) a fact in issue; or

(b) a matter of common knowledge."

Analysis of the evidence

[91] At the most basic level this Court must be satisfied that the challenged Will satisfied the provisions of **section 61** of the **Succession Act, Cap. 249**. This Will does all those things: the document produced is in writing; it is signed at the foot or end thereof by a person purporting to be the testator Lionel Eversley Brooker; that signature, purporting to be that of Lionel Eversley Brooker has on the face of the document been made or acknowledged by the testator in the presence of each of two witnesses, Harley Moseley QC and

Ms. Brenda Alleyne, present at the same time, both of whom have attested by their respective signature, the signature of Lionel Eversley Brooker.

[92] Both of the attesting witnesses gave evidence of due execution and to a lesser extent the Plaintiff, who let them in at the instruction and in the presence of her husband, who led them to the dining room and the dining room table where the business of execution was transacted. She retreated to her kitchen, but gave evidence that from there, though not physically in the room, she knew what was going on. This evidence at a primary level, if believed, is presumptive of the testator's knowledge and approval and testamentary capacity.

[93] What remains for the evaluation of this Court, against the backdrop of the simple facts outlined above, is the allegation of fraud, specifically that the Plaintiff and others 'concocted' to forge the signature of the testator and/or suspicious circumstances alleged by the Defendant *inter alia* that the attesting witnesses failed to properly identify the person signing the Will as being the deceased.

[94] Notably, neither in the pleadings nor in the evidence before this Court has the testamentary capacity of Lionel Eversley Brooker been questioned. And, in the face of the testator's intention since 1997 to leave all his worldly possessions to his wife, and even in his 2001 Will to ensure that she was taken care of during her lifetime (provided she did not remarry), the argument that

the questioned Will did not have his knowledge and approval is against the weight of evidence. This is analogous to what Wooding CJ in **De Noriga v De Noriga (1967) 12 WIR 342**. And as therein stated by Wooding CJ, and equally noted to the circumstances of this case, "Accordingly, his testamentary dispositions were such as should be expected." referred to as the "apparent reasonableness of the terms of the Will".

[95] It is necessary therefore for this court to determine on the evidence and on the balance of probabilities whether there has been due execution of the questioned Will and I so find. **Barry v Butlin** (supra) ruled that the onus of proving a Will is in general discharged by proof of capacity, and the fact of execution, from which the knowledge of and assent to its contents by the testator will be assumed.

[96] Three persons testified to the fact that Harley Moseley QC attended at Haggatt Hall with a Will which was executed. Harley Moseley QC stood before this Court and gave clear, cogent testimony in this matter. It did not conflict with his affidavit evidence, nor was his credibility, veracity or integrity ever challenged by counsel for the Defendant in cross-examination, or for that matter by the Defendant himself, who very pointedly and meticulously exonerated Mr. Moseley and his secretary from any wrongdoing. If the alleged fraud was not committed by Mr. Harley Moseley QC and his secretary, then

by whom was it perpetrated? No evidence was advanced by the Defendant nor was it put to Mr. Harley Moseley QC and his secretary that there were other persons in his office and their role therein. Such absence can only take the Court down a path of conjecture.

[97] What has been pleaded but not proven, in the opinion of this Court, is that the Plaintiff Patsy Brooker, with the connivance of persons unknown in the office of Harley Moseley QC, substituted in her home an unknown person who pretended to be her husband Lionel Eversley Brooker and who purported in the presence of Harley Moseley QC and Brenda Alleyne to sign the Will presented to him by Harley Moseley QC in a freehand forgery of the signature Lionel Eversley Brooker, patterned from a (23 year old) Deed of Charge dated 15th December 1980, which was signed with the written out three name format "Lyall Eversley Brooker" whereas the questioned signature was signed "Lionel Eversley Brooker".

[98] Not only is this scenario not plausible, there is also no evidence of same. Stated differently, while within the realm of possibility, on the evidence and findings thereon by this Court, such a scenario was highly improbable and is a likely self-serving proposition advanced by the Defendant in support of his Counter-Claim. At paragraph [35] above, this scenario was put to the witness Harley Moseley QC and was denied by him. He spoke to the testator on the

phone and received instructions for a very simple Will mirroring the one made in 1997, namely, that he was leaving all his worldly possessions to his wife, the Plaintiff. In the opinion of this Court, the fact that he could not recall if he wrote down these instructions was of no great moment and not a suspicious circumstance. He did not say that he did not write down his instructions, merely that he did not recall. The Plaintiff was known to himself and his secretary and there appears to be no dispute that she called his office and that Brenda Alleyne and Harley Moseley QC spoke to a person she introduced as her husband on at least two occasions according to the evidence of Mr. Moseley (for instructions and for directions). When Mr. Moseley visited the Haggatt Hall residence he was reminded by the testator of an occasion when they had met many years before in the Magistrate's Courts. Mr. Moseley readily remembered the occasion, which they then discussed and the man he saw at Haggatt Hall on 1 December 2003 appeared to him to be that same person. He said to that person: You are Lionel Eversley Brooker and was satisfied by the response and the attendant circumstances that he was. The correction of the word 'Annex' in the opinion of this Court, is not a suspicious circumstance, in fact, it is supportive of the fact that Lionel Eversley Brooker and not an imposter would have made such a correction.

[99] All of the above was corroborated with some additional detail by Brenda Alleyne.

[100] I do not consider it a suspicious circumstance that Harley Moseley QC could not recall with certainty who opened the door to admit himself and Ms. Brenda Alleyne to the Haggatt Hall residence especially in the context of the Defendant's pleading and evidence. Ms. Brenda Alleyne was quite clear that it was Patsy Brooker the Plaintiff and she was not challenged on this evidence. Nor was Patsy Brooker challenged when she gave evidence to the same effect.

[101] Both Harley Moseley QC and Brenda Alleyne were good witnesses who were not shaken in cross-examination on the material details or at all. Patsy Brooker also, was a strong confident witness, whose confidence counsel for the Defendant characterized as arrogance (but could also have been characterized as a refusal to be intimidated), but who gave her evidence in a forthright manner with no embellishments.

[102] I have addressed my mind to all the alleged circumstances of suspicion attending and/or relevant to the preparation and execution of the Will and find them inclusive of the defendant counsel's criticism of the evidence of Mr. Moseley and Ms. Alleyne, to be unpersuasive. In particular, I am not persuaded from the evidence that there were 3 Wills as argued by counsel for the Defendant.

[103] The evidence of the Plaintiff and her witnesses, contrasted greatly with the Defendant whose evidence appeared self-serving and contrived to buttress his Counter-Claim. I am satisfied that he typified the individual "whose [legitimate] expectations of testamentary benefit are disappointed": per Lord Justice Mummery in **Julia Hawes v Elizabeth Burgess & Another** (supra). Those expectations, however, could not have been "legitimate" given the unchallenged evidence of the 'falling out" or estrangement and the demanded return of the testator's title deeds. There is no evidence, other than his, that his father was feeble, could hardly see and in no condition to make and execute a Will in 2003. It was the evidence of his wife the Plaintiff that he was well enough to take care of himself when she travelled abroad to have her eyes looked after. The only arrangement she needed to make was for the Defendant to bring him his meals. It was her evidence that he did everything for himself except cook. There is her denial that his diabetes had any noticeable effect on his eyesight. ("I do not know that diabetes affected his eyesight because I have diabetes too".) There is the evidence carefully skirted by the Defendant that as soon as the Plaintiff departed to have her eyes looked after in the United States he convinced his father that she was off "gallivanting" and that he should (inferentially) punish her by changing the terms of his Will. There is the evidence of Harley Moseley and Brenda

Alleyne that apart from being seated when they attended for the execution of the Will, the testator appeared well, wore no glasses, appeared to be seeing without apparent challenge and easily signed the document in the correct place after appearing to read it himself and having it read to him. He was handed a pen and he signed the document unassisted.

[104] It bears underscoring here, that it was not the case for the Defendant, despite his evidence that his father was feeble and could not see, that his father was incapable of understanding what he was doing when he made his Will and that it did not freely reflect what he wished to be done with his estate on his death. It was his case that the Will was a forgery, it was not the signature of his father and by implication not his document and that a fraud was perpetrated by the Plaintiff.

The Credibility of the Defendant

[105] It was the conclusion of this Court that the Defendant exhibited a decided *'animus'* towards the Plaintiff. This Court noticed his disrespectful and contemptuous reference to the Plaintiff, his father's wife of over 20 years at the time of his death, as his "supposed wife" and his pointed refusal to call her by name. This was made clear throughout this case but no more so than in cross-examination when he was challenged on the fact that he did not attend his father's funeral. He gave this explanation as to why he did not attend:

> "Answer: My father asked me to take care of his body and his wife refused. It is a lot deeper than I can here explain."

[106] When again asked why he did not attend his father's funeral, he replied:

> "Answer: It was not possible for me to go."

[107] This further exchange in re-examination lightened the fog somewhat:

> Question: Could you tell us whether you are a Christian?
> Answer: I am a Christian and I belong to the Closed Brethren.

[108] To Barbadians, this statement holds historical and cultural significance and certain nuances. We are all aware of the doctrine of separation practiced by this sect.

> Question: Did this have any influence on your not going to your father's funeral?
> Answer: I could take of his body but I could not be affiliated with his wife's religion. The answer is "Yes".

[109] The inference drawn from the ensuing cross-examination was that father and son disagreed over his attitude towards the Plaintiff.

[110] This Court observed the parties closely while they gave their evidence and throughout the proceedings and given several of the exchanges (some of which have been reported in the review of the evidence in this matter), was not impressed with the credibility of the Defendant.

[111] In the premises, I have accepted the evidence of Harley Moseley QC and Brenda Alleyne (largely unchallenged by the Defendant), as well as that of

the Plaintiff Patsy Brooker. The evidence as outlined in the testimony of the witnesses did not excite the suspicions of this Court.

Resolving the Conflict of the Expert Testimony

[112] I have approached the conflicting evidence of the two experts against this backdrop bearing in mind that this matter does not merely rest on the credibility of the Plaintiff's witnesses, but there are several reasons, notwithstanding, that I favoured the evidence of the Plaintiff's expert over that of the Defendant's. While the Defendant asserted that he was guided in his opinions by his expert, this Court concludes that the converse may hold true. The Defendant by his admission, confirmed by his expert, advanced to the expert that he was suspicious of the signature because he knew his father to only sign his name LE Brooker and L Brooker. He never drew to the expert's attention that in an affidavit dated 7th March 2008 and filed 8th March 2008 Harley Moseley QC had stated at paragraph [6] thereof:

> "[6] Mr. Brooker was instructed by me to sign his name 'Lionel Eversley Brooker' as it appeared in the Will."

[113] The expert, in the opinion of this Court, set out to prove that the signature was a forgery. He was decidedly surprised by the notion that the testator would have been told to sign his full name and admitted, as noted above, that he never contemplated it in his analysis, but recovered sufficiently to maintain

that it would not have influenced his conclusion in this matter when clearly it was the core basis of his approach.

[114] It is not plausible, in my opinion that a person seeking to forge the signature of the testator would have used as their template an obscure 20 year old deed with a different signature. It is noted that the signature on this deed was 'Lyall Eversley Brooker' as opposed to 'Lionel Eversley Brooker' on the questioned document. The Defendant was clearly being untruthful when he stated in evidence that he only became aware of the name "Lionel" as a result of the claimed forgery. It was also clear that the expert selected this document because up to that point it was the only specimen shown him by the Defendant with a three part signature similar to the questioned document.

[115] It bears mention here, and it was adverted to by counsel for the Plaintiff, that in an exercise calling for microscopic visual examination, the Defendant's expert was delayed in his ability to carry out his functions because he had to undergo surgery on his eyes and told the Court that he needed time to allow his vision to return before completing his analysis of the documents examined. No further mention was made of this by the expert or counsel for the Defendant and this circumstance without more, begs the question as to whether this expert's vision was restored to an acceptable level. In cross-

examination by counsel Mr. Mosely however, he stated that he was seeing out of both eyes "but one is more impaired than the other."

[116] Also, what should this Court make of the evidence that the Defendant's (former) attorneys, one of whom prepared the 2001 Will, contracted Ms. Nola Murphy to advise on the authenticity of the questioned signature? And the fact that after this consultation, not only did he contract the services of new attorneys, but a new expert?

[117] What should this Court make of Expert Holder's statement/admission that if the signature was slowly written that could account for the apparent strength of the handwriting? "It need not have pressure but the slow writing causes the ink line to be thicker, hence it appears fairly strong".

[118] Another cause for hesitation is this: if the testator was as visually challenged and feeble as the Defendant insisted, surely one or both of the experts would have picked this up in their examination of the specimens, especially those for the period 2001 to 2004, in particular the very current National Insurance cheques. Expert Murphy was clear that she noted variations in her specimens inclusive of the questioned document, but they fell within the realm of expected or natural or habitual variations and she specifically stated that she saw no evidence of tremors in the specimens. Expert Holder expressed the view that the deceased's handwriting showed signs of breakdown prior to

2003 and as early as 1978, but concluded there was no breakdown in the questioned document and this was one of the factors which convinced him it was a forgery. But both experts conceded that the effect of failing eyesight and health can reveal itself in several ways in the handwriting. Neither of the two gave evidence that specific variations were symptomatic of grave illness, near blindness and/or feebleness. They were in total agreement that the variations were natural/ expected/habitual. Expert Holder had this to say on the issue of variations and their significance in establishing whether a signature was forged:

> "I say to some extent they write their signature and it looks different because a person is not a machine. There's a thing called natural variation which comes into play when you write. And so your signature will fall within this natural variation. The scope of this variation varies slightly but it can still be seen to be yours depending on a number of factors which are to be found in the handwriting such as the size of the handwriting, the slope of the handwriting, the shape of the letters, number of other things such as the crossing of the Ts and the dotting if the Is . Where they apply they can help the expert to determine if it's the same person who wrote the different signatures.
>
> … it is quite fair to say the similarities guide you but it is also fair to say when one looks at handwriting analysis, you look at both similarities and differences. You weigh them both.
>
> …
>
> I would define an unnatural variation as an aspect of handwriting which does not conform to the handwriting of an individual to whom it is attributed."

[119] And on the effect of age, failing health and failing eyesight on a person's handwriting:

> "It can reveal itself in my opinion in several ways. Depending on what the ailment is, the person might write in a tremulous fashion, the person might write larger if his sight is failing, the person might write the normal hand but go uphill or downhill as the case might be depending on the position of the writing tablet or the document and its alignment to the top…"

[120] Expert Holder appeared reluctant to state that the variations he noted over the years could have been as a result of deterioration of health and/or eyesight.

[121] One of his strongest points on the unnatural variation, specifically the strength and youthfulness of the questioned signature was undermined by this exchange in cross-examination:

> Question: … So is it fair then to say that if it were slowly written that would account for it being fairly strongly written? Is that correct?
>
> Answer: That is exactly what I am saying. Slowly written accounts for the apparent stride of the handwriting, there need not be pressure on the pen but the fact that it is slowly written, the flow of the ink from the ball of the pen causes the ink line to be thicker and so it appears to be heavy and strong."

[122] He then went on to say, when questioned about the possibility of the testator writing slowly and deliberately, that the result should be the same as the normal way one writes one's signature:

> "No it is not conceivable to me that they would write any other how than they are accustomed writing their signature. Writing is

> writing and if you are writing your signature, the fact that you are old and proud does not make you write it slowly or otherwise. You write it as you are accustomed to writing it."

[123] Yet, later in cross-examination, when asked if the testator had decided to write slowly could that explain the strength of the signature in the questioned document, he replied:

> "I guess so."

[124] This Court accepts the evidence of the witness Nola Murphy over that of the Defendant's expert Mervyn Holder.

[125] In the premises, this court upholds the case for the Plaintiff that the Will dated 1 December 2003 was duly executed with the knowledge and approval of Lionel Eversley Brooker, the testator.

THE ISSUE OF COSTS

[126] The parties to this action are not divided on their understanding of the law to be applied and the considerations to be taken into account by this Court on the disposition as to costs. The law is that the orders as to costs are at the discretion of the court.

[127] Counsel for the Plaintiff on the authority of Parke B in **Barry v Butlin** (supra) submits that the Defendant should be condemned in costs if his charge of fraud fails. Greater reliance was placed on the exposition of Persaud JA in the case

of **Sumintra Bankay Case** where he follows **Mitchell v Gard** (supra) where the law was outlined as follows:

> "The basis of all rule on this subject should rest upon the degree of blame to be imputed to the respective parties; and the question, who shall bear the costs will be answered with this other question, whose fault was it that they were incurred? If the fault lies at the door of the testator, his testamentary papers being surrounded with confusion or uncertainty in law or fact, it is just that the costs of ascertaining his will should be defrayed by his estate…
>
> If the party supporting the will has such an interest under it that the costs, if thrown upon the estate, will fall upon him, and he by his improper conduct has induced a litigation which has caused…
>
> From these considerations, the court deduces the two following rules for its future guidance: first, if the cause of litigation takes it origin in the fault of the testator or those interested in the residue, the costs may properly be paid out of the estate; secondly, if there be sufficient and reasonable ground, looking to the knowledge of the opposing party, to question either the execution of the will of the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent".

[128] Both parties relied on and quoted the above authority. Counsel for the Plaintiff relied on the further authorities of **Spiers v English [1907] P122** and **Re Cutliffe (1953) 3 All ER 642** in his written submissions. I endorse counsel's reference to **Spiers v English** (supra) because it best explains why costs should not always follow the event in probate matters. Sir Gorell Barnes stated as follows in that case:

> "In deciding questions of costs one has to go back to the principles which govern cases of this kind. One of those principles is that if a person who makes a will or persons who are interested in the residue have been really the cause of the litigation a case is made out for costs to come out of the estate. Another principle is that, if the circumstances lead reasonably to an investigation of the matter, then the costs may be left to be borne by those who have incurred them. If it were not for the application of those principles, which, if not exhaustive, are two great principles upon which Court acts, costs would now, according to the rule, follow the event as a matter of course. Those principles allow good cause to be shewn why costs should not follow the event. Therefore, in each case where an application is made, the court has to consider whether the facts warrant either of those principles being brought into operation."

[129] And **Hodson LJ** in **Re Cutcliffe [1959] P. 6** as follows:

> It seems to me a strong thing, and a thing to which I should be slow to listen, to maintain that people whose evidence has been found by the learned judge to have been wholly false and who have lost their case with costs against them, should be heard to say that an order for costs should be made wholly or in part in their favour because the court normally exercises its discretion in these cases along certain lines and in accordance with certain principles. The discretion of the court is always there, and the rules on which that discretion is exercised are for the assistance of those who have to advise litigants before they embark on litigation, so that they may have some idea of what risks they run as to costs. In the Probate Division, notwithstanding exceptions to be found in the books, the probability is that people who unsuccessfully make pleas of undue influence and of fraud will be condemned in the costs not only of that charge but of the whole action".

[130] Counsel for the Defendant submitted on the issue of costs firstly, that should the Plaintiff fail to obtain probate of the Will in solemn form, costs should be paid by her personally if in the circumstances the Court finds that the

allegations of fraud as raised points in her direction. Secondly, he submits that should the Defendant be held to have brought this action unnecessarily then costs should be paid by him personally. If on the other hand it is found that he is entitled to ask a question and to put the Plaintiff to proof then the costs should be payable from the estate as he would have justifiably acted to protect the estate given that he was the sole person in the case who could recognize his father's signature which to him did not appear on the questioned document.

[131] See also Wooding CJ of the Court of Appeal of Trinidad and Tobago in **De Nobriga v De Nobriga (1957) 12 WIR 342** on the treatment of costs in probate actions.

[132] This Court is not of the view that the litigation was brought about by the folly of the testator and is not of the view that his estate should be burdened with the costs of this litigation. "To do so, would be to waste away the assets upon litigation that was not brought about by an act of the testator or of the executrix, and was based upon no valid ground." **Persaud JA** in **Sumintra Bankay Case** at page 13.

DISPOSAL

[133] In view of the premises, this Court Orders as follows:

1. This Court pronounces for the force and validity of the Last Will and Testament of Lionel Eversley Brooker executed on the 1st day of December 2003, and orders that this Will be admitted to probate in solemn form;

2. The Defendant substituted on 26 April 2017 by his widow Saramesha Brooker, shall pay the costs of the Plaintiff's estate in an amount to be agreed, if not assessed.

MARGARET REIFER
Judge of the High Court