

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

CLAIM NO. ANUHCY 2005/0545

BETWEEN:

INDIRA SALISBURY
STACY A. RICHARDS ANJO
As executrixes of the Estate of David Toms, deceased

Claimant

AND

MANDY RAQUEL TOMS
CHRISTOPHER BATESTON

Defendants

Appearances:

Mr. Vashist Maharaj for the Claimant
Mr. John Fuller for the Defendant

.....
2007: October 16, 17; November 12; 2008: January 02
2008: November 16.
.....

JUDGMENT

✓ [1]

Harris J: This is a matter between the two executors of a will and an aggrieved beneficiary – the wife of the Testator.

INTRODUCTION

[2] The Testator was the proprietor of several businesses, interests and investments in Antigua and Barbuda and abroad. At the time of his death he was intimately involved with the 1st Claimant (who is one of his executors and a beneficiary under his will), having cohabited with her since 2003. The testator's estranged wife and defendant herein, resided in the U.K. at the time of the testator's death.

- [3] The testator suffered from a *pot-pourri* of ailments apparently related to his diabetic condition (Diabetes Mellitus). On the 4th April, 2005 the Testator walked into the Adelin Hospital, a private medical institution, in the company of his girlfriend/1st Claimant and was admitted as a patient. The Testator's medical condition hereon in did not improve.
- [4] On the 5th April 2005, the Testators lawyer, at his request, and in the presence of his said girlfriend and another employee of his, took and made a written record of his instructions for the preparation of his last will and testament whereby he provided for, among other persons, all members of his immediate family and the 1st claimant/Girlfriend.
- [5] By the night of the 6th of April 2005, the Testators medical condition had worsened, he having already been placed on a ventilator and as a consequence, under sedation. During the course of the night and thereafter, his heart rate, blood pressure and blood oxygen saturation levels fluctuated. At around 6:00 am the following morning, 7/April/05, he was weaned off the sedative rendering him more alert. At the request of the Testator to the nurse on duty, the testator's girlfriend visited him between 6.45-7.00am the 7th April, 2005. She was accompanied by the Testators lawyer who had with her the prepared will. In the presence of the Testator, the lawyer requested the nurse on duty to witness the execution of the will and testament.
- [6] Sometime between 6.45 – 7.00am on the 7th April 2005, the Testator took the 3 sheets of paper comprising his last will and testament from the lawyer and read them. The will was not read to him. The testator then requested a pen and appended his signature to the will. The nurse on duty and his lawyer both, then signed as witnesses in his presence. The will on its face was executed in full compliance with the formalities of the Wills Act.

[7] The Testators general medical condition was deteriorating so he was moved from the private hospital to the Intensive Care Unit of the Holberton public Hospital. The Testator died later that day, the 7th April/2005.

[8] The Defendant¹ Mandy Toms, the Testators estranged but lawful wife, resided in the U.K. at the time of the testator death. The Defendant contests the validity of the will on the grounds that at the time of the execution of the will (i) the testator did not know and approve the contents of the will (ii) that the execution of the will was obtained by the undue influence of the testators girlfriend/1st Claimant (iii) that at the time of the execution of the will and/or instructions for the will the testator was not of sound mind, memory and understanding. In support of her case, the Defendant relies on what includes medical evidence of the mental incapacity of the testator and several circumstances which she contends should excite the suspicion of the court. Several witnesses gave evidence for the parties; Cynthia Byers, Indira Salsbury, Correne McKellar, Stacy Richards-Anjo, Margaret P Frazer, Mike Toms, Dr Ravi , Dr. Jason Belizaire, Mr. Lois Belizaire, Mandy Toms and Christopher Bateson. Several witnesses who had provided witness statements or reports for the claimant did not give evidence and their statements/report is not considered.

[9] Several main issues arise to be considered.

ISSUES

1. Whether the Testator had the necessary testamentary capacity to give instruction for the preparation of a will on the 5th April, 2005.
2. Whether the Testator had the necessary testamentary capacity to execute his last will and testament on the 7th April, 2005.
3. Whether the testator had knowledge and approve of the contents of the instructions on the 5th April, 2005 and the will on the 7th April, 2005.

¹ The second named defendant had been struck off as a Defendant in earlier interlocutory proceedings by Order dated 19th May 2006. He gave evidence for the remaining Defendant, Mandy Toms, at the trial.

4. Whether the testator if found to have had limited testamentary capacity at the time of executing his last will and testament but had full testamentary capacity at the time of giving instructions, this would validate the will.
5. Whether the testator was unduly influenced by the 1st named Claimant in the giving of the instructions for the preparation of a will on the 5th April, 2005 and/or, the execution of the last will and testament on the 7th April, 2005.

[10] I shall dispose of the last issue "(5)" first; **Whether the testator was unduly influenced by the 1st named Claimant in the giving of the instructions for the preparation of a will on the 5th April, 2005 and/or, the execution of the last will and testament on the 7th April, 2005.** I commend the submissions of the counsel for the 1st/Claimant on this point, to the reader. Before considering the testamentary capacity of the testator, it first has to be proved by the defendant that the testator had been induced to make dispositions which he did not really intend to make.

[11] Whilst the Defendant has pleaded undue influence with particulars of surrounding circumstances that could give rise to acts contributing to undue influence, she did not plead specific acts that she alleges amount to the undue influence. Further, this allegation was not put to the 1st Claimant, Indira Salisbury in cross-examination. The Defendants have not led evidence of any action on the testator whether before or at the time of the making of the will amounting to undue influence.

[12] The test for undue influence is that "*there must be something amounting to force and coercion in the obtaining of the act itself.*" Undue influence is really a question of testamentary capacity¹ and the principle governing this plea has been stated by Sir J. P. Wilde in Hall and Hall, cited in Williams on Wills 6th edit at pp 45 thus:

¹ Williams on Wills, 6th edit pp 45

'Persuasion is not unlawful, but pressure of whatever character if so exerted as to overpower the volition without convincing the judgment of the testator, will constitute undue influence through no force either used or threatened.'

- [13] I accept that evidence in support of a testator's (i) knowledge and approval of the contents of the will (ii) testamentary capacity, may be relevant to a plea of undue influence. However in the instant case the evidence in support of "(i)" and "(ii)" in this paragraph do not in my view, provide sufficient evidence in support of the plea of undue influence.
- [14] The Claimants sought to establish that the execution of the will was done without the 1st Claimant coercing the testator to make the will in a particular way. The Defendants counterclaim that the execution of the said will of the testator David Toms was obtained by the undue influence of the 1st named Claimant, Indira Salisbury.
- [15] I think it necessary to set out certain parts of the evidence relied on by the parties on this issue.
- [16] The Defendant, although she pleaded undue influence, did not do much in the way of evidence to prove undue influence.
- [17] The evidence from the Claimant, the nurse on duty, the Attorney taking the instructions Ms. Stacy Richards-Anjo and the employee of the testator Ms. Correne McKellar all support the regularity of the process of taking the instructions and the execution of the will.
- [18] The evidence of the Claimant, Ms. Salisbury, of both the giving of the instructions for the will on the 5th April, 2005 and of the execution of will on the 7th April, 2005 is clear. Her evidence does not raise any incident of coercion or the testator being otherwise induced to make the dispositions he did. On both days there were other persons present with the testator during her presence in the room at the material time¹.

¹ Ms. McKellar with Mrs Richards-Anjo and nurse Byers with Mrs. Richards-Anjo respectively.

- [19] The corroborating evidence of Ms. McKellar was that on the 4th and 5th of April, 2005, the testator was alert and engaged her in banter that included work related assignments. In the end he indicated to her that he wanted to make a will and that she should contact, Attorney-at-law, Stacy Richards-Anjo and ask her to come to the clinic and attend to the matter of his will. Ms. McKellar was the testator's personal assistant and is taken to know him well¹. She made no untoward observations of him with respect to his free will being compromised.
- [20] Stacy Anjo-Richards did attend at the clinic and on the instructions of the Testator she pulled out her pad and recorded the testator instructions as he dictated it to her. At this time the Attorney asked the 1st Claimant Indira Salisbury, to step out of the room with her, which she did.
- [21] Ms. McKellar remained in the room and said that whilst alone with the testator, he indicated to her he had taken care of everyone in the will.
- [22] Ms. Richards-Anjo for her part, spoke of the testator asking her to take instructions for the preparation of his will. She said that she advised him on a few matters which resulted in her adjusting his instructions.
- [23] Ms. Richards-Anjo's evidence of the later execution of the will on the 7th April, 2005 is that she handed to him the 3 page typed will, he took it , he appeared to read it, asked for a pen and ultimately signed it. There is no evidence of coercion or circumstances that would induce him to make dispositions that he did not really intend to make.
- [24] The corroborating evidence of Mrs. Beyers, the Nurse on duty and the witness to the will, does not speak of any coercion or circumstances that suggest that the testators free will had been compromised on the 7th of April, 2007 or that circumstances existed that would have induced the testator to make dispositions that he did not really intend to make.

¹ She was also a beneficiary under the will. It is not alleged by the claimant that she was exerting undue influence over the testator at the material times.

- [25] The applicable Law is that 'undue influence' must not only be specifically alleged but affirmatively proved by the person asserting it.
- [26] In William on Wills Vol. 1, 6th edit. at pp 45 the editors speaks of undue influence as being the acts of others whereby the testator has been induced to make dispositions which he did not really intend to make. The evidence does not disclose any force or incessant badgering over time for instance, by the 1st claimant of the Testator, so that he was made to act in a certain way¹.
- [27] Mandy Toms, the Wife of the testator and Defendant in this matter gave evidence which in the end, did not significantly add to the case for the defendant on the issue of the undue influence and for that matter on any of the other issues in the matter. She said that she spoke with her husband very often from the U.K. And she initially did say that her husband at some point did admit to her that he was living with the Claimant but he was merely fond of her and the relationship was not a sexual one. She insisted that the claimant was the testators maid from 2001 until they commenced a "girlfriend and boyfriend" relationship from December 2003.
- [28] Mrs. Toms was apparently familiar with aspects of her husbands business including being aware of the existence of Arpels and Astra Holdings Ltd. She knew that Camelot Trust owned Arpels and that the Trustee of Camelot Trust was Mr. Bateson. This information she acknowledged, she obtained prior to her leaving Antigua in 2003 and after the death of her husband.
- [29] Mandy Toms testified that she spoke with the testator in March of 2005 and spoke with him about Arpels and that he was "behaving strangely". No particulars of the 'strange behavior' or the conversation on Arpels was given. She continued to say that she had difficulty with telephone contact with Mr. Toms in March and not before. She testified that she had a conversation with him in the 1st week of April 2005 but cannot say anything about the state of David Toms at that time.

¹ Sin Young Chin and Anor. V Catherine Kelly and Others (1968) 12 WIR 429; Goddard v Jack (1959-1962) 1 WIR 169.

- [30] Mrs. Toms acknowledged having seen the copy of the will and that it did make provision for herself and her three children. She added that it made no provision for his mother and that she did not believe he would have put a secretary¹ before his mother. She made no comment on the presence of Mrs. McKellar, the testator's personal assistant, as a beneficiary, also before the testator's mother. The testator's mother is not a party to this matter and did not testify in the matter.
- [31] The evidence of Mrs. Toms was not particularly helpful in providing the court with facts upon which the court can draw its own conclusion on relevant matters including why the testator did not or should have made provisions for his mother in the will. Further, it is unclear as to what aspect of her case she speaks. In cross examination she said that part of her case is that "*Indira Salisbury exerted undue influence over Mr. Toms prior to execution of the will.*"
- [32] Wooding C.J. in *Moonan v Moonan* noted that the "*essence of undue influence is coercion – coercion inducing the making of the dispositions by the will under challenge. He goes on to add that the sort of coercion which is necessary to be proved was well summed up by Sir J. P. Wilde in Hall v Hall ... when he said that:*
- "a testator may be led but not driven; and his will must be the offspring of his own volition, and not the record of someone else's".***
- [33] There is no sufficient evidence before me that points to the circumstances prevailing at the material times or to the relationship between the testator and the executors and Mrs. McKellar, that suggests that by their actions or by their presence alone or two or more of them, the testator would have been pressured or otherwise induced to make dispositions he otherwise did not intend to make. The Defendant has not raised any matter that can satisfy the law on Undue Influence. In my judgment the allegation of undue influence has not been made out. The Claimants have established that the execution of the will was done without the 1st Claimant coercing or inducing the testator to make the will in a particular way. **The Defendant's counterclaim that the execution of the said will of the testator David Toms was obtained by the undue influence of the 1st named Claimant, Indira Salisbury, fails and is dismissed.**

¹ Ms Salisbury.

ISSUE "1" and "3"

Did the Testator have the necessary testamentary capacity to give instructions for the preparation of a will on the 5th April, April 2005? AND Whether the testator had knowledge and approve of the contents of the instructions on the 5th April, 2005 and the will on the 7th April, 2005.

- [34] On this issue the Claimant is saying that the testator was not at the time of giving of instructions for the making of his will of sound mind memory and understanding¹. This goes to testamentary capacity. The onus of proving testamentary capacity is on the Claimants who are propounding the will (See Wooding CJ in *Moonan v Moonan* (1963) 7 WIR 421 (422 I)).
- [35] The editors of *Williams on Wills* provides that: "... that three things must exist at one and the same time: (i) The testator must understand that he is giving his property to one or more objectives of his regard; (ii) he must understand and recollect the extent of his property; (iii) he must also understand the nature and extent of the claims upon him both of these whom he is including in his will and those who he is excluding from his will."
- [36] Several witnesses can speak to this issue. Nurse Beyers, a corroborating witness who observed the testator walk into the Clinic with his girlfriend, the Claimant, on the 4th April, the day before he gave the instructions for his will. She made no observation that calls into question his testamentary capacity at that time. She did not see the testator after that until 11:00 pm of the 6th April, 2005.
- [37] Correne McKellar, the testator's personal assistant was another corroborating witness. Ms. McKellar spoke of the testator engaging her in discussion about her assigned tasks of the 5th April culminating with him asking her to request the presence of his lawyer to take instructions for the drafting of his will. The Testator appears to the court to have been normal and lucid at that time.

¹ See also *Alia Williams v Augustus Williams*, Suit #ANUHCV 2000/0311 per Mitchel J.

- [38] Stacy Richards-Anjo, the Testators Attorney at Law gave evidence of the taking of the testator's instructions. She said that on her arrival at the clinic the testator greeted her, he sat up in bed and told her "*I want to give you certain instruction which you must use to prepare a will.*" Ms. Richards-Anjo continued; that "*Upon taking the instructions, I observed that the total percentage of the shares in "Arpels Limited" which Mr. Toms was purporting to bequeath to the various beneficiaries exceeded 100% and I so advised him. He immediately adjusted the percentages and I changed the record of his instructions accordingly¹.*"
- [39] Ms. Richards-Anjo said further, that she discussed with him what she referred to as "*some technical problems*" with his instructions. She said **(I)** the property at Valley Church was not registered in his name and **(II)** she had some reservations as to the legality of the clause voiding any gift made to someone who challenged the will. Her evidence, which is not contradicted, is that the testator then changed that clause².
- [40] Mrs. Richard-Anjo then handed him the complete written record of her instructions which he read aloud. She said she had to help him when he had difficulty understanding her writing or the alterations made.
- [41] Ms. Richards-Anjo's professional conduct is not in doubt. Her integrity was not impugned at trial.
- [42] Ms. Salisbury, the testator's girlfriend and a substantial beneficiary under the Will gave evidence of the testator freely dictating the instructions for his will. The evidence does not disclose at the giving of the instructions and the execution of the will, that Ms Salisbury, an executor, was with the testator alone.
- [43] Mrs. Byers, the nurse of over 25yrs. experience, testified as to what transpired on the 7th April when the testator executed his will. Her evidence corroborates that of Ms. Salisbury and Ms. Stacy Richards-Anjo. When asked by Ms. Richards-Anjo to witness the will she agreed. Ms. Byers does not in her evidence express coming

¹ This suggests that he was in control of his faculties and reason.

² This suggests that he had the capacity to understand and reason.

to any conclusion that the testator did not appreciate, understand and approve what he was doing or that he was not otherwise competent to do what he did. The will was executed in the presence of the two attesting witnesses, nurse Byers and Stacy Richards – Anjo.

- [44] Dr. Ravi was an expert witness for the defence. His evidence with respect to the testator's mental health on the 5th April 2005 was unremarkable. The crux of his evidence commences from his testimony that "*on the morning of the 6th April, 2005 he started to deteriorate. His oxygen started to come down to 75%-80%.*" The testator was subsequently put on a respirator.
- [45] In cross-examination Dr. Ravi admitted that the testator was "*not being administered drugs ...*" prior to the 6th April, 2005. He said that on the 5th and 7th of April he was in charge of the Testator and that he called in Dr. Sen on the morning of the 6th April.
- [46] The Defendant contends that circumstances exist that should arouse the suspicion of the Court and not until the Claimant has removed this suspicion can the will be propounded. This indeed is the Law.
- [47] The Defendant contends that there are circumstances that should excite the suspicion of the court with respect to the testator's testamentary capacity and his knowledge and approval of the will and dispositions therein at the time of giving instructions for the making of the will on the 5th April 2005 (they are equally applicable at the time of the execution of the will two (2) days later). The suspicion must be that the will or some provision in it did not express the mind of the testator¹. If the Defendant shows that there are circumstances that excite the suspicion occurring before at or after the giving of the instructions or the execution then the Propounder – the claimants – is required to prove the actual knowledge and approval of the contents of the will by presenting evidence that removes that suspicion. The defendant submits that the dispositions made in the will were unnatural and improbable and totally contrary to matters that were

¹ Per Lord Wilberforce in *Lucky Tiwari* (1965) 8 W.I.R. 363 at 367.

within the deceased's knowledge when of sound mind.¹ The defendant contends as follows;

- (a) That the testator's medical condition indicates that he would not have freely appreciated, understood and approved the contents of his instructions and dispositions thereto. The Court finds that there is no or insufficient medical evidence in relation to the testator on the 5th of April 2005 to support the Defendant's contention on this point.

- (b) That the disposition of shares in Arpels was unnatural and improbable, for the Testator was aware at all times that he had no alienable interest in this company.² The Defendant contends that Arpels was owned by one Mr. Bateson, a professional trustee, and that Arpels Investment Ltd owns 75% of Astra Holdings, the other 25% owned by the Government of Antigua and Barbuda. Arpels is in fact owned by Camelot Trust, a Liberian incorporated Trust Company of which Mr. Bateson is the sole shareholder. Mr. Bateson gave evidence that Camelot Trust is the trustee of the Fellowship #2 Settlement which owns Arpels Trust Ltd. Fellowship #2 he said, is a Charitable discretionary Settlement. He testified that the beneficiary of the settlement is Camelot Trust Corporation. He said the Testator never held any shares nor was he the beneficiary of any of these companies or settlements. He gave evidence in cross-examination that 95% of the shares of Arpels are held by two (2) Charitable discretionary settlements; one is the Fellowship #2 Settlement and the second is the Falmouth Settlement. These he said, are registered in Hong Kong. Mr. Bateson said that he has moved part of his business from the Isle of Man to Hong Kong. He said that Mr. Toms was never a shareholder in any of these entities. Mr. Toms he said, was appointed by a power of Attorney – renewed every six months - to conduct the business in Antigua for 'Arpels'. It appears on the evidence, to be common ground that the Testator, Mr. Toms, did operate on a 6th month Power of Attorney in relation to "Arpels". Mr. Bateson said that he could not provide information on the 21 to 22

¹ See para 38 of the Defendant's written submissions filed December 7 2007.

² The defendant did concede in para 40 of her written submissions filed 7th Dec. 2007 that "*there were a multitude of companies, with different subsidiary companies and the like which could potentially be difficult to recall by memory in totality.*"

companies owned by 'Astra' Holdings without checking his file. He said that he can't be expected to remember every detail of every Company and conceded that the Testator could not be expected to remember every detail of any 'Astra' owned company. He denies that the Testator had any authority to allocate shares in 'Arpels' to any person. He said further that the Tax residence of Mr. Toms, the Testator, was Antigua. A curious fact, I thought, to know about a man's residence. Mr. Bateson acknowledged that in the near 20yrs of its existence, the "Charitable discretionary settlements" never made a contribution to a charity. Mr. Bateson appeared very uncomfortable during the entire examination in-chief and more so under cross-examination. At the end of his testimony the court is no closer to identifying the ultimate beneficial owner of this circular chain of interlocking companies, and entities registered in Antigua, The Isle of Man, Hong Kong and Liberia. There is no evidence of the source of funds of these companies and entities. What is clear, that notwithstanding Mr. Batesons insistence that the Testator had no share/interest in Arpels and Astra Holdings or any of the entities outside or inside of Antigua, the Testator did by letter dated the 9th February 2001¹ speak of him disposing of 5% shares of Arpels to a Mr. Thurgood at a time when no one questions the testators mental capacity². Mr. Toms is taken to know what interest he has in these companies and entities and he dealt with that interest appropriately both in the letter of 2001 and in his will of 2005 . Indeed that information was peculiarly within the knowledge of Mr. Bateson and the Testator. As with Mr. Bateson, if the testator did not have total recall of the extent of this interests in any of the many companies he operated, without resort to his records, I do not find this of itself to be evidence of lack of testamentary capacity or absence of knowledge and approval of the contents of the will. The Court's 'suspicions' on this point is not excited.

¹ See pp 104 of the core bundle. Pp105 also contains a letter relevant to the authenticity of the transaction disclosed in letter of 9th Feb. 2001.

² Mr. Bateson provided an explanation for this which I do not accept over the strong inference to be drawn from the said letter and on the whole of the evidence. The defendant submitted otherwise in para 40 of her written submissions in this matter.

- (c) That the Testator's eldest child, according to Mr. Bateson, had changed her name many years ago by Deed Pole and the testator was aware of this, yet her former name appeared in the will. This, the Defendant contends is evidence that the Testator was not of sufficiently sound mind at the time of giving instruction for the will (and also executing the will) and did not know to whom he was disposing his property to. I disagree. The Testator could have had his own legitimate reasons for doing that, including that he preferred to maintain the use of the name that he gave to his child. Further, Mr. Bateson produced no documentary evidence of this change. I do not accept his evidence. In any event and by any other name, this daughter was provided for in the will. So is it also, with the misspelling of the name of the deceased wife. I take it that notwithstanding this, there is no mistaking the identity of the recipient of the disposition.
- (d) That the Claimant was not wearing glasses when giving instructions for the preparation of his will and presumably when reading it over aloud (see evidence of Ms. Richards-Anjo). Four (4) witnesses testified to not knowing the Testator to wear glasses at any time. No evidence has been led as to the purpose of the glasses; whether the Testator is short-sighted or far-sighted, the strength of the prescription and so on. The preponderance and indeed the veracity of the evidence is in favour of the Testator not wearing glasses at all or in any event the glasses apparently not being a necessity for engaging in the activities in which they observed him is patent. Further, on the evidence, the presence or absence of glasses at the time of the execution of the will in this case, does not sufficiently go to whether the will or some provision therein expressed *the mind of the testator*.
- (e) That the handwritten instructions as allegedly given by the deceased Testator, varied in substance from that which was actually contained in the purported will. Mrs. Richards-Anjo was cross-examined on this issue. This query surrounded what was suggested as the difference in the content of para. 4 of the typed will not occurring directly in the instructions. The witness insisted that what was in the will does equate with

the instructions and that the last paragraph of the 1st page in the handwritten instructions (the offending gift) appears in para. 4, 5(i) and 5(2) of the typed will at pp 74 of the Core Bundle.

[48] I am satisfied from the testimony of the Attorney and the comparison of the handwritten instructions and the typed Last Will and testament of the Testator, that the typed will sufficiently reflects the instructions.

[49] I note that none of the issues raised by the defendant as exciting the suspicion of the court; represent a *marked departure from previous testamentary dispositions*, because there were none; represent evidence of the *absence of independent advice*; represent *secrecy surrounding the execution of the will*; *questionable character of the attesting witnesses*¹; or represent the *signature of the testator... being materially different from previous signature*; or represent the disinheritance of next of kin in favour of strangers to the testator². The Claimants have not raised any matter that excites the suspicions of the court. **In all the circumstances, I am satisfied that the Testator had the testamentary capacity at the time of giving the instruction for the preparation of his will and knew and approved of the contents of those recorded instructions.**

ISSUE "(2)" and "(3)"

Did the Testator have the necessary testamentary capacity to execute his last will and testament on the 7th April, 2005? AND Did the testator have knowledge and approve of the contents of the Instructions on the 5th April, 2005 and the will on the 7th April, 2005.

[50] The degree of mental capacity required of the Testator does not necessarily have to be the highest. Neither is it necessary that a testator possess these qualities in as great a degree as he may have formally done³. It is sufficient that the testator had sufficient intelligence to understand the testamentary act. Once this can be established, this will be adequate even though the testator's mental powers are reduced below the ordinary standard⁴.

¹ The Testators 'girlfriend', beneficiary

² See Lindley LJ in *Tyrell v Painto*. Also note that the 1st Claimant was not a stranger to the testator.

³ Non -Contentious Probate Practice in the English Speaking Caribbean 2nd edit. By Karen Nunez-Tesheira pp 35.

⁴ Pp 35, Probate Practice, 2nd edit, by Karen Nunez -Tesheira.

- [51] The circumstances surrounding the execution of the will in the instant case only differ from that which attended the giving of the instructions in that there are additional circumstances applicable to the execution of the will. My findings with respect to those circumstances¹, of the giving of the instructions detailed in "a", "b", "c", and "e" in para. 47 and 49 above, apply equally to the issue of "knowledge and approval" and to this issue of the execution of the will on the 7th April 2006. The additional circumstances relative to the execution, follow this paragraph.
- [52] This issue now turns heavily on the medical condition of the Testator at the time of the execution of the will. The will was duly executed in accordance with the formalities of the Wills Act.
- [53] Further, the will was executed without undue influence. The testimony of the witnesses including that of Doctor Ravi does not support the allegation that the free will of the testator was overborne by acts of coercion or fraud for that matter².
- [54] I need not recount all the evidence of the Claimant's witness; Ms. Byers a nurse of some 25 yrs experience, Ms. Richards-Anjo Attorney-at-Law, Ms. Salisbury the Testators girlfriend and a beneficiary and claimant in this action. Suffice it to say, their evidence describes the Testator as being in a fit enough condition to be of sound mind memory or understanding and to *know and approve* the contents of his will.³ The testimony is that the testator by sounds and gestures asked for his will, read it, called for a pen, motioned for the pen to be moved from his left hand to his right hand and signed the will in the presence of the two attesting witnesses.⁴
- [55] The Defendant contends that the Testator's medical condition was severe and it affected his mind so as to render the Testator without Testamentary Capacity at the time of signing the will.

¹ See also para 19, 21, 22,23, 38, 39 and 40 above.

² See para 15-28 above for findings on the question of undue influence.

³ See evidence in support of claimant's knowledge and approval in paras 19-23, 38,39,40.

⁴ See also the rule in *Parker v Felgate* [1948] AC 16.

- [56] Much evidence was led of the deteriorating medical condition of the Testator. Testimony was elicited from the Medical doctors; two of them together with the experienced Nurse Byers, concerning the effect on the mind of the Testator, of factors which include fluctuating blood and oxygen levels, sedation levels, and blood pressure levels.
- [57] Dr. Ravi said he spoke with Ms. Salisbury on the morning of the 7th April, about the Testator's poor diagnosis "*as his vital organs are failing to function.*" Vital organs include brain, heart and kidney he said. The Testator was intubated and sedated from the 6th April 05. He received sedation approx. every 10-15 min to ½ hour. At 4:40 am on the 7th April Dr. Ravi said "*I administered 'doparin', a life saving drug*". After sedation was eased off he said "*he was more alert*"¹. He was drowsy.
- [58] Dr. Ravi went on to say "*Drowsy is more better than semi-conscious. In my opinion I don't think he was able to read 3 pages of document. No he did not have on any glasses.*"
- [59] He acknowledged that at 7:15 am of the 7th April, 2005 there was no improvement in the Testator's medical condition but that he "*was a little more alert than he was at 6:10 am*". It was after this he discussed with Dr. Sen transferring the Testator to Holberton Hospital I.C.U.
- [60] Dr. Ravi said that between the 6th and 7th of April, 2005, the Testator was never fully conscious². Even if this condition is accepted as rendering the testator incompetent - and this is not necessarily so (see para 45 above) - he could have a lucid interval at the time of signing the will. The authorities suggest that to constitute a lucid interval whether for an hour or a month; the act must be a rational act, it must be rationally done and it must be the testator's own act³. Evidence of this 'rational act' at the time of the giving of the 'instructions' and at the time of executing the will is given by the witnesses for the claimant and is referred to and recounted in other parts of this judgment.

¹ Dr. Sen arrived between 5:30 - 6:00 am and advised on easing of the sedation but not stopping it.

² "*To establish the existence of a lucid interval it is not necessary to establish complete mental recovery. It is sufficient if it is shown that the testator understands that he is making a testamentary disposition and what is required of him in making the disposition*": **Williams on Wills 6th edit. Vol 1 pp 28 -29.**

³ See Probate Practice by Nunez -Teshiera.

- [61] Dr. Ravi in cross-examination said that every patient's tolerance of fluctuation in oxygen saturation levels varies depending on many factors. He said further, that he tests for consciousness by just asking them to follow his oral commands "*and then you do a clinical examination.*" Both doctors evidence suggest that the 'oral command' test is a significant one.
- [62] He said at 5:30 am on the 7th April the Testator was following his commands partially. He went on to say "*Yes he responded to all my commands*" and that the next time he administered the oral test was at 6:10 a.m. that day.
- [63] He said by 7:15 am of the 7th April the testators' consciousness had improved although his blood saturation level had fallen. He said between 6:10 am that morning and 7:15 am he left to see other patients and was not in a position to know how quickly the testator would have been recovering consciousness. The direct evidence of the testator's mental condition during this period when Dr. Ravi was absent is substantially that which is given by the lay witnesses and nurse Byers. Stacy Richards- Anjo said that when she came into the hospital on the morning of the 7th at about 6.45 am Dr. Ravi assured her that the testator was "*collective and was capable of understanding and giving instructions and was fully aware of his surroundings*". Dr Ravi denies this content of their conversation.
- [64] The Testator was taken off the ventilator for a short time before being transferred the Holberton Hospital and placed on an external *ambuvac* between 8:10 - 8:30 AM. At this stage said Dr. Ravi, there was no need for a sedative because there was no intrusion. At 8:10 the Testator was more conscious than before, he acknowledged.

- [65] Dr. Belizaire who received the Testator at the I.C.U. at Holberton at 9:00 am said that at that time the Testator was not conscious; he never regained consciousness and died later that day.
- [66] Dr. Belizaire completed his evidence by saying the ability to respond to commands is not definitive of full consciousness and that a person can respond to oral stimuli but not be able to read and understand a three (3) page opinion.
- [67] He said the primary test for consciousness – response to commands – can only be carried out by someone who is actually seeing the patient.(see para 69 below)
- [68] Dr. Belizaire declined to give an opinion on the Testators capacity to sign a legal document 2½ hr before he, Dr. Belizaire, had examined him that morning.
- [69] Nurse Byers, was a nurse of some 25yrs. experience¹. Dr. Ravi said he had confidence in her ability to administer the primary test for consciousness. (See para 67 above) She gave evidence that “*when I saw him sign the document I had no reservations about whether he understood the contents of the documents*”. She testified of him executing the will in a manner that suggests to the court, consciousness - testamentary capacity and *knowledge and approval*.
- [70] Dr. Ravi, although he had not himself administered the *command test* at the time of the execution of the will and indeed was absent for the better part of the hour immediately preceding the execution of the will, had his reservations about the testamentary capacity of the Testator at the time of the execution of the last will

¹ I am unable to find any reason for this witness being anything but neutral and independent.

and testament. But in his evidence, Dr. Ravi in effect left open the possibility for a finding of a sufficient testamentary capacity at the time of execution of the last will and testament on the 7th of April 2005. Dr. Belizaire evidence was of a general nature and one of opinion, which also left open the prospect of the finding of the Testator having the testamentary capacity at the time of the execution of the will. This conclusion with respect to Dr. Belizaire's evidence is only possible by applying his opinion retroactively to the testimony of the eye witnesses, that of Dr. Ravi and the medical records.

[71] The Defendant submits, that the court prefer the evidence of Dr. Ravi, that the Testator wore glasses and the evidence of all the witnesses including those of the Claimant that at the time of the execution of the will (and the giving of the instructions) he did not have them on, so therefore could not have read the will and know and approve of its contents.

[72] I prefer the evidence of the Claimant on this point and have dealt with it above. In any event even if I accepted the evidence of Dr. Ravi that the Claimant did wear glasses, I have no evidence before me as to the use to which the Testator put the glasses, the strength of the prescription and such matters as would enable me to determine whether its absence would have an effect on the issue. Certainly the evidence of the Testators conduct at the material times negatives the suggestion that he required glasses to execute the will.

[73] What further in the circumstances of the execution of the will should excite the suspicion of the court?

[74] The Defendant, by her counsel's address, has raised what is referred to as a discrepancy in the witnesses account with respect to the posture of the testator in the hospital bed at the time of the execution of the will. She also raised the question as to who actually gave the testator the pen to sign. In either case, taking them at their highest evidential value and in no way discounting their

significance, I am of the view that these inconsistencies - if that is what they are – are accounted for by the anxiety of the moment and ordinary workings of human recall between witnesses. In para 17 of the Claimant's amended reply to the defence and counterclaim they plead that the testator "tried to elevate himself but could not". However, the Court's primary finding of this fact is that having failed to elevate himself – to a seated position as he did when he gave the instructions for his will - his posture on the 7th was that which is testified to by his Attorney at Law and executor, Mrs. Richards – Anjo. It is not disputed that the testator actually signed the will. In order to do so the posture and circumstances described by Mrs Richards – Anjo in my view, accords with greater logic.¹ But, I note that the will could have been executed from either posture.

[75] The fact that the Testator was in a critical condition and died later the same day, although not to be trivialized, is not in itself a suspicious circumstance for it is precisely the contemplation and imminence of death that would move a person to put their affairs in order and execute a will. Indeed it is not unusual to hear persons recount conducting a lucid conversation with a dying person and the person passing during the conversation.

[76] **The evidence in support of and against testamentary capacity and knowledge and approval of the will at the time of execution on the 7th of April 2005 is balanced in favour of the claimants. I prefer the evidence of the lay witnesses and the nurse of the actual reaction and conduct of the testator at the material time.²**

[77] It is clear that the Testator understood what was happening around him. He knew and understood "*the business in which he was engaged in at the time he*

¹ In cross examination she testified that "*He pulled himself up into a semi inclined position. He did that without assistance*". This evidence was not refuted and stands as a finding of fact in this matter. The evidence of Indira Salsbury is not entirely inconsistent with this evidence for both witnesses put him on his back, on the hospital bed.

² See *Hari Singh v Sardarni Lachmi Devi* 1921 A.I.R . Lahore 126 per Leslie Jones J 126; *Ramlal Rathi v The State*(1951) A.I.R. Calcutta 305 per Harries CJ 305.

executed his Will ¹. I accept the evidence of his taking the papers, knowing what they contained, trying to sit up and in fact succeeding only in elevating himself to semi inclined position ², appearing to read the will and then gesturing for a pen which was handed to him in the wrong hand and he in an agitated manner (an expression of emotion in response to the specific circumstance before him), indicating that the pen be put in his other hand and then signing the document knowing he was executing the will and or alternatively knowing he was executing the will for which he had given instructions just two days before. The medical evidence as given by Dr. Ravi does not definitively suggest that the Testator, in executing a will on the 7th Of April 2005, would have done so entirely conscious of the nature and character of his acts or having fully known and approved of the contents of the papers. His evidence is somewhat speculative and is not based on empirical evidence on the testator at the time of execution of the will. Dr Belizaire's evidence would have been speculative, he having seen a deteriorating patient who had been transferred at that critical point from one hospital to another with the assistance of a portable respirator – an ambuvac - 2 ½ hrs after the execution of the will. Dr. Belizaire, correctly in my view, declined to express an opinion in these circumstances, on the mental capacity of the Testator prior to his examination of him at the hospital to which the testator was transferred. Dr Belizaire did however testify as to oxygen saturation levels being an insufficient indicator by itself, for determining mental capacity. I accept that Dr. Ravi's assessment of the testator's mental capacity was based substantially on the oxygen saturation levels of the testator and to that extent, is in conflict with the testimony of Dr. Belizaire, the specialist in Internal Medicine. I have considered the evidence of both doctors in coming to my decision. **The physical actions of the testator as testified to by the two attesting witnesses (one lay person) including nurse Byers (of 25yrs experience), are in my view deliberate actions of a man sufficiently conscious of his circumstances and the significance of the moment and represents a man with testamentary capacity and aware of the nature and contents of the document and his approval of it.**

[78] I turn now to the last issue("4") which the claimant relies on in this matter.

¹ Banks v Goodfellow L.R.1870 Cockburn C.J. 568.

² See cross examination of Stacy Richards – Anjo.

Whether the testator ,if found to have had limited testamentary capacity at the time of executng his last will and testament but had full testamentary capacity at the time of giving instructions, this would validate the will.

[79] As a general rule the testator must have the testamentary capacity at the time of the execution of the will. There is a qualification to this general rule known as the rule in *Parker v Felgate*. The qualification is to the effect that a will which has been prepared in accordance with previous instructions given when the testator fully understands the content and effect thereof is valid, notwithstanding that at the time of execution the testator does not in fact have that understanding¹.

[80] This rule is an extension, if you will, of the requirement that the testator have knowledge and approve of the contents of his will. That the testator in the instant case had knowledge of and did approve of the contents of the instructions for his will, given on the 5th of April 2005, has been resolved above, in favour of the claimants herein.

[81] To fall within the ambit of the rule, the claimants must establish that **(i)** the testator had testamentary capacity at the time when he gave the instructions for the preparation of the will – 5th April 2005 **(ii)** the will was prepared in accordance with his instructions **(iii)** at the time of executing the will at the hospital on the 7th April 2005 he was capable of understanding that he executing the will for which he had given instructions².

[82] The testator, for the reasons provided above, is found to have had testamentary capacity at the time of the giving of the instructions for the preparation of his will.

¹ Williams on Wills Vol.1 6th edit pp 38

² See para 44 above, for the extent of mental capacity required.

[83] That the will was prepared in accordance with the testators instructions is borne out by the exhibit of the hand written instructions and the prepared and executed will. In cases where the testator employs an expert (Attorney at Law) to prepare the will with the appropriate wording to give effect to the testators intention, the testator is taken to "*accept the phraseology selected by the draftsman without himself really understanding the esoteric meaning and in such case he adopts it and knowledge and approval is imputed to him*"¹. Further, the facts are that the testator read over the will both at the time of giving instructions and at the time of execution and on neither occasion did he query the phraseology.

[84] The testators Attorney testified to having correctly taken the testators instructions and adequately captured his intentions in the typed, last will and testament of David Toms.

[85] **I find, that the testator on the 7th of April 2005, at the Adeln hospital was capable of understanding and did understand that he was executing the last will and testament for which he had given instructions to Mrs. Richards- Anjo and he demonstrated that capacity by his several deliberate² and, in the circumstances appropriate actions as borne out by the evidence.**

✓ [86] It is said, that the testamentary intentions of a testator are not to be lightly taken and/or easily defeated for he has taken care to ensure as far as he can that his wishes are given effect in a way which complies with the Law.

ORDER

✓ [87] For the reasons provided above **It is hereby ordered:**

¹ See Williams on Wills 6th edit pp 38

² See para 38 fn.2 and para 40, for some of his conscious and deliberate actions at the time of giving the instructions for the will.

- (i) That there be Judgment for the Claimant;
- (ii) That the Court pronounces for the force and validity of the said Will in Solemn form.
- (iii) That the Defendant Mandy Raquel Toms do pay the Claimant's costs in accordance with the CPR 2000 Prescribed Cost scale or as otherwise agreed between the parties in writing and filed within 14 days of this order. That pursuant to Part 65 of the CPR 2000, the value of the claim be deemed EC\$50,000.00 for the purpose of calculating the said costs.



**DAVID C. HARRIS
JUDGE
THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA**