



[2024] JMSC Civ 200

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FAMILY AND PROBATE DIVISION

CLAIM NO. 2017P02113

**IN THE MATTER OF THE ESTATE of
CLEVELAND EDWARDS**, late of Apartment
101b, 14 Kingsway, Kingston 10 In the Parish of
Saint Andrew, Retired Businessman,
Deceased.

BETWEEN	CLIVE JUNIOR EDWARDS	1ST CLAIMANT
AND	SANJAY EDWARDS	2ND CLAIMANT
AND	ROYDEL ROWE	1ST DEFENDANT
AND	ANDREA WATSON	2ND DEFENDANT

IN OPEN COURT

Mr. Seymour Stewart holding for Miss Aisha Robb Cunningham instructed by CLS Services for the 1st Claimant.

Mr. Craig Carter instructed by A McBean & Company Attorneys-at-law for the 2nd claimant

Mr. Pierre Rogers, Mr. Vincent Wellesley, Miss Moneaque McLeod, and Mr. Jason Mitchell instructed by Bailey Mitchell and Co. Attorneys-at-law for the 1st Defendant

Heard on: March 4, 5, and 7 and 11, 2024, July 12 and 31, 2024.

PROBATE - WILL - S. 6 WILLS ACT - VALIDITY OF WILL - WHETHER THE SIGNATURE ON THE LAST WILL AND TESTAMENT WAS THAT OF THE TESTATOR OR A FORGERY - EXPERT EVIDENCE - WHETHER THE

TESTATOR WAS SUFFERING FROM MENTAL INCAPACITY - WHETHER THE TESTATOR WAS ACTING UNDER UNDUE INFLUENCE WHEN HE EXECUTED THE LAST WILL AND TESTAMENT – AMENDMENT TO FIXED DATE CLAIM FORM AT THE TIME OF JUDGMENT - RULE 26.9 OF THE C.P.R.

REID, ICOLIN J.

BACKGROUND

- [1]** Cleveland Edwards (“the deceased”) died on July 17, 2017. He was survived by two of his three children. They are Clive Junior Edwards and Sanjay Edwards, the 1st and 2nd Claimants respectively in this matter. The 1st Defendant, Roydel Rowe, is the founder and Senior Pastor of Power of God Ministries International Limited. The 2nd Defendant is Andrea Watson who served as the deceased’s secretary until his death. Following the deceased’s passing, the Claimants were informed about a document, purporting to be his Last Will and Testament dated March 14, 2017, in which the Defendants are named as executors and are also among the beneficiaries.
- [2]** The Claimants allege that, upon becoming aware of the purported Will, numerous requests were made to the 1st Defendant, through his Attorneys-at-Law, for production of a copy but to no avail. The 1st Defendant subsequently applied for a Grant of Probate in the estate of the deceased. In response, the 1st Claimant filed a Caution in the estate on October 12, 2017. Thereafter, on January 31, 2019, the 1st Claimant commenced these proceedings challenging the validity of the Will. By Order of the Court dated July 23, 2019, the 2nd Claimant was joined to the proceedings.

THE CLAIM

[3] By way of Fixed Date Claim Form filed on January 31, 2019, the 1st Claimant sought orders to include the following:

- i. *"A Declaration that the said document purported to be the Last Will & Testament of Cleveland Edwards dated the 14th day of March 2017, was obtained by fraud, undue influence, duress or wrongful inducement and is fraudulent and/or void and of no effect.*
- ii. *An Order that the Defendants, Roydel Rowe and Andrea Watson are to produce and deliver to the Registrar of the Supreme Court the purported Last Will & Testament of Cleveland Edwards dated the 14th day of March 2017;*
- iii. *An Order determining and declaring the respective interests and the lawful entitlements of the beneficiaries of the Estate of the late Cleveland Edwards, Retired Businessman, Deceased, Intestate in relation to all his lawful effects and assets.*
- iv. *An order restraining the Defendants, Roydel Rowe and Andrea Watson, or their agents, servants, assignees, or representatives from intermeddling, dealing in, treating with, interfering in and or transferring, transmitting, and/or disposing of any part of the said assets of the Estate until the claim herein is finally determined.*
- v. *An Order that the Registrar of the Supreme Court is empowered to sign any documents to effect the transfer of any property should any of the parties be unwilling, unable, and/or fail to do so.*
- vi. *In the alternative, the Claimant Clive Edwards claims damages against the Defendants, Roydel Rowe and Andrea Watson for fraudulently, unlawfully, improperly, or by way of undue influence, wrongful coercion, and or improper inducement having devised and bequeathed the goods of the estate unlawfully depriving the beneficiaries of the said Estate of their legal and or equitable interest in the property as the children of the said Cleveland Edwards.*

[4] The 1st Claimant alleges that the purported Will is a forgery and was not executed by the deceased. Alternatively, it is contended that the Will was procured by fraud, undue influence, duress, or other wrongful inducement, and is therefore fraudulent, and should be declared void, and of no effect. Following his joinder to the proceedings, the 2nd Claimant, together with the 1st Claimant, filed an Amended Particulars of Claim in which the alleged fraud was particularised as follows:

- i. *The defendants falsely represented themselves to be the executors of the deceased's estate and acted in a manner to defraud the deceased's estate.*
- ii. *Forging and wrongfully procuring the deceased's signature or forcing and unduly influencing/inducing the deceased to sign the document purporting to be his Last Will & Testament purporting to leave his estate to the Defendants.*

- iii. *Falsifying and producing documents/deeds in support of being the executors of the deceased's estate.*
- iv. *Failing to disclose to the claimants that they had those documents/deeds declaring them as the executors of the deceased's estate.*
- v. *Acting in a manner to defraud the deceased's estate.*
- vi. *The Defendants acted, willfully, deliberately and maliciously so as to deprive the other beneficial owners of their interest in the deceased estate.*
- vii. *Further and alternatively, the Defendants knew well that the deceased was infirm and advanced in age and lacked mental capacity and competence.*
- viii. *In or about March 2017 the defendants wrongfully procured had induced the deceased to sign and execute the purported "Last Will and Testament" dated the 14th day of March 2017, purporting to leave his estate to the Defendants.*
- ix. *The Defendants induced the deceased to do acts and things mentioned and in each of them by the undue influence of the Defendants and under their direction and pursuant to the faith, trust, and confidence reposed in them but without any separate legal or independent advice and without consideration of the reasons of or the effect of what he was doing.*

[5] The alleged undue influence was particularized further as:

- i. *The defendants pressured or otherwise induced the deceased into effecting the purported will when:*
 - a. *His mental and physical health were diminished, and the deceased's bargaining power was grievously impaired by illness and advanced age.*
 - b. *He had no knowledge of what he was signing.*
 - c. *When his bargaining power was impaired.*
 - d. *Without affording him any independent legal advice about the legal implications of doing so.*
- ii. *The defendants knew or ought to have known that at the time of the execution of the purported will the deceased was ill and suffering and was undergoing medical treatment, was advanced in age, and would have medically been regarded as unfit to carry out even basic matters and conducting business and nevertheless pressured and coerced the deceased into signing and executing the purported will.*
- iii. *The defendants were careless and/or reckless as to the deceased's mental health and his ability to understand the implications and purpose of the signing and execution of the purported will.*
- iv. *The defendants were deliberate in selecting or choosing to have the deceased execute the purported will at a time when he was not mentally capable of comprehending and*

properly understanding the implications of signing and executing said will so as to unduly benefit from the deceased's estate.

- v. *As a consequence of the fraud and the undue influence of the defendants, the claimants are unable to benefit from the deceased's estate.*

THE DEFENCE

- [6] I note that the 2nd Defendant was not served with the Amended Particulars of Claim. The 1st Defendant, in response, filed an Amended Defence on 25 September 2020, denying each allegation contained in the Amended Particulars of Claim. He contended that, at the date of the deceased's death, the deceased had not retired from his calling as a businessman, as he continued to operate his business, Edwards Tropical Foods, at 138 Spanish Town Road and it was therefore untrue to describe him with those medical and mental defects as mentioned in the Amended Particulars of Claim. The 1st Defendant further asserted that the deceased attended at his place of business on the date of his death and, although unwell, had not been considered to be at risk of death and continued to perform his daily functions as the owner of the business.
- [7] The 1st Defendant also contended that the assertions contained in the Amended Particulars of Claim are false and misleading, asserting that the document presented to the Court as the deceased's Will bears the signature of the deceased and the handwriting therein appears, in every aspect, to be that of the deceased. He denied the Claimants' allegation that the deceased in his Will dispossessed them as a reading of the said last Will reveals that the deceased's residence was gifted to both Claimants while the other beneficiaries were gifted with the deceased's personal effects.
- [8] The 1st Defendant stated that the deceased attended services at the Power of God Ministries International and, in his later years, became a member. He further stated that, to his knowledge, there was no fraud or forgery in respect of the said Will and he denied the Particulars of Undue Influence.

THE EVIDENCE

- [9]** At the trial, the 1st and 2nd Claimants relied on evidence contained in their respective witness statements, as well as the witness statement and expert report of Miss Beverley East. Those statements and the report were admitted as their evidence in chief and the witnesses were cross-examined.
- [10]** The 1st Defendant relied on the evidence contained in his witness statement and that of Merrick Vassell. Their statements were likewise admitted as their evidence in chief, and both witnesses were cross-examined.
- [11]** I will address the essential aspects of the evidence in my analysis. At the close of the Defendant's case, the Court directed that written submissions be filed. Submissions were received from all parties, save for Counsel for the 1st Claimant, Mr. Seymour Stewart. I am grateful for the submissions received, which have assisted the Court in its deliberations. I have read the submissions in their entirety, but I will only refer to the parts that are most relevant to my decision.

THE ISSUES

- [12]** The issues for determination are:
- i. Whether the deceased possessed the testamentary capacity at the time the will dated 14 March 2017 was executed.
 - ii. Whether the deceased's signature appearing on the purported Last Will and Testament dated 14 March 2017 was obtained by fraud and is a forgery.
 - iii. Whether the deceased was unduly influenced to sign the purported Last Will and Testament dated 14 March 2017?

ISSUE i: Whether the deceased possessed the necessary testamentary capacity at the time the Will dated 14 March, 2017 was executed.

LAW AND ANALYSIS

[13] The test for testamentary capacity was laid down by Cockburn C.J. in **Banks v Goodfellow** (1870) LR5 QB 549 on page 565:

"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 claim 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 which, if the mind had been sound, would not have been made."

[14] Further on page 576, His Lordship opined that:

"As to the testator's capacity, he must, in the language of the law, have a sound and disposing mind and memory. In other words, he ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who are the objects of his bounty, and the manner in which it is to be distributed between them."

[15] Additionally, it was established in **Parker v Felgate** (1883) 8 PD 171 that a Will is still valid if the testator had the testamentary capacity when he gave instructions for the preparation of the Will, provided that it was prepared according to his instructions and at the time of execution, he understood that he was executing a Will for which he gave instructions.

[16] The burden of proof for all parties in civil matters is on a balance of probabilities. I note that the 1st Defendant, as the propounder of the will, has the burden of proving that the testator had the requisite mental and testamentary capacity. A person propounding a testamentary document must demonstrate that, at the time of execution, the testator was of sound mind and memory and knew and approved

its contents. If the testator had testamentary capacity, and had the opportunity to read the document, knowledge and approval will be presumed. However, some circumstances may arise in which the Court will require affirmative proof of knowledge and approval. This will be required wherever the circumstances are such that the presumption of due execution is not sufficient to discharge the propounder's burden of proof. For example:

- i. *where the document was executed in suspicious circumstances (a lack of gifts to family/persons who might be expected to receive);*
- ii. *where the Will was drawn up in strange circumstances and the presence of mistakes; and*
- iii. *where the testator was of reduced mental capacity...*

[17] I have taken notice of the words of Wooding CJ in **Moonan v Moonan** [1963] 7 WIR 420 on pages 422-423, that *"If the matter is left in doubt, then they fail to prove that the testator was capable of making a will. The resolution of that issue may be in one of three ways: either that the Court is affirmatively satisfied that the testatrix was sound in mind, memory, and understanding, or that the Court is satisfied that she was not sound in any of these respects, or that the Court is left in doubt, with the result that the issue has to be resolved against the party seeking to propound the Will."*

[18] The Claimants asserted in the Amended Particulars of Claim that it would have been impossible for the deceased to give effect to the purported last Will and Testament of Cleveland Edwards dated the 14th of March 2017 at the time of its purported execution, having regard to his medical condition and mental state, in that he lacked the requisite legal capacity to execute any such instrument. Further, they asserted that in his later years, the deceased was indigent, old and infirm, suffering from serious mental defects and incapacity, rendering him unable to make cognizant and reasonable and serious decisions of his own and immobile. In the Particulars of Fraud, they added that the Defendants knew that the deceased

was advanced in age and lacked the requisite mental capacity and competence to execute a will.

- [19] The Claimants asserted that, by reason of the deceased's diminished mental and physical health, his bargaining power was grievously impaired by illness and advanced age such that he did not know what he was signing. They contended that the deceased, being ill, suffering and undergoing medical treatment, would have been regarded medically unfit to carry out even basic matters and was not mentally capable of comprehending and properly understanding the implications of executing the Will.
- [20] The Claimants, in supporting their pleadings in respect of the deceased's lack of testamentary capacity, gave evidence of a myriad of health conditions including diabetes, hypertension, poor blood circulation, kidney and heart issues which affected him. The 1st Claimant said he arranged the deceased's dietary needs and his weekly well-being visits from police officers to ensure he was okay. The greater part of the evidence in this regard came from the 2nd Claimant who asserted that he witnessed firsthand the debilitating effects of these illnesses from their onset and their progression over time, such that the deceased became weak, lethargic, withdrawn, and increasingly diminished in both his physical and mental health.
- [21] The 2nd Claimant's evidence was at times confusing and contradictory. The Court, at times, was uncertain as to whether he was asserting that the deceased was mentally competent or incompetent. During cross-examination, Counsel, Mr. Rogers, referred him to paragraph 43 of the Amended Particulars of Claim, which read "***In his later years the deceased was indigent, old and infirm, suffering serious mental defects and incapacity to make cognizant and reasonable and serious decisions on his own which rendered him immobile.***"; and the following exchange ensued:

Question: Did you tell anyone that?

Ans: Immobile.

Question: Indigent – what indigent mean?

Ans: Old and infirm

Question: Did you tell them he was “suffering serious mental defects”?

Answer: Yes and no.

Question: Incapacity to make cognizant and reasonable and serious decisions of his own which rendered him immobile?

Answer: Yes.

Question: He was suffering from serious mental defects?

Answer: It varied. Serious? No.

Question: which made him immobile?

Answer: No.

Question: You caused your lawyers to believe your father was “in his later years the deceased was indigent, old and infirm, suffering serious mental defects and incapacity to make cognizant and reasonable and serious decisions of his own which rendered him immobile?”

Answer: Those words were true except the “immobile” part.

In re-examination Mr. Carter asked the 2nd Claimant

Question: Please explain the “yes” and “no” responses to the question about the “serious mental defect” that your father had those conditions, but he went to work every day.

Answer: The “yes” part to the “serious mental defect” means at times he gets confused on his medication and he would double up on them. Sometimes he would not take them and other times he would take them or double up on them. The “no” part means he did not have serious mental defect. He was able to go to work. He had that drive and would push to go to work.

[22] This exchange significantly undermined the 2nd Claimant’s credibility and, by extension, the veracity of the Claimants’ case.

[23] The 2nd Claimant asserted that he would take the deceased to his doctors’ appointments. However, he could not recall the last time he had done so, neither

could he identify any of the deceased's doctors, even though there were several of them. When severely pressed in cross-examination, he finally named one Dr. Channer who he said was the deceased's eye doctor. He further said he saw the deceased three days before his death at the supermarket and pharmacy, which he indicated was their usual meeting place.

[24] There are several grave inconsistencies in the Claimants' case in relation to the testamentary capacity of the deceased. On the one hand, the 1st Claimant indicated that he kept in touch with his father who had raised certain issues with him, while the 2nd Claimant asserted that the deceased had serious mental issues. I bear in mind that no medical evidence was adduced to support the alleged conditions. However, there is no mandatory rule that requires supporting medical evidence. I note too that the Defendant's case supported the fact that the deceased had several medical conditions that required regular doctors' visits but disputed that he suffered from mental incapacity.

[25] The Claimants, on the one hand, have painted a picture of the deceased as being mentally incompetent and incapable of giving instructions for the preparation and execution of a Will. However, their evidence as to their interactions with him is inconsistent and does not support those allegations. In particular, the 2nd Claimant's evidence is that he met his father at the pharmacy on more than one occasion. He did not indicate that his father was accompanied by anyone, nor that he accompanied his father to fill his prescriptions. It begs the question, whether the deceased, if he was mentally incompetent, would have been able to go to the pharmacy alone to fill his prescriptions.

[26] The Claimants did not challenge the Defendants' evidence that the deceased went to his business place on the very day of his death. The 2nd Claimant's evidence is that the deceased had that drive and would attend work 5 days per week. In those circumstances, if the deceased was capable of making decisions and carrying on

his agricultural export business, how could he be “*suffering from serious mental defects that rendered him incompetent*” to execute a Will.

- [27] It is gleaned from the evidence that the Claimants were relying on their very close relationship with the deceased, their familiarity with his signature, and his alleged lack of mental capacity to challenge the validity of the purported will. However, it is clear on the 1st Claimant’s evidence, that he did not have a good relationship with the deceased. Their relationship was strained, particularly in light of the fact that the deceased had sued him in respect of the property at Winston Avenue and it appears that the relationship further deteriorated when the 1st Claimant received part of the sale proceeds from the property. I do not accept that police officers conducted welfare checks in respect of the Claimants’ father, with the regularity suggested, if at all. I also do not accept that the 2nd Claimant played such an important role in the deceased’s medical care given the severe challenge he had in identifying the deceased’s doctors or the frequency of the doctors’ visits.
- [28] It also emerged in cross-examination that both Claimants were unaware that the deceased was a member of the 1st Defendant’s church. I do not accept that the deceased told the 1st Claimant that he was required to pay \$7 million for prayers. I find that this was said to cast a shadow on the integrity of the Power of God International Ministries and the veracity of the Defendant’s case.
- [29] I bear in mind that the deceased relinquished \$11 Million of the sale of the Winston Avenue property to the 1st Claimant, who admitted that he did not contribute to its purchase. While there was no specific evidence from the Defendant regarding the relationship with the 2nd Claimant, it can be inferred from the 2nd Claimant’s responses to the management of his deceased father’s health care, that he had very limited knowledge about it.
- [30] It is inconceivable that the relationships between the deceased and the Claimants were as close as they would have the Court believe, particularly in the period

leading up to his death. I find that the Claimants had limited knowledge of their father's illness and his day-to-day affairs. Further, the evidence that the 2nd Claimant met the deceased at the supermarket and pharmacy, coupled with the fact that the deceased worked five days per week in his own business, certainly does not demonstrate a man who suffered from reduced mental capacity, an inability to make decisions, or was immobile. Rather, it suggests the contrary.

[31] I find that the evidence adduced by the Claimants strongly contradicts their case of the deceased's mental incapacity. I find that the evidence demonstrated that the deceased appreciated his health challenges and was mentally competent to conduct his business. After all, he did go to work on the day that he died. I therefore reject the Claimants' evidence that the deceased was infirm, of such advanced age and lacking in mental capacity and competence.

[32] On the other hand, I find the evidence of the 1st Defendant and his witness, as propounders of the Will, to be more persuasive and reliable on the issue of the deceased's mental capacity. The 1st Defendant deponed that the deceased operated an export business at the Agricultural Marketing Corporation (AMC) on Spanish Town Road in Saint Andrew and continued to do so up to the date of his death on July 17, 2017. He further stated that the deceased spoke of the relationship between his son, the 2nd Claimant, and his daughter, Marie, and his disagreements with the 1st and 2nd Claimants. The 1st Defendant asserted that during the critical period of the deceased's illness, he, along with other members of his congregation, ensured that the deceased did not attend medical appointments alone as he suffered from a heart condition, diabetes, and a multitude of aches and pains.

[33] The 1st Defendant testified that, notwithstanding the deceased's ailments, looking at him, one would never know, because he always appeared bright and alert and did not rely on anybody to make decisions for him. However, when it was time for appointments, especially when a shipment was being processed, Pastor Findley

and at least one other member of the congregation would make themselves available to accompany the deceased to his doctor's appointments and ensure that his medications were secured. The 1st Defendant said he received constant updates on steps taken to assist the deceased during these doctor's appointments. He emphasized that not once during the deceased's life since he knew him, has he ever found him to be a man of unsound mind, confused, or unaware of his actions.

[34] Mr. Merrick Vassell, one of the attesting witnesses, gave evidence as to the circumstances under which the Will was executed. He stated that he and Pastor Findley met with the deceased and his secretary (the 2nd Defendant) at the deceased's office and the four of them chatted for some time. After the 2nd Defendant left the office, the deceased produced a document from a file in front of him and indicated the document was his Will and that he wanted them to act as witnesses. He said the deceased signed the document, he (Mr. Vassell) signed and then Pastor Findley signed. Mr. Vassell stated that the deceased did not look distressed, confused, afraid, or under duress.

[35] I note that there were discrepancies between the evidence of the 1st Defendant and that of Mr Vassell. Nonetheless, their evidence was largely consistent, in relation to the deceased's mental competency and he being assisted by church members to medical appointments. Both witnesses spoke of the deceased's mental capacity based on their interactions with him. Mr. Vassell specifically spoke to the deceased's mental capacity at the time of the execution of the Will.

[36] Learned Counsel Mr. Carter submitted that Mr. Vassell's evidence has provided no basis for the purported will to be considered authentic and relied in part on the fact that Mr. Vassell did not see the front page of the will which therefore disqualifies him from being a witness with sufficient evidence to prove the will in solemn form. I find that Mr. Vassell, not seeing the first page of the Will, is not fatal as he indicated that the deceased told him it was his Will. Based on **Keigwin v**

Keigwin [1843] 163 E.R. 841, there is no requirement in law for an attesting witness to examine the testator's will or read its contents. It was sufficient for him to be told by the deceased that he was signing his Will. His sole purpose was to see that the deceased signed what he said was his Will in his presence along with Pastor Findley and for him to attest and subscribe to the Will in the presence of the testator. Mr. Vassell did that and more. He was able to give evidence of the circumstances surrounding the execution of the Will.

[37] Having regard to the principles in **Banks v Goodfellow** (*supra*), I find that the testator had sufficient intelligence to understand the nature of the testamentary act and its implications at the time the will was executed. The Claimants' evidence has failed to meet the requisite threshold to raise any doubt in the mind of the Court that the deceased was suffering from any serious mental defects sufficient to deprive him of the mental capacity to duly execute the disputed Will. I am persuaded by the evidence presented by the Defendant, that the deceased at the time of the execution of his Will, possessed a sound mind and memory and was aware of the significance of his actions. I find that the 1st Defendant has effectively discharged the burden of proof, and I so determine that the deceased possessed the requisite testamentary capacity at the time he executed the purported Will.

ISSUE ii: Whether the deceased's signature appearing on the purported Last Will and Testament dated 14 March 2017 was obtained by fraud and is a forgery.

LAW AND ANALYSIS

[38] It is trite law that, for a Will to be valid it must have been duly executed in accordance with section 6 of the Wills Act. Sections 3 and 4 of the Forgery Act set out the circumstances relevant to the forgery of a document. According to the learned authors of Tristram and Coote's Probate Practice, 28th edition, paragraph 38.10:

*“In a probate claim there may well be shifts in the burden of proof, but in broad outline, where the issues raised in the claim include those arising out of the alleged condition, act, or omission of the testator (e.g. **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, ...*

*The burden of proving affirmative allegations impeaching the will where the fault does not lie with the testator (e.g. **undue influence or fraud**) is upon the party making them ... (emphasis mine).*

[39] The more serious the allegations, such as fraud and undue influence, the more cogent the evidence required to establish such allegations. It is well established that fraud must be precisely alleged and strictly proved. In considering matters of this nature, the starting point is the presumption that the Will was properly executed; however, this presumption can be rebutted if there is sufficiently cogent evidence before the Court which calls into question the validity of the Will. The Court in **Paul Griffiths v Claude Griffiths** [2017] JMSC Civ 136, at paragraph 53 opined that the presumption applies only where there is no evidence before the Court as to the manner of execution of the Will and does not apply where there is evidence proving or disproving due execution. I find that, in the case at bar, there is evidence as to the due execution of the Will from one of the attesting witnesses, Mr. Merrick Vassell, therefore, the presumption of due execution does not arise, but in light of the challenge to the purported Will the Court must examine the evidence on the Defendant's case. I will also proceed to assess whether the Claimants, have discharged the burden of proving their allegations of forgery and fraud.

[40] Both Claimants indicated that they were familiar with their deceased father's signature but their evidence as to how they became familiar with his signature was weak. However, I accept that they were both familiar with his signature. It was interesting to note that the 1st Claimant recognised his father's signature on Exhibits 7, 8 and 9 (the Fixed Date Claim Form filed by Cleveland Edwards on May 6, 2016, the Affidavit of Cleveland Edwards filed on May 6, 2016, and the Affidavit

of Cleveland Edwards filed on August 24, 2016, all signed by Cleveland Edwards, the deceased). On the other hand, the 2nd Claimant claimed that he did not recognise the signatures on any of the documents. I do not believe the 2nd Claimant was being forthright.

[41] There was no evidence presented by the Claimants as to how the 1st Defendant or 2nd Defendant made, or caused the Will to be made, or that the deceased did not authorize its making. It was made plain during cross-examination that neither of the Claimants knew the 1st Defendant or his church members prior to the deceased's death. I find that the Claimants were unable to establish any relationship between the 1st Defendant and the deceased capable of giving rise to dishonesty, fraud or trickery. I further find that the evidence they are seeking to rely on does not indicate how the 1st Defendant falsely represented himself as executor or acted in a manner to defraud the deceased's estate. The Claimants have failed to establish any nexus between the 1st Defendant and the construction of the Will, or that he acted dishonestly in procuring it. There is no evidence to support the pleadings, neither is there an ounce of evidence to support a conspiracy between the 1st Defendant and anyone else, not even Mr. Vassell. Suspicious events by themselves do not prove fraud.

[42] The Claimants have also failed to indicate to this court, by what means or method the 1st Defendant committed, assisted in, or caused the forgery to be carried out. It is insufficient to merely plead that the Defendants forged the purported will. The Claimants are required to adduce cogent evidence to substantiate their case. They have failed to do so as they have not advanced any evidence that would establish forgery.

[43] There must be sufficient evidence from which the court could find that one or both Defendants knew, or ought to have known of the alleged forgery and colluded in having the will prepared and the signature purporting to be that of the Deceased affixed. While it may give rise to suspicion that the Defendants are named

beneficiaries, suspicion alone is insufficient. There is no evidence before the court to demonstrate that the 1st Defendant knew or ought to have known that the document was not the deceased's Will nor is there any evidence that the 1st Defendant misled, encouraged, and or assisted with the alleged forgery of the Deceased's signature. There was no evidence that the 1st Defendant played any role at all in the execution of the will.

[44] It is noteworthy that the 1st Defendant has a criminal conviction for dishonesty and the Claimants' attorneys at law both severely pressed him on this issue in cross-examination. The Defendant's attorneys at law challenged the Claimants about their dishonest conduct but neither of them was ever convicted. The Claimants' attorney however used the 1st Defendant's criminal conviction for dishonest conduct as a strong support and as further proof that he was part of the fraud and forgery of the deceased's Will.

[45] Counsel Mr. Carter contended that the 1st Defendant lacked previous good character, as in the case of **Supple v Pender and another** [2007] EWHC 829 and as such the probability of the Will being forged is less remote in all the circumstances. Counsel added that in this case based upon the 1st Defendant's and his witness' evidence under cross examination alone, it is sufficient to find that the Will is a forgery. I note that the 1st Defendant admitted conviction for Illegal Possession of Firearm and Robbery with Aggravation. There is however nothing in law to support the position that because of his criminal conviction, he is of a totally dishonest character and whatever he does is fuelled by dishonesty. There was no connection between his dishonest conduct in the criminal matter and the drafting and execution of the Will. The 1st Defendant's dishonest conduct being alluded to should relate to the material issues in the case at Bar.

[46] I therefore cannot use his conviction to colour his conduct in the matter before the Court where there is no evidence presented to support dishonest conduct by the Defendants in relation to the preparation of the will. Mr. Vassell's evidence was

however, not without blemish. In his affidavit evidence he said he followed Pastor Findley to visit the deceased twice after they signed the Will for his doctor's appointment however on the court's inquiry, he said that he had never by himself or with others taken the deceased to his medical appointment. This internal inconsistency raises the issue of the credibility and reliability of his evidence.

[47] In considering credibility and reliability, the Privy Council made this clear, in the case **Villeneuve and another v Gaillard and another** [2011] UKPC at paragraph 67 citing a well-known passage from **Armagas Ltd v Mundogas SA (The Ocean Frost)** [1988] 1 Lloyd's Rep 1, 57 that *"...it is essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth."*

[48] I remind myself that the Court is not obliged to accept all of a witness' evidence. I can accept one part of his evidence and reject another part. Contrary to Mr. Vassell's evidence in cross-examination, I find that he did accompany the deceased, along with other members of the church, to medical appointments. I am of the view that he sought to downplay the extent of his interactions with the deceased during his lifetime. It may be gleaned from the Defendant's case that Mr. Vassell assists the church and accompanies Pastor Findley on various engagements. I also find that Mr. Vassell sought to minimise the nature of his relationship with the 1st Defendant.

[49] I find that the 1st Defendant was also attempting to portray his interactions with the deceased as less than they truly were. He said that he did not consider himself a

friend of the deceased, but he was certainly not a stranger, as he obtained very personal information from him during his lifetime, particularly concerning his relationship with his children, and was even asked to act as his executor. I find that this is indicative of a close relationship. However, I do not find that these inconsistencies, or the downplay of the apparent relationships with the deceased, have destroyed their credibility.

[50] Interestingly, while the Defendant and his witness sought to minimize the extent of their relationships with the deceased, the Claimants, on the other hand, sought to magnify their relationships with their deceased father. I find that the 1st Defendant and his witness were more reliable, unlike the Claimants, whose purpose was to create a fallacy of the close relationship they shared with their deceased father to provide a boulder to destroy the validity of the Will.

[51] I also considered that Mr. Vassell appeared to have nothing to gain from the dispositions in the Will, given that the deceased left his estate to his sons, his two caretakers, the 1st and 2nd Defendants, and the Power of God Ministries International. I am mindful that the 1st Defendant, as a beneficiary under the purported Will was bequeathed the deceased's 2012 Honda CRV motor vehicle and the 2nd Defendant was bequeathed One Hundred Thousand Dollars. However, I cannot place any weight on the Claimants' assertions without sufficient evidence from them proving the allegations of fraud and forgery. I find the claimants' evidence not only lacked reliability but was insufficient to substantiate their pleadings and challenge the veracity of Mr. Vassell's evidence that he went to the office of the deceased and witnessed the Will being signed by the deceased.

[52] I find that Mr. Vassell has provided evidence to prove to the satisfaction of the court that the document was duly executed by the deceased. He agreed with the suggestion from Counsel Mr. Carter that he had said that he only became aware of the deceased's death in September, yet he went to the funeral in August. Counsel submitted that this was further evidence that Mr. Vassell was an unreliable

witness. I must, however, point out that in further review of Mr. Vassell's affidavit evidence that suggestion was incorrect. His evidence was that he found out in August 2017 that the deceased had passed and he later attended the wake and the funeral.

[53] In the circumstances of this case the 1st Defendant and his witness, as propounders of the testamentary document, must also dispel any suspicions that might arise concerning its execution. The Will on its face appears to have complied with all the formalities of section 6 of the Wills Act.

[54] It was also the Claimants' contention that the presence of mistakes in the purported Will created further support that it was a forgery. It was brought out in the cross-examination of the 1st Defendant and his witness, the alleged misspelling of Pastor Findley's first name and the misspelling of Mr Vassell's address on the purported will. I observed in Mr Vassell's evidence when asked to confirm the correct spelling of the name "**Roydel**", the 1st Defendant's first name, he said that he was not good at spelling. When asked about Pastor Findley's first name, he said he thinks it's pronounced '**Kevan**' Findley. No clarification was sought as to how he spelt it. He said he was able to read and write a little. He described Pastor Findley as a man of a lighter complexion than himself and of similar height. Mr. Vassell is of dark complexion.

[55] Utilising the *Peter Blake* principle, Counsel Mr. Carter showed a document to Mr. Vassell. He responded that he recognized it and accepted it as accurate and that it was a picture of the 1st Defendant and Mr. Findley. He further agreed that he saw Pastor Findley's name at the top right-hand corner of the picture however when asked if he agreed with counsel that Pastor Findley's name is spelt **K-e-v-a-n**, he said he saw the "**Kev**" but the rest of the word was blurry and so he could not make it out. The document was admitted into evidence as Exhibit 10 but edited to remove the writings thereon.

- [56] The 1st Defendant, under cross-examination by Mr. Carter, said that he had known Pastor Findley for many years and knew him very well, but he did not remember Pastor Findley's first name. He said he called him "Kevon" and said he would spell it "Kevon". He agreed with counsel after viewing a document, that Pastor Findley's first name was spelt "*Kevan*", but he did not accept the document as true.
- [57] I find that despite Mr. Vassell's recognition and acceptance of the individuals in the document, it bears no weight in the case at Bar. The Claimants did not raise any spelling issues about misspelt words in their pleadings concerning Pastor Findley's first name or made any mention of those matters in their witness statements nor that Mr. Vassell was responsible for the writing of the Will. Furthermore, I am unable to rely on a random social media post allegedly containing the correct spelling of Pastor Findley's first name when there is no cogent evidence before the Court as to what is the correct spelling of Pastor Findley's name or better yet how Pastor Findley spells his first name. So, although the Claimants' attorneys at law have made heavy weather of this issue in cross examination as well as Counsel Mr. Carter in his submission, the alleged misspelling of Pastor Findley's first name does not provide any further support to their case for forgery. I am therefore not in agreement with Counsel Mr. Carter's arguments concerning the writings on the document, (that is Exhibit 10), and as such while I accept that the images are pictures of the 1st Defendant and Pastor Findlay, I do not place any weight on the writings thereon.
- [58] Counsel Mr. Carter submitted that further evidence of Mr. Vassell's lack of credibility was revealed in his inability to spell "Leas Flat" and also to tell whether Leas Flat was on the left or the right side of the road when ascending Red Hills. Mr. Vassell had stated that it was on the left while the 1st Defendant had indicated that it was on the right. I have considered the spelling error of "*Leas*" Flat, the 1st Defendant spelling it as '*Least*' Flat similar to that in the purported will under the address of Mr Vassell, and Mr. Vassell's failed attempt at identifying that the

property was on the right side of the road ascending the hill. Mr. Carter pointed out that in cross-examination Mr. Vassell was able to spell '*Leas Flat*' correctly compared to the spelling on the purported Will. Counsel for the Defendant argued that the Claimants found themselves in a situation where fraud had been particularised but was not proven and so during a fishing expedition undertaken during cross examination, they attempted to reconfigure their case and sought to prove allegations which were not pleaded.

[59] None of these allegations were pleaded or in any statements made by the Claimants. Pleadings are to be specifically stated as they guide the opposing party and the Court as to the case that the party is advancing. I agree with Counsel for the Defendant that there was nothing pleaded by the Claimants to indicate that there was forgery of the signatures of the witness or witnesses to the Will. I find that these alleged misspellings and the seemingly placing of the property on the wrong side of the road, without more, are minor errors that do not significantly affect the Defendant's case, although they may cause some suspicion but they do not rise to the level of fraud nor proof of forgery.

[60] Several authorities have emphasized that allegations of fraud are serious, therefore, they should not be made lightly and certainly not without evidence to support it. Although the Amended Particulars of Claim allege fraud; to my mind, the Claimants have failed to prove that the 1st Defendant acted dishonestly or fraudulently in procuring the signature on the purported Will.

[61] I find that given the insufficiency in the Claimants' evidence concerning the seriousness of the allegations of forgery, their case falls now to be determined on the evidence presented by Miss Beverly East, the handwriting expert. In assessing her evidence, the court is mindful that expert evidence must be assessed in the context of the other evidence given in the case. That evidence should be tested against known facts. The Court is tasked to consider the evidence of the expert and decide if that evidence is to be accepted. I agree with Counsel for the 1st

Defendant that the nature of the documents assessed, the science used and the strength of the analysis may all be used in deciding whether the expert's evidence is to be accepted.

EXPERT'S EVIDENCE

- [62]** I will set out a summary of certain aspects of Miss East's expert report, with specific issues to be considered in greater detail in my analysis. She testified that in June 2019 she was retained by Mr. Craig Carter on behalf of the 2nd Claimant, to examine the authenticity of the deceased's signature on a purported Will dated 14 March 2017. She was provided with two known signatures, namely a National Commercial Bank RTGS form dated 3 February 2017, and the deceased's Driver's Licence issued 30 June 2015. Having compared these with the questioned signature, she prepared a report identifying inconsistencies (*Graphics 1-7*) and concluded that the signature on the purported Will was not authentic.
- [63]** Miss East explained that she identified habitual writing patterns in the known signatures using the principles of movement, form, spacing, and line quality, the latter being observable under magnification. She identified consistent features in the known signatures, including a flat-bottom "C", a printed capital "E", a rounded "w", a distinctive "r", and the formation of the "d" and "s". She stated that none of these habitual features appeared in the questioned signature, which she said differed in formation, exhibited breaks in movement, and sat flat on the line, which she regarded as a red flag. She concluded that the questioned signature was not genuine.
- [64]** In cross-examination, Miss East accepted that her analysis was based on two known samples and that she had not seen the deceased sign any document. She rejected the suggestion that a larger sample size was required, maintaining that additional samples would not have affected her conclusions.

- [65] When shown the Fixed Date Claim Form and the two Affidavits (Exhibits 6,7 and 8) all bearing the deceased's signature, she accepted that certain features she had identified, including a curved "C" and letters resting on the line, appeared in those signatures, and that the habitual patterns she identified were also present. She also accepted that, contrary to her earlier position, the signatures in **Exhibits 6,7 and 8**, which she was shown in Court, in fact sat on the line. She nevertheless maintained that these matters did not affect her analysis or her conclusion that the questioned signature was not genuine.
- [66] On re-examination, Miss East stated that her analysis was not dependent on sample size and that questioned signatures may be assessed independently by features such as retracing and lack of fluidity. She accepted that there may be natural variation in signatures but maintained that the questioned signature did not exhibit the habitual patterns of the known signatures.
- [67] Having regard to the information set out in the previous paragraphs, as to the basis for her conclusion, Miss East's evidence has revealed a complete reliance on the five similar characteristics. She remained steadfast in her findings of the five characteristics seen in the known signatures even when faced with the fact that three out of the five characteristics were absent from the deceased's signature on the court documents (Exhibits 6,7 and 8). This Court cannot put much weight on these five characteristics given her acceptance that she picks up patterns from the known samples and these same characteristics, for example, the flat bottom 'C' which is not seen in the known signatures affixed to the court documents, were all referenced as natural variations.
- [68] Significantly, Miss East found that the questioned signature sits flat on the line, and that for experts, was always a red flag because when you know your name you just sign it, you do not need a line to guide you. Yet, in the court documents, (Exhibits 6,7 and 8) the deceased's signature, as identified by the 1st Claimant, is sitting flat on the line. I find that the presence of other signatures has exposed that

the characteristics Miss East sought to buttress her findings and conclusion are unreliable. I am not persuaded by these five characteristics.

[69] Of significance is the fact that the impugned signature on the purported Will bore several similarities with the signatures appearing on the Court documents filed by the deceased in 2017 in his case against the 1st Claimant. Although these similarities were clear to the naked eye, Miss East was adamant that having examined these additional documents she would stand by her findings. She maintained that her mode of analysis in this case was not restricted by her sample size and that she did not have to use known signatures to make a comparison, as this was not necessary. I understand this to mean that she does not need samples of a person's signature when analysing a document said to contain a forged signature of that person. The question therefore that this court is left with is this: bearing in mind that she was unfamiliar with the testator's handwriting, how could she present her findings that the characteristics of the signature in the questioned document are consistent or inconsistent with the testator's handwriting if she had no sample for comparison? I find the reliability of her evidence is further weakened due to the repeated reluctance, to acknowledge, in the face of evidence to the contrary, that a greater sample size would have proven more fruitful to her analysis.

[70] The Court of Appeal in **Clarke v Beckford et al JM 1993 CA 33A** opined that a judge is entitled to disagree with an expert if there is a clear basis on which to do so. I find that Miss East's evidence, and the quality of her reasoning, do not inspire confidence in the Court that the signature was a forgery. For the reasons already outlined, I do not consider that she has assisted the Court impartially on matters within her expertise, nor has she supported the Claimants' allegations of fraud and forgery of the deceased's signature on the purported Will. Bearing in mind that I am not bound to accept her findings and conclusions, I reject her evidence for the foregoing reasons.

[71] In all the circumstances, the Court is inclined to find that as the bearers of the legal burden, the Claimants' evidence concerning the forgery of the deceased's signature did not sustain their pleadings. I find that there is a paucity of evidence in support of their allegation of forgery of the deceased's signature. It lacked cogency and did not persuade the court of the probability of their allegations. There was no indication as to how the 1st Defendant made the document or that the deceased did not authorize its making. There was no evidence as to the connection between the 1st Defendant and the construction of the will or the execution thereof or how he committed or assisted in the commission of the forgery. The Claimants have failed to discharge their legal burden for the court to find on a balance of probabilities that the Defendant perpetuated fraud and forgery against the deceased's estate.

ISSUE iii: *Was the deceased unduly influenced or under duress when he signed the purported Last Will and Testament dated 14 March 2017?*

LAW AND ANALYSIS

[72] Having determined that there was no forgery nor fraud it is essential that the Court also considers the issue of undue influence and or duress. It is trite law that where a Will was prepared under undue influence it will be declared invalid. In **Errol Davis et al v Barrett-Davis** [2017] JMSC Civ. 44, a decision of Harris J (as she then was), stated at paragraph 98 that *"It has long been settled that those who allege that a will was created under duress, or undue influence must prove it. To succeed, the party making the allegation must show that the testator was not merely persuaded. It must be established that the testator was coerced. Where a will was created under undue influence it will be declared invalid."*

[73] The learned judge further noted at paragraph 102 that *"it must be shown (whether by direct or indirect evidence) that the testator was coerced into doing what he or she did not want to do. This can range from "confinement to violence, or a person*

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

[74] I find that I cannot place any weight on the Claimants' assertion that the deceased was unduly influenced because he lacked the physical, mental, and testamentary capacity. There is some overlap of the evidence to be considered under this heading with that of forgery, but I will limit the repetition in my analysis to only what is necessary. The Claimants gave evidence of the medical condition of the deceased leading up to his death. They gave details of the negative effects of his sickness in the Amended Particulars of Claim (see paragraphs 4 and 5 above). However apart from the 1st Claimant saying that his father had told him that he wanted \$7 million to pay for prayers, it is manifest on the evidence that neither Claimants knew the 1st Defendant nor his church before their father's death. The 2nd Claimant unequivocally admitted under cross-examination that he was unaware that his father was a member of the church.

[75] All of this points to the fact that the Claimants had very little interaction with their father during the last few years of his life, contrary to their evidence of having maintained a close relationship with him. It is worthy of note that the Claimants were described in the deceased's Will as his "*estranged sons*", which, in my view, further supports the conclusion that their relationship was strained and not of the nature that the Claimants would have the Court believe. I bear in mind that the Will was executed after the case in which the deceased had sued the 1st Claimant in respect of the Winston Avenue property. I further add that I believe that they were indeed the deceased "*estranged sons*."

[76] The 1st Defendant said there was no way he could have influenced a man like the deceased because all the time that he knew him, he was a strong-willed and

opinionated man, and if anyone wanted to, they could not cause him to change his mind. He said that he did not promise the deceased anything in exchange for making him his executor or for the gifts he generously gave to the Church. He denied forcing the deceased to make his Will or to make any of the gifts that he made in the Will.

[77] There was no evidence that the deceased was in such a condition that he would be easily influenced or coerced by the 1st Defendant or anyone in executing the purported Will; or that the deceased's mental and physical health were diminished such that his bargaining power was grievously impaired by illness and advanced age that he did not know what he was signing or fit to carry out even basic matters. I therefore find the 1st Defendant and Mr. Vassell more reliable witnesses and I reject the Claimants' evidence.

[78] There is not a scintilla of evidence presented to this Court to substantiate the belief held by the Claimants that their deceased father acted under duress to execute the purported Will. They have not established that the deceased was a person who would likely be subjected to undue influence. They were unable to shed any light on the type of relationship shared between the 1st Defendant and the deceased and why the deceased would deposit such trust and confidence in him, nor how he would have abused it. Nor by extension how Mr. Vassell could have influenced him to execute the purported Will. I agree with the submission from Counsel for the Defendant that there was a paucity of evidence to support the allegations of undue influence and duress. The Claimants' evidence was tenuous and unreliable as it concerned the deceased's health status at the time the purported will was executed and was insufficient to substantiate their pleadings of undue influence and duress.

[79] I am therefore of the view that the evidence that has been presented by the Claimants on this issue has fallen woefully short of the standard required by law. As a result, I find that the Claimants have not satisfied this court on a balance of

probabilities that the deceased was unduly influenced or under duress when he executed the purported will. The Claimants presented no evidence which would explain the nature of the relationship between the deceased and the 1st Defendant from which the court could conclude that the deceased had been coerced into executing the purported will. The 1st Claimant's evidence that his father told him that he wanted to sell the property in order to pay \$7 million for prayers did not, without more, provide any support for this assertion of undue influence.

[80] I find that the Claimants have not proven on a balance of the probabilities that the 1st Defendant unduly influenced the deceased as they have failed to establish that a relationship capable of giving rise to the necessary influence existed; a relationship of trust and confidence or ascendancy and dependency. They have also not proven that the influence, if any, generated by the relationship which existed between the 1st Defendant and their deceased father was abused, and led to the deceased being coerced into executing the will.

AMENDING THE FIXED DATE CLAIM FORM

[81] An issue arose near the conclusion of the case at the point of the Court giving the judgment when it was realised that the Fixed Date Claim Form had not been amended to include the 2nd Claimant. By way of a Notice of Application for Court Orders filed on March 25, 2018, the 2nd Claimant had applied to be added as a Claimant in the proceedings. On July 23rd, 2019, the Court ordered that the 2nd Claimant be added as a Claimant and an Amended Fixed Date Claim Form was to be filed and served. Both Claimants filed an Amended Particulars of Claim on September 19, 2019, but did not amend the Fixed Date Claim Form. Unfortunately based on an oversight it was never realised by anyone, including the Court. It is noted that after the Amended Particulars of Claim was filed and served all

subsequent documents filed and served by all the parties listed Sanjay Edwards as the 2nd Claimant.

- [82]** The issue to be determined at this stage of the proceedings is whether the Claimant's failure to file and serve an Amended Fixed Date Claim Form resulted in a procedural irregularity that can now be corrected or a procedural nullity which would cancel all the proceedings that took place after the order was made for the joinder of the 2nd Claimant.

LAW AND ANALYSIS

- [83]** Rule 26.9 (3) of the Civil Procedure Rules states:

26.9 (1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order. 137 Case Management –

(2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.

(3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.

(4) The court may make such an order on or without an application by a party.

- [84]** The Court heard oral submissions from Counsel for the 2nd Claimant and the 1st Defendant, with Mr. Carter holding for Mr. Stewart on behalf of the 1st Claimant. Both counsel submitted that the Court, utilising its case management powers, ought to permit the Claimants to file and serve an Amended Fixed Date Claim Form by July 31, 2024.

- [85]** In consideration of the issue Rule 26.9 (3) seems to be the most appropriate to address the problem. The order made by the Learned Judge on July 19, 2019, was that:

1) It is hereby declared that Sanjay Edwards be appointed as a Claimant in these proceedings.

2) Amended Fixed Date Claim Form to be filed.

3) Permission granted to the Claimant to file and serve Particulars of Claim on or before September 20, 2019.

[86] The orders were not made subject to any sanction, nor were they framed as an unless order. Accordingly, while it would have been prudent for Counsel for the 2nd Claimant to have complied, his failure to do so was not fatal to the proceedings and did not render his *de facto* joinder a nullity.

[87] The Amended Particulars of Claim cannot add the 2nd Claimant to the proceedings because it is not an originating document. Part 8 of the Rules requires that an Amended Fixed Date Claim Form be served on the Defendant. Technically, the Court would not have had jurisdiction over the 2nd Claimant. However, he has filed several documents including the Amended Particulars of Claim, a statement, Expert Report and has participated fully in the trial of the matter. Counsel acting on his behalf has cross-examined both witnesses for the Defendant.

[88] The Court considered that the case had proceeded on the assumption that the amendment had occurred and the document was served. The 2nd Claimant had participated in the trial as if he was properly on record as a party to the proceedings. The 1st Defendant had presented his case on the basis that the 2nd Claimant was properly joined, and the Defendant and his witness were thoroughly cross-examined by Counsel for the 2nd Claimant. It would be an affront to justice to declare the trial a nullity. I have determined that the steps that were taken by the 2nd Claimant after failing to comply with the order to file the Amended Fixed Date Claim Form amounted to a procedural irregularity.

[89] I rely on the Court of Appeal decision in **Douglas Thompson v Peter Jennings** [2021] JMCA Civ 6 at paragraph [44] where the Court opined:

[44] It is necessary to examine rule 26.9 in some detail. This rule gives the court “general power to rectify matters where there has been a procedural error”. Rule 26.9(1) states that

the rule “applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order”. The use of rule 26.9, it would seem, is restricted where there is non-compliance with a rule, practice direction or court order and the consequence for the failure to comply has been specified by any rule, practice direction or court order. In other words, where there are no consequences provided for failing to conform to a rule, practice direction or court order, rule 26.9 may be used to remedy procedural errors.

[90] At para [45], the Court went further to say that:

[45] Rule 26.9(2), however, provides that an error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any steps taken in the proceedings, unless the court so orders. Additionally, rule 26.9(3) allows for the court to make an order to put matters right, where there has been an error of procedure or a failure to comply with a rule practice direction, court order or direction. It follows, therefore, that, while rule 26.9(1) refers to instances in which the general powers of the court to rectify procedural errors cannot be exercised, rules 26.9(2) and (3), reflect the broad instances in which these powers can in fact be utilised.

[91] The issue at hand falls squarely within the rule 26.9 and I therefore rely on **Thompson v Jennings (supra)**. I find that that the late filing and service of the Fixed Date Claim Form was a procedural irregularity that did not invalidate the proceedings. This approach is supported by the case of **Harkness v Bell’s Asbestos and Engineering Ltd** [1966] 3 All ER 843, at page 845, where Lord Denning MR explained that the new procedural rule abolished the distinction between nullities and irregularities in respect of errors or mistake in practice or procedure and empowered the court to rectify such errors so long as it could be done without injustice.

[92] I find that the irregularity can be cured by an order to allow the late filing and service of the Amended Fixed Date Claim Form. I do not find that any of the parties would be prejudiced by this as the orders sought in the Amended Fixed Date Claim Form were similar to those in the Fixed Date Claim Form as set out in paragraph 3 above. It would also be in keeping with the overriding objective of the CPR to deal justly with cases. The Court therefore allowed the Claimants to file and serve the Amended Fixed Date Claim Form.

ORDERS

- 1 The Amended Fixed Date Claim Form filed and served on July 31, 2024, is deemed to have been properly filed and served.
- 2 The orders sought in the Amended Fixed Date Claim Form are refused.
- 3 The Will dated 14th March 2017 is declared to be the Last Will and Testament of Cleveland Edwards.
- 4 The 1st and 2nd Defendants are permitted to proceed with the application for Probate of the estate of Cleveland Edwards, deceased.
- 5 Costs of the Claim to the 1st Defendant, to be agreed or taxed.
- 6 The 2nd Claimant's attorneys at law are to prepare, file and serve the order.