[2025] JMCA Civ 32

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE DUNBAR GREEN JA

SUPREME COURT CIVIL APPEAL NO COA2021CV00076

IN THE ESTATE of CALVIN BARTHOLOMEW WILLIAMS late of 2 Montclair Drive, Kingston 6, in the parish of Saint Andrew, deceased, Accountant.

AND

IN THE MATTER of an application under Rule 68.46 of the Civil Procedure Rules.

AND

IN THE MATTER of an application by the Administrator-General of Jamaica

BETWEEN	**WINSTON KEEN (SR)**	**APPELLANT**
AND	**THE ADMINISTRATOR-GENERAL OF JAMAICA**	**RESPONDENT**

Patrick Foster KC and Mark-Paul Cowan instructed by Nunes, Scholefield, Deleon & Co for the appellant

Mrs M Georgia Gibson Henlin KC, Miss Stephanie Williams and Mrs Alia Leith Palmer instructed by Henlin Gibson Henlin for the respondent

26 October 2023 and 7 November 2025

Will – Presumption of regularity – Allegations of forgery – Presumption of due execution – Whether it was displaced on the evidence – Duty of the propounder to establish that the testator knew and approved the contents of the will – Whether circumstances of suspicion required the learned judge to shift the evidential burden of due execution to the propounder

Expert Evidence – Forgery – Assessment of expert evidence – Whether the learned judge erred in his approach to the expert evidence – Whether the learned judge erred in failing to conduct his own assessment of the disputed signature against the known signatures of the deceased

F WILLIAMS JA

[1] I have read in draft the judgment of Simmons JA. I agree with her reasoning and conclusion and have nothing to add.

SIMMONS JA

[2] This is an appeal from the judgment of K Anderson J ('the learned judge'), who on 2 July 2021 made, *inter alia*, the following orders:

> "1. Judgment on this claim is granted in favour of the defendant.
>
> 2. Costs of this claim are awarded to the defendant with such costs to be taxed if not sooner agreed."

Background

[3] The dispute in this matter surrounds the validity of the last will and testament ('the will') of Mr Calvin Bartholomew Williams who died on 2 October 2010 ('the deceased'). By the will, Mr Fernando Dyte ('Mr Dyte') was appointed as the sole executor and principal beneficiary of the deceased's estate. The only other devisee, Medina Williams, the sister of the deceased, had predeceased him and as such, Mr Dyte, as the residuary beneficiary, was entitled to the entire estate of the deceased. In February 2011, Mr Dyte, according to the chronology of events filed in this court, applied for a grant of probate in the deceased's estate.

[4] The proceedings became contentious in June 2011 when the deceased's nephew, Mr Winston Keen Sr ('the appellant'), filed a caution in the Supreme Court. Mr Dyte died on 9 May 2012, leaving minor children.

[5] On 23 December 2015, the appellant filed a notice of application to appoint the Administrator-General of Jamaica ('the respondent') as the representative of the estate of Mr Dyte. The order was granted by D Palmer J on 25 January 2016. The appellant was also granted leave to serve a fixed date claim form and particulars of claim on the respondent.

[6] On 2 February 2016, the appellant filed a claim by way of a fixed date claim form against the estate of Mr Dyte seeking the following orders:

> "1. A declaration that the Paper writing dated 6th day of November, 2006, pretended [sic] to be the Last Will and Testament of CALVIN BARTHOLOMEW WILLIAMS was obtained by fraud and the same is null and void for the reason that the execution of the said pretended [sic] will was not executed by the late CALVIN BARTHOLOMEW WILLIAMS deceased.
>
> 2. Alternatively a declaration that the paper writing dated the 6th day of November, 2007 purported to be the Last Will and Testament of CALVIN BARTHOLOMEW WILLIAMS deceased was obtained by undue influence upon CALVIN BARTHOLOMEW WILLIAMS deceased and does not represent his true will and intent and is thus invalid.
>
> 3. A declaration that the said CALVIN BARTHOLOMEW WILLIAMS deceased, died intestate
>
> 4. A declaration that the Claimant WINSTON URIAH AUGUSTUS KEEN is the lawful next [sic]kin of CALVIN BARTHOLOMEW WILLIAMS deceased, and is the person entitled in priority to take Grant of Letters of Administration in the estate of the late CALVIN BARTHOLOMEW WILLIAMS pursuant to rule 68.18 of the Civil Procedure Rules 2002.

5. A declaration that the Applicant WINSTON URIAH AUGUSTUS KEEN is entitled under section 5(3) of the Intestates Estates and Property Charges Act to benefit from the residuary estate under the Estate of CALVIN BARTHOLOMEW WILLIAMS deceased.

6. That there be liberty to apply.

7. That the costs of this action be borne by the Defendant's Estate.

8. Such further and other relief as this Honourable Court may see fit and just."

[7] The appellant, in the particulars of claim, asserted that he is the only person entitled to apply for a grant of letters of administration in the deceased's estate, as he is the only child of the deceased's sister, Melcerious Williams. The deceased, he stated, was pre-deceased by both of his parents and only siblings, Medina Williams and Melcerious Williams. Medina died a spinster and had no children. Melcerious was also a spinster at the time of her death. The appellant asserted that he had a close relationship with the deceased and that Mr Dyte had only recently entered the picture.

[8] The particulars of claim further alleged that the deceased's purported signature on the will was either fraudulent or was obtained by Mr Dyte by the exercise of undue influence over the deceased. The particulars of fraud state:

"a) The said Fernando Dyte deceased tendered uttered and/or permitted to be fraudulently tendered or uttered a Grant of Probate by this Honorable Court [sic] paper writing dated the 6th day of November 2006 purporting to be the Last Will and Testament of [the deceased], knowing full well that the said paper writing was not signed by [the deceased].

b) Fernando Dyte fraudulently created and/or permitted the use of the deceased [sic] signature to fraudulently execute the paper writing dated the 6th day of November 2006 purporting to be the Last Will and Testament of [the deceased]."

[9] The respondent filed a defence on 15 April 2016. Therein, she stated that the appellant was not the person in priority entitled to apply for letters of administration as he had not proved that his mother, Melcerious Williams, was the lawful sister of the deceased and put the appellant to strict proof of same. The respondent made no admission that the appellant is the nephew of the deceased, and he was put to proof that he is entitled to benefit from the deceased's estate. The defence further stated that the deceased was predeceased by all lawful beneficiaries entitled to benefit under the Intestates' Estates and Property Charges Act and that the deceased had died testate, with Medina Williams, his sister and Mr Dyte being the beneficiaries of his estate.

[10] The respondent also denied that the deceased, at the time of making his will, was suffering from any mental defect and/or weakness. It was asserted that the deceased understood the nature of his act and its effect. The respondent also stated that the burden of proof was on the appellant to prove that the deceased was not an autonomous individual completely free in will and mind in the disposition of his assets.

[11] It was also asserted that the appellant and the deceased did not have a close relationship, and he was not involved in the deceased's affairs. As such, the appellant was not a person to whom the deceased would have made a favourable disposition.

[12] The respondent also stated that the allegations of fraud and the allegation of undue influence are irreconcilable and that the appellant did not sufficiently particularize the acts of fraud and/or undue influence as required by law.

[13] In addition, the respondent further stated that the appellant's delay in challenging the will while Mr Dyte was alive, prejudiced the estate of Mr Dyte and his beneficiaries and that the defence of laches was being relied on.

Proceedings before the learned judge

[14] The claim of undue influence was not pursued when the matter came on for trial. Evidence was given by the appellant, his son Winston Keen ('Winston Keen Jr') and

Assistant Superintendent George Dixon ('ASP Dixon') who was appointed as an expert witness. Attorney-at-law, Gordon Steer, gave evidence on behalf of the defence.

[15] The following documents were agreed and admitted into evidence:

1. The expert report of George Dixon, filed on 10 July 2019 - Exhibit 5.

2. Mortgage instrument No 257565 dated 25 September 1973, between the deceased and Fiduciaries Ltd - Exhibit 6.

3. Transfer instrument No 378775 between Aston Davis and the deceased, dated 23 July 1979 - Exhibit 7.

4. Transfer instrument No 303967 between Alan Coombs and the deceased, dated 25 September 1973 - Exhibit 8.

The appellant's evidence

[16] The evidence in chief of the appellant was summarised by the learned judge at para. [5] of his judgment as follows:

> "a. He is the child of the sister of the whole blood of the deceased, who died a bachelor with no issue.
>
> b. The deceased promised the appellant the house at No. 46 Lawrence Ave, Kingston 8, Saint Andrew. This was the family home and he never sold it.
>
> c. The dispositions in the disputed will are contrary to that which would have been expected to have been made by the person now deceased, in the close-knit family which the deceased had always been a part of.
>
> d. The signature on the will is inconsistent with the signature of the deceased that he is familiar with, as the person now deceased always signed his signature in joined letters ('joint up') and always wrote: 'Calvin B Williams', as his signature."

[17] A number of documents were shown to the appellant during the trial, namely exhibits 5, 7, and 8. He identified the deceased's signature on exhibits 7 and 8. The learned judge expressed the view that his cross-examination was unnecessary because the witness gave no evidence about the will, except that he saw the name "Calvin B Williams" on exhibit 8. Counsel for the defence agreed, and the witness was not cross-examined.

Mr Winston Keen Jr's evidence

[18] The appellant's son, Winston Keen Jr, stated that it was the appellant's grandfather who had purchased the house at No 46 Lawrence Avenue. After the death of the appellant's grandfather, the deceased transferred all properties into his name but regarded the appellant as his natural heir. Mr Winston Keen Jr also identified exhibits 6, 7, 8 and 10 as being signed by the deceased. He also identified the deceased's signature on an Instrument of Transfer between Miramount Limited and the deceased, dated 11 October 1975 (exhibit 10), as well as the Instrument of Mortgage between the deceased and Aston Leslie Davis dated 23 July 1979 (exhibit 11).

[19] Mr Winston Keen Jr further stated that the deceased always signed his name as "Calvin B Williams" in "joint up letters". He stated that when they were leasing or renting 46 Lawrence Avenue, the deceased would sign the lease in his presence. His evidence was that the deceased would also sign cheques in his presence to cash at the bank. When shown the will (exhibit 9), he stated that there was no "B" in the signature. He described it as "[t]he purported will of [the deceased]". He was also shown exhibits 7 and 8 and asked to comment on those documents. Despite defence counsel's objection that, due to the dates on the documents, the witness could not properly identify the signature as a "known signature", the witness was allowed to do so, as they emanated from the National Land Agency. He identified the signatures on those exhibits as the deceased's.

[20] In cross-examination, he stated that although the deceased had moved from Lawrence Avenue, he still had a room at the house and would stay there for months at a

time. He agreed that the instruments of transfer and the mortgages that he said were signed by the deceased were signed before he was born.

ASP Dixon's evidence

[21] ASP Dixon used a projector to show images from his first expert report. He stated that certain pressure points were not present in the purported signature of the deceased in the will, particularly the letter "m".

[22] His report, which was admitted in evidence, stated as follows:

> "After carefully examining and comparing of [sic] the documents in questioned [sic] and known signatures and handwriting, it is my professional opinion that [the will] was not written and signed by one and the same author as the [known documents]
>
> The most telling characteristics
>
> 1. The master pattern of the questioned writing is inconsistent to that of the known writing.
> 2. The pressure pattern of the writing in questioned [sic] is inconsistent to that of the known writings.
> 3. The writing in question reflects criminal tremor.
> 4. The letter "B" which is consistent in the known writing is not found in the question writing.
> 5. The master pattern of the letter "B" in the known is a very unique and significant character within the author [sic] known signature."

[23] Several images were included in the report. The images of the known signatures were compared with the questioned signature. The report stated:

> "Images above show both known and questioned signatures of Mr. Calvin Williams. The differences in both are indicated as follows:

1. Signature observed to be written with a smooth and consistent flow throughout the known writing. Questioned documents show signs of tremor;

2. Author of known writing constructs signature with a middle initial "B" while this is absent throughout the questioned documents examined."

[24] Having compared another aspect of the handwriting, the report continued:

> "Images above show both known and questioned signatures of Mr. Calvin Williams. The differences in both are indicated as follows:
>
> 1. Base of first staff is angular in known writing while rounded in the question [sic] writing;
>
> 2. Second base of letter is flattened in known exemplars. This master pattern was not observed in the questioned writing;
>
> 3. Final upward stroke of letter curves inwards in known writing and curves outwards in question writing."

[25] Images that included the letter "M" were also included in the report. ASP Dixon's comments were as follows:

> "Images above show both known and questioned signatures of Mr. Calvin Williams. The differences in both are indicated as follows:
>
> 1. Two ink blots observed at the terminal stroke of the known letter 'M' which gives the impression of two downward stems. This characteristic was not observed in the questioned document examined.
>
> Based on the literature of Ordway Hilton author of the scientific examination of questioned documents revised edition; states, To establish that the known and disputed material have different sources requires that there is at least one basic, significant differences [sic] between them - one fundamental identifying characteristic that does not occur in the same way in both sets of specimen; hence my opinion."

[26] ASP Dixon also provided information on his method of examination. He stated:

> "The handwriting on each listed document has been carefully examined for the degree of slant, the size of letter, height, pen stroke movements, alignments and proportions. Individual letter forms have been examined and compared, each document was photograph [sic] and examined under a digital microscope and under a Video Spectral Comparator (VSC40)."

[27] In cross-examination, the witness stated that there are always variations in an individual's signature. He disagreed that the "m" in the known documents was different. He described them as variations. When asked whether tremors in handwriting can occur due to age, he agreed. He explained that there is a difference between "criminal tremor" and "tremor" and that tremulous handwriting due to age cannot be mistaken for "criminal tremor". This latter aspect of his evidence was challenged but he maintained his opinion.

[28] ASP Dixon agreed that the deceased's signature could have changed over time and that the master pattern that he identified with the known signatures was the letter "B". He said it was one of the most "telling characteristics". The witness agreed that there were other telling characteristics but stated that he only listed the "most telling ones'" in his report. He agreed that it would have been best practice to have documents that were contemporaneous with the one under review, but none had been submitted to him. He also stated that forged writings usually have "pen lifts". He disagreed with the suggestion that the signature on the will had no pen lifts. When challenged that this information was not in his report, he indicated that he had stated the "most telling" characteristics.

[29] The witness was unable to say whether the will was created by Mr Dyte.

Case for the defence

[30] The defence relied on the evidence of Mr Gordon Steer, an attorney-at-law who had previously represented the deceased. Mr Steer was unable to shed any light on the matter as he stated that he was not familiar with the signature of the deceased at the time of the trial. No other evidence was presented by the defence.

The decision

[31] The learned judge found that the expert "either failed, in some respects, altogether or at least in the most part, to explain to [the] court, how it was, that he reached the conclusion which he did". Consequently, the learned judge concluded that "whilst…there exists ample basis for reasonable suspicion that the purported signature of the person now deceased, on the disputed will, may indeed, have been forged thereon, that is not to be equated with proof of forgery". On that basis, the learned judge found that the appellant had failed to prove his case and made the orders reproduced at para. [1] above.

The appeal

[32] The appellant, aggrieved by that decision, filed a notice and grounds of appeal (later amended) challenging ten findings of fact. He has relied on the following grounds:

> "(i) The Learned Judge erred in that having found that there was "ample evidence for reasonable suspicion" that the signature on the purported Will was a forgery, failed to cast any evidential burden on the Respondent to prove due execution of the Will.
>
> (ii) The Learned Judge having found on the evidence that there was reasonable suspicion that the purported Will was a forgery, to the extent that he characterized the said evidence as ample, he nevertheless failed to place any evidential burden on the Respondent to rebut the evidence of reasonable suspicion surrounding the execution of the Will.
>
> (iii) The Learned Judge, having found that the presumption of due execution/regularity of the purported Will was rebutted misdirected himself in maintaining the position that the Appellant bore the burden of proving fraud/forgery in order to obtain the reliefs sought on the Claim.
>
> (iv) The Learned Judge on the totality of the evidence erred in fact and/or in law in failing to find, on a balance of probabilities, that the purported will was procured by forgery thereby precluding the Respondent from propounding the said Will.

(v) The Learned Judge having found that the Appellant led evidence through the expert report of Assistant Superintendent of Police George Dixon which had the effect of "disputing and rebutting" the presumption of due execution of the said Will erred in fact and in law by rejecting the said evidence on the basis that the expert did not sufficiently explain or outline the methodology that he used to draw his conclusions.

(vi) The Learned Judge erred in fact and/or in law in failing to conduct his own assessment of the signatures of Mr. Calvin Bartholomew Williams on the "known documents" adduced as evidence at the trial and the signature on the purported Will, as he was entitled to do as the trier of fact."

[33] The findings of facts challenged by the appellant are as follows:

a. "The court wishes to make the observation that for the most part, the evidence of the lay witnesses was insignificant with respect to this court's adjudication upon the issue as to whether or not the disputed Will was forged. That is though, unsurprising, since expert evidence will typically be necessary to prove same." [*para 35 of Written Judgment*]

b. "The evidence given did not help to prove the particulars of fraud as have been alleged. That, bearing in mind the dicta from the Privy Council in the Crawford case (op cit) is, to my mind, enough to dispose of this claim, in the defendant's favour." [*para 36 of Written Judgment*]

c. "In this case, the claimant has led evidence from an expert: ASP Dixon, disputing and rebutting the presumption of due execution of the disputed will. As such we are right where we began with respect of this claim, which is that the claimant bears the burden of proving this claim on a balance of probabilities and in that regard, the evidence needed to prove this claim, needed to have been strong/cogent." [*para 41 of Written Judgment*]

d. "The claimant's expert witness fell well short, in enabling this court to draw the conclusions which he did, that being that the signature of the deceased on the disputed will, was forged. The same fell well short of that which is necessary, in terms of the provision of evidence in that regard because the expert did not sufficiently explain or even outline, the

methodology that he used, in order to draw the conclusions which he did." [*para 44 of Written Judgment*]

e. "The claimant's expert witnesses [sic] needed to have furnished this court, during the evidentiary phase of this trial, with the necessary scientific criteria such as would have served to have enabled me, as the trial judge, to form my own independent judgment, by means of the application of those criteria to the facts proven in evidence." [*para 45 of Written Judgment]*

f. "In the matter at hand, the claimant's expert witness either failed, in some respects, altogether or at least in the most part, to explain to this court, how it was, that he reached the conclusion which he did." [*para 47 of Written Judgment*]

g. "Furthermore, it must be mentioned that the expert is not to be personally faulted for having failed to explain or at least sufficiently explain his methodology. He is tasked as a witness in this court only to answer and speak in only to answer to the questions that are asked of him either by counsel or by the trial judge. Therefore, if he did not at all or did not sufficiently explain his methodology that was not because, 'he is not a good teacher,' as the claimant's lead counsel had blithely suggested to this court during his oral closing submissions, but rather it was because he was not asked by claimant's counsel, or any other counsel, to do so." [*para 52 of Written Judgment*]

h. "In the absence of such evidence from the expert, it was not open to me as the presiding judge to assess the handwriting of [the deceased], and to conclude one way or the other upon whether or not the same was forged on the disputed will."

i. "Though this court has accepted that the evidence of this witness has rebutted the presumption of regularity/due execution, this court is not satisfied that the evidence led by ASP Dixon is cogent and thus meets standard of proof for fraud, either as the claimant has alleged in his particulars of fraud, or at all." [*para 54 of Written Judgment*]

j. "Ultimately though, this court needed to have had the benefit of cogent expert evidence, coupled with the evidence of lay witnesses being the claimant and his son, respectively

> in order to properly have found this claim to have been duly proven. To my mind, this court only had the benefit of the latter. The court did not have the benefit of the former-mentioned, of those two necessary facets." [*para 58 of Written Judgment*]

[34] The appellant has sought the following orders:

1. That the Hon. Mr Justice Anderson's order dated 2 July 2021, granting judgment to the respondent, be set aside.

2. That the court considers the evidence and substitutes therefor judgment for the appellant against the respondent.

3. Costs of the appeal and in the court below to the appellant.

[35] A counter notice of appeal was filed seeking an order that the decision of the learned judge be affirmed on the following grounds:

> "1. That the learned Judge was correct in finding that the suspicion of fraud put forward by the Claimant/Appellant did not merit the conclusion of fraud as the evidence presented was insufficient to establish the existence of fraud.
>
> 2. That the learned Judge was entitled to make the Orders as the burden of proof did not shift to the Defendant/Respondent and the Claimant/Appellant did not provide clear and sufficient evidence of actual fraud and failed to satisfy the legal burden of proof to establish fraud.
>
> 3. That the learned Judge was correct in making the Orders based on his finding that the presumption of due execution or regularity was applicable, and this rebuttable presumption was not challenged on evidence of the Claimant/Appellant.
>
> 4. That the learned Judge was correct in making the Orders based on his finding that the evidence of the handwriting expert was inadequate to enable the Court to draw the conclusion that the signature of the [deceased] was forged.
>
> 5. That the learned Judge was correct in making the Orders based on his finding that the handwriting expert did not

> furnish the Court with the necessary scientific criteria or explain how he arrived at his conclusions, so as to enable the learned judge to form his own independent judgment by the application of these criteria to the facts proved in evidence.
>
> 6. That the learned Judge correctly exercised his discretion and jurisdiction in granting the orders and was entitled to do so in light of the evidence before him."

[36] Before us, the appellant sought permission to adduce fresh evidence in the form of a power of attorney dated 6 May 2009 and a second expert report by ASP Dixon dated 14 December 2022, in which his findings pertaining to his examination of the signature on the will and the power of attorney were detailed. The application was refused. In refusing the application, we noted the principles in **Ladd v Marshall** [1954] 1 WLR 1489. The power of attorney that was sought to be admitted was available at the time of the trial and it was not clear why ASP Dixon was not instructed to consider it in the preparation of his first report. In fact, an application to admit the power of attorney into evidence was made during the course of the trial. This application was later withdrawn. Moreover, we were not satisfied that either document would have changed in any significant way, the outcome of the case, given the learned judge's reasons for his decision.

Issues

[37] The following issues arise in this appeal:

1. Whether the learned judge, having found that there was ample basis for reasonable suspicion that the testator's signature was forged, erred when he failed to shift the evidential burden of due execution to the respondent. (Grounds (i), (ii) and (iii) of the amended notice of appeal and ground 2 of the amended counter notice of appeal)

2. Whether the learned judge erred in his assessment of the expert evidence. (Ground (v) of the amended notice of appeal and grounds 4 and 5 of the amended counter notice of appeal)

3. Whether the learned judge erred in failing to conduct his own assessment of the signature on the will and signatures of the deceased on the "known documents". (Ground (vi) of the amended notice of appeal)

4. Whether there was sufficient evidence to prove forgery/fraud although the perpetrator was unknown. (Ground (iv) of the amended notice of appeal and ground 1 of the amended counter notice of appeal)

5. Whether the presumption of due execution was rebutted in the circumstances? (Ground a of the amended counter notice of appeal. It is to be noted that in the amended counter notice of appeal, ground of appeal "a" is followed by a list of numbered grounds, all of which are treated as substantive grounds for the purposes of this judgment)

Issue 1: Whether the learned judge having found that there was ample basis for reasonable suspicion that the testator's signature was forged, erred when he failed to shift the evidential burden of due execution to the respondent. (Grounds (i), (ii) and (iii) of the amended notice of appeal and ground 2 of the amended counter notice of appeal)

Issue 5: Whether the presumption of due execution was rebutted in the circumstances? (Ground a of the amended counter notice of appeal)

Appellant's submissions

[38] Mr Patrick Foster KC submitted that where a disputed will appears to have been regularly executed, the presumption of due execution may arise. This presumption is, however, rebuttable. Reference was made to **Supple v Pender and another** [2007]

EWHC 829 (Ch) ('**Supple v Pender**') in support of that submission. Counsel also relied on **Paul Griffith v Claude Griffith** [2017] JMSC Civ 136 ('**Griffith**'). Mr Foster stated that the evidence required to rebut the presumption of due execution may include evidence of a handwriting expert (**Zakir Husman v Mumtaz Husman** Claim No 515 of 2011 at para. 8 ('**Zakir Husman v Mumtaz Husman**'). King's Counsel submitted that the learned judge correctly applied the above principles when he concluded at paras. [40] and [41] that the appellant had rebutted the presumption of due execution. He also pointed to the fact that ASP Dixon's evidence refuted the authenticity of the deceased's purported signature on the will. In addition, the judge accepted the evidence of the appellant and Winston Keen Jr as "truthful and accurate" ("in large measure"). The combination of their evidence, he submitted, was cogent and rebutted any presumption of due execution. In the circumstances, he submitted that ground of appeal a of the respondent's amended counter notice of appeal is without merit and ought to be rejected by this court.

[39] Where the burden of proof is concerned, Mr Foster submitted that where a purported will is challenged, the onus is on the propounder of the will to prove its due execution either by presumption or by leading positive evidence (see **Zakir Husman v Mumtaz Husman** at para. 9 and **Barry v Butlin** (1838) Moo PCC 480 ('**Barry v Butlin**').

[40] King's Counsel submitted further that where there are circumstances surrounding the execution of the will that excite the concerns of the court, the presumption of due execution is displaced and the onus will be on the party propounding the will to establish that the testator knew and approved of its contents (**Tyrell v Painton** [1894] P 151 ('**Tyrell v Painton**'), **Gill v Woodall and others** [2010] EWCA Civ 1430 ('**Gill v Woodhall**') and **Re Mikhail (deceased), Mikhail v Hana and another** Appeal 22 ITELR 528).

[41] Reference was also made to **Face v Cunningham and another** [2020] EWHC 3119 (Ch) ('**Face v Cunningham**') in which Judge Hodge QC stated that where it is

alleged that the deceased's signature on a will has been forged, the burden is on the person propounding the will to prove due execution.

[42] Mr Foster submitted that the learned judge made two critical findings of fact that warranted the shifting of the burden of proof onto the respondent as the propounder of the will to prove its due execution. They are:

1. The court's acceptance that the evidence of the witness rebutted the presumption of regularity/due execution (para. [54]).

2. That there was ample basis for reasonable suspicion that the signature of the deceased on the disputed will may have been forged (para. [48]).

[43] King's Counsel argued that the nature of the dispositions in the purported will, coupled with the evidence of the appellant, Mr Winston Keen Jr and ASP Dixon rebutted the presumption of due execution and excited the suspicion of the court. He stated that the learned judge failed to appreciate that whether or not forgery/fraud was specifically proved by the appellant, the burden of establishing due execution was on the respondent. The successful discharge of that burden, he said, was necessary before the will could be admitted to probate. The learned judge, therefore, erred when he failed to cast the evidential burden of proving due execution on the respondent.

[44] It was submitted, based on **Tyrell v Painton,** that even if fraud/forgery was not specifically proved, the respondent ought to have been barred from propounding the will. King's Counsel stated that no evidence had been adduced by the respondent relating to the due execution of the will and the evidence of the respondent's sole witness did not advance the matter.

Respondent's submissions

[45] Mrs Gibson Henlin KC, on the respondent's behalf, submitted that the overriding issue is whether this court is entitled to overturn the learned judge's findings of fact relating to the due execution of the will.

[46] In relation to the issue at hand, King's Counsel submitted that since it is the appellant who has challenged the will, he is required to satisfy the court of the truth of his allegation. She, too, relied on **Griffith** for the principle that there is a presumption of due execution. King's Counsel stated that, where all formalities have been observed in the execution of a will, it will be presumed that it was properly executed. King's Counsel further submitted that the mere finding of suspicion is not enough to shift the burden of proof. (see **Gill v Woodall**)

[47] It was submitted that the deceased spent his later years with Mr Dyte, and there was no cogent evidence that the appellant or any other near relation did so. King's Counsel stated that the learned judge's finding of mere suspicion or irregularity in the execution of the will was insufficient to discharge "the high hurdle of due execution". It was also submitted that the learned judge was correct when he found that fraud was not properly pleaded and was not proved. King's Counsel also directed the court's attention to the Forgery Act and the Wills Act and submitted that the will was executed in accordance with the latter Act.

[48] Mrs Gibson Henlin submitted that the learned judge was not "plainly wrong" in his assessment of the evidence and findings of fact and as such, the interference of this court was not warranted (see **D & LH Services Limited & others v The Attorney General of Jamaica & Another** [2015] JMCA Civ 65 ('**D & LH v The AG**') at paras. [30] – [33]). In support of this submission, counsel stated that the learned judge in arriving at his decision took the following factors into account:

1. The will bore the signature of the deceased and the two attesting witnesses.

2. There was no allegation that the attesting witnesses acted fraudulently or that they were parties to the alleged forgery.

3. The appellant admitted that he did not know the signature of the deceased.

4. The "known" signatures of the deceased were signed well before the examination by the expert, that is, they were dated.

5. The expert evidence failed to rise to the required standard of scientific probity.

[49] Mrs Gibson Henlin also submitted that the learned judge was correct when he found that the appellant had failed to prove fraud. She stated that although the particulars of claim set out the particulars of fraud, fraud was not pleaded. Reliance was placed on **Crawford v Financial Institutions Services Limited** [2005] UKPC 40. King's Counsel also stated that the learned judge was correct when he stated that the appellant did not plead that the deceased's signature was a forgery.

[50] King's Counsel submitted that very strong evidence is required to rebut the presumption of due execution where the signatures of the deceased and the attesting witnesses are in the right places. Reference was made to **Sherrington v Sherrington** [2005] EWCA Civ 326 ('**Sherrington v Sherrington**'), in support of that submission.

[51] Where the burden of proof is concerned, King's Counsel relied on **Gill v Woodall**, in which Lord Neuberger opined that there is no magic in adopting the two stage approach of first making a determination of whether the presumption of due execution is rebutted by suspicion and secondly shifting the burden to those propounding the will to prove that it was duly executed. It was also submitted that the learned judge in the instant case considered the evidence as a whole and his approach cannot be faulted. King's Counsel asserted that the appellant is unhappy that he did not receive an inheritance and does not know the signature of the deceased. In addition, Mr Dyte has died, and there is

nothing but the appellant's assertion to suggest that the deceased would not have left his estate to him.

[52] King's Counsel submitted that very strong evidence was required to prove forgery, and the appellant did not discharge that burden. The evidence of the expert, she said, was not sufficiently strong and cogent to rebut the presumption of due execution. Additionally, the attesting witnesses were not called as witnesses. In this regard, King's Counsel directed the court's attention to **Fuller v Strum** [2002] 1 WLR 1097 ('**Fuller v Strum**').

Discussion

[53] Section 6 of the Wills Act states:

> "No will shall be valid unless it shall be in writing, and executed in the manner herein after mentioned; That is to say, it shall be signed at the foot or end thereof by the testator, or by some other person, in his presence and by his direction..."

[54] As stated by Thompson-James J in **Griffith**, where the validity of a will has been challenged, the "starting point" is that it was properly executed and valid. Cogent evidence is required to rebut this presumption, which is encapsulated in the maxim *omnia praesumuntur rite et solemniter esse acta*, which means that where on the face of the document all formalities appear to have been complied with, in the absence of evidence to the contrary, it is presumed that there was compliance (see also **Supple v Pender**).

[55] The presumption of due execution can only be rebutted by very strong evidence (see **Sherrington v Sherrington**) and does not apply where there is evidence before the court pertaining to the execution of the will. In **Griffith**, Thompson-James J stated at para. [53]:

> "It must be noted however, that the presumption applies only where there is no evidence before the Court as to the manner of execution of the Will. Where there is evidence before the Court, either proving or disproving due execution, the maxim

does not apply. Certainly, once there is evidence against the due execution of the Will, the maxim cannot be applied to strengthen the case for due execution [Williams on Wills; **Re: the Estate of Slidie Basil Joseph Witter** [2014] JMSC Civ. 185, paras. 45-48]. In **Harris v Knight** [1980] 15 P.D. 170 at page 179, Lindley L.J. explained the principle as such:

> *'The maxim, 'Omnia præsumuntur rite esse acta,' is an expression, in a short form, of a reasonable probability, and of the propriety in point of law of acting on such probability. The maxim expresses an inference which may reasonably be drawn when an intention to do some formal act is established; when the evidence is consistent with that intention having been carried into effect in a proper way; but when the actual observance of all due formalities can only be inferred as a matter of probability. The maxim is not wanted where such observance is proved, nor has it any place where such observance is disproved. The maxim only comes into operation where there is no proof one way or the other; but where it is more probable that what was intended to be done was done as it ought to have been done to render it valid; rather than that it was done in some other manner which would defeat the intention proved to exist, and would render what is proved to have been done of no effect'.*" (Italics as in the original)

[56] The learned judge, in the instant case, relying on **Sherrington v Sherrington**, stated at para. [39] of his judgment:

> "The presumption of regularity must be considered in respect of this matter. It must be considered because the disputed will, appears on the face of it, to have been regularly/duly executed. That presumption is often described also, in cases such as these in treatises on this legal subject area, as the 'presumption of due execution.' That though, is a rebuttable presumption. In circumstances wherein that presumption has not been rebutted, very strong evidence will be needed in order for a court to properly conclude that a will in respect of which that presumption applies has not been properly executed."

[57] At paras. [40] and [41], he stated:

"[40] the presumption though, only applies where there is no evidence before the court, which is capable of disproving due execution of the will. Thus, once there is evidence against the due execution of the will, the maxim cannot be applied to strengthen the case for due execution. See: **Re the Estate of Slidie Basil Joseph Witter** [2014] JMSC Civ. 185**,** at paragraphs 45 to 48."

[58] In **Fuller v Strum,** Peter Gibson LJ, at paras. 32 and 33, stated:

"32 Probate proceedings peculiarly pose problems for the court because the protagonist, the testator, is dead and those who wish to challenge the will are often not able to give evidence of the circumstances of the will. **The doctrine of 'the righteousness of the transaction' whereby the law places a burden on the propounder of the will, in circumstances where the suspicion of the court is aroused, to prove affirmatively that the deceased knew and approved of the will which he was executing, is a salutary one which enables the court in an appropriate case properly to hold that the burden has not been discharged.**

33 But 'the righteousness of the transaction' is perhaps an unfortunate term, suggestive as it is that some moral judgment by the court is required. What is involved is simply the satisfaction of the test of knowledge and approval, but the court insists that, given that suspicion, it must be the more clearly shown that the deceased knew and approved the contents of the will so that the suspicion is dispelled. Suspicion may be aroused in varying degrees, depending on the circumstances, and what is needed to dispel the suspicion will vary accordingly. In the ordinary probate case knowledge and approval are established by the propounder of the will proving the testamentary capacity of the deceased and the due execution of the will, from which the court will infer that knowledge and approval. **But in a case where the circumstances are such as to arouse the suspicion of the court the propounder must prove affirmatively that knowledge and approval so as to satisfy the court that the will represents the wishes of the deceased.** All the relevant circumstances will be scrutinised by the court which will be "vigilant and jealous" in examining the evidence

in support of the will: *Barry v Butlin* (1838) 2 Moo PC 480, 483 per Parke B." (Emphasis supplied)

(See also **Pascall v Graham** [2025] UKPC 26)

[59] The learned judge, at para. [29] of his judgment, stated that the burden of proving that the will was a forgery lay on the appellant. This statement of the law by the learned judge is incorrect. In **Barry v Butlin**, Mr Baron Parke, who delivered the judgment of the Judicial Committee of the Privy Council, stated thus:

> "… The onus probandi lies in every case upon the party propounding a will, and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator….
>
> The strict meaning of the term onus probandi is this, **that if no evidence is given by the party on whom the burden is cast, the issue must be found against him. In all cases the onus is imposed on the party propounding a will, it is in general discharged by proof of capacity, and the fact of execution, from which the knowledge of and assent to the contents of the instrument are assumed**…" (Emphasis supplied)

[60] This principle was also accepted in **Zakir Husman v Mumtaz Husman**, by Benjamin CJ, who stated at para. [8] of his judgment:

> "A presumption as to due execution of a will is founded on the maxim *omnia praesumuntur rite esse acta.* The learning of Halsbury's Laws of England, 5th Ed. Vol. 102 (2010) at para. 68 states:
>
> > 'There is a presumption of due execution where there is a proper attestation clause, even though the witnesses have no recollection of having witnessed the will, but this presumption may be rebutted by evidence of the attesting witnesses or otherwise… where there is no attestation clause, the presumption of due execution may be applied, usually where no evidence can be produced as to the circumstances of the signing and attestation. **The burden of proving due execution,**

> **whether by presumption or by positive evidence, rests on the person setting up the will**.'
>
> The presumption may be rebutted by the evidence of a handwriting expert that the testator's signature was forged **Parslow v Parslow (1959) Times**, 3rd December)." (Emphasis supplied)

And at para. [26], the learned Chief Justice said:

> "The burden of proving the due execution of the alleged Will has to be discharged by the Defendant as she has sought to set up the alleged Will for probate in solemn form."

[61] In this matter, the appellant, who is the nephew of the deceased, gave evidence that the will did not bear the deceased's usual signature. ASP Dixon's evidence supported that view. Where a purported will is challenged, the burden is on the propounder of the will to prove its due execution. The learned judge, at paras. [41], [48] and [54], stated:

> "[41] In this case, the claimant has led evidence from an expert: ASP Dixon, disputing and rebutting the presumption of due execution of the disputed will. As such we are right where we began with respect of [sic] this claim, which is that the claimant bears the burden of proving this claim on a balance of probabilities and in that regard, the evidence needed to prove this claim, needed to have been strong/cogent.
>
> …
>
> [48] …there exists ample basis for reasonable suspicion that the purported signature of the person now deceased, on the disputed will, may indeed, have been forged thereon, that is not to be equated with proof of forgery.
>
> …
>
> [54] Though this court has accepted that the evidence of this witness has rebutted the presumption of regularity/due execution, this court is not satisfied that the evidence led by ASP Dixon is cogent and thus meets (sic) standard of proof for fraud, either as the claimant has alleged in his particulars of fraud, or at all."

[62] Having found that the presumption of due execution had been rebutted, the learned judge failed to appreciate that the burden of proof had shifted to the respondent. No evidence was presented to the court by the respondent to prove the deceased's knowledge and approval of the contents of the will.

[63] In **Face v Cunningham**, Judge Hodge QC had this to say at para. 46:

> "I do not accept that the burden is on a person alleging forgery to establish that fact (albeit to the civil, rather than the criminal, standard of proof). It is a formal requirement of the validity of a will that (amongst other things) it is in writing, it is signed by the testator (or by some other person in his presence and by his direction) and it is duly witnessed. **It therefore seems to me that the burden must rest on the party propounding a will to establish that it has been validly executed and witnessed. That is one of the formal requirements for proof of a will. I can well understand that where a will is challenged on the grounds of fraud or undue influence, the burden is on the party asserting that; but where the forgery of a will is alleged, then the ultimate burden of proving that the will is not a forgery must rest on the party propounding the will, as part of the formal requirements of proving that the will was duly executed by the testator and was duly witnessed**. (See also **Fuller v Strum** [2002] 1 WR 1097)." (Emphasis added)

[64] In such circumstances, based on the principle in **Barry v Butlin**, the appellant's claim ought to have succeeded. The learned judge erred when he stated that the burden of proof was on the appellant.

[65] The appellant stated that he was familiar with the deceased's signature, as he had conducted business on behalf of the deceased for a number of years. His evidence was that the deceased always signed his name as "Calvin B Williams". He identified the deceased's signature on exhibit 6 (mortgage instrument no 257565, dated 25 September 1973 between the deceased and Fiduciaries Ltd); exhibit 7 (transfer instrument no 378775 between Aston Davis and the deceased, dated 23 July 1978; exhibit 8 (transfer instrument no 303967 between Allan Coomb and the deceased, dated 25 September

1973). The deceased's signature on these exhibits will be referred to collectively as the "known signatures" of the deceased.

[66] Additionally, the appellant gave evidence that the family home, which was bequeathed to the deceased's sister, Medina Williams, was to pass to Mr Dyte if she predeceased the deceased. Based on his evidence, Medina Williams died before the deceased, and therefore, the entire estate, which included five parcels of real estate and all personal property, including two bank accounts in the United States, would pass to Mr Dyte.

[67] It was also the appellant's evidence that the family was closely knit. He opined that the terms of the will, which excluded him as the sole surviving descendant of the deceased's father, were inconsistent with the nature of their familial relationship.

[68] These circumstances ought to have excited the concern of the court, thereby placing the onus on the respondent to establish that the deceased knew and approved of the contents of the will (see **Tyrrell v Painton**).

[69] In any event, the learned judge at para. [54] of the judgment stated:

> "[54] **Though this court has accepted that the evidence of this witness has rebutted the presumption of regularity/due execution, this court is not satisfied that the evidence led by ASP Dixon is cogent and thus meets [the] standard of proof** for fraud, either as the claimant has alleged in his particulars of fraud, or at all." (Emphasis supplied)

[70] Having found that the presumption of due execution had been rebutted, the learned judge erred in not recognising that the burden of proof had shifted to the respondent, who failed to present any evidence regarding the signature of the deceased. Grounds (i) – (iii) of the amended notice of appeal, therefore, succeed. Grounds of appeal a and 2 of the amended counter notice are of no merit and, therefore, fail.

[71] Concerning issue 5, the learned judge, at para. [54] of his judgment, found that the presumption of "regularity/due execution" had been rebutted. I agree. He, however, took the view that the evidence provided by the appellant was not cogent and, as such, fraud had not been proved. In other words, the appellant had not discharged his burden of proving fraud.

[72] As stated above, once a will has been executed in accordance with the Wills Act, there is a presumption of regularity. That presumption is, however, rebuttable. Where the validity of a will is challenged, the burden of proof is on the propounder to establish its due execution. Proof must, therefore, be provided that the testator knew and approved the contents of the will. The propounder must present cogent evidence to satisfy the court that the will truly represents the testamentary intention of the deceased.

[73] In the present case, the respondent, as propounder, adduced no evidence to demonstrate that the testator knew and approved the contents of the purported will. In contrast, the evidence presented by the appellant was, in my view, sufficient to displace the presumption of regularity. That evidence provided enough material to disprove the authenticity of the testator's "signature". The learned judge was, therefore, correct when he found that the presumption of due execution had been rebutted. In light of the circumstances, ground a of the amended counter notice of appeal fails.

Issue 2: Whether the learned judge erred in his assessment of the expert evidence. (Ground (v) of the amended notice of appeal and grounds 4 and 5 of the counter notice of appeal)

Issue 3: Whether the learned judge erred in failing to conduct his own assessment of the signature on the Will and signatures of the deceased on the "known documents". (Ground (vi) of the amended notice of appeal)

[74] In light of the fact that counsel's submissions on issues (2) and (3) substantially overlap and given the close connection between the subject matter and the applicable legal principles, it is convenient to address these issues together. Both concern the learned judge's approach to the evidence relating to the disputed signature on the will,

specifically his assessment of the expert evidence and whether he was obliged to conduct his own comparison with the signatures on the admitted documents.

Appellant's submissions

[75] Mr Foster submitted that the learned judge erred when he rejected the evidence of ASP Dixon on the basis that the witness did not sufficiently explain the methodology used to arrive at his findings. In this regard, Mr Foster directed the court's attention to pages 4 and 10 of ASP Dixon's report. King's Counsel stated that even if ASP Dixon's evidence could have been more detailed, "such a criticism could not be fairly used by the learned judge to discount the evidence in the way that he did". Having pointed to various aspects of the report, King's Counsel submitted that the learned judge erred when he found that the report "fell short of that which was necessary…because the expert did not sufficiently explain or even outline, the methodology that he used, in order to draw the conclusions which he did". King's Counsel stated that, like the expert in **B v IVF Hammersmith Ltd (R, third party)** [2020] QB 93 ('**Hammersmith**'), ASP Dixon's comparative evaluation of the signature on the will with that on the known documents is "less scientific and more opinion-based and experiential". However, that did not make his evidence insufficient or inadequate.

[76] It was submitted further that the learned judge, as the arbiter of fact, also erred when he failed to examine and assess the deceased's signatures on the known documents as against his purported signature on the will. According to King's Counsel, this was an abdication by the learned judge of his function.

[77] Mr Foster submitted that the case of **Griffith** is instructive on how expert evidence ought to be treated. He stated that Thompson-James J, after confirming that the court had the discretion to rely on or reject the evidence of the handwriting expert, proceeded to evaluate the expert's evidence and also conducted her own appraisal of the signatures. He submitted that a similar approach was taken by the Court of Appeal in **Hammersmith**.

[78] King's Counsel also relied on **Zakir Husman v Mumtaz Husman**, in which Benjamin CJ stated that the assessment of the questioned signature is a question of fact which is to be decided based on the consideration of the evidence as a whole. The learned judge in that case also compared the signature on the will with that on the known documents. Reference was also made to **Supple v Pender** in which the court assessed the evidence given by one of the attesting witnesses as well as that of the expert in its assessment of whether the signature of the deceased on the will was a forgery.

Respondent's submissions

[79] Mrs Gibson Henlin submitted that the learned judge was correct in his finding that the handwriting expert did not furnish the court with the necessary scientific criteria on which his findings were based. Had he done so, the learned judge would have been able to conduct his own assessment by the application of that criterion (see **Davie v Magistrates of Edinburgh** [1953] SC 34. King's Counsel also relied on **Griffith**, in which Thompson-James J outlined the role of expert evidence at para. [68].

[80] King's Counsel submitted that the learned judge, having heard the evidence, made the right decision and the exercise of his discretion ought not to be disturbed.

Discussion

[81] The learned judge, at paras. [44] and [45] of his judgment, stated:

> "[44] The claimant's expert witness fell well short, in enabling this court to draw the conclusions which he did, that being that the signature of the deceased on the disputed will, was forged. The same fell well short of that which was necessary, in terms of the provision of evidence in that regard because the expert did not sufficiently explain or even outline, the methodology that he used, in order to draw the conclusions which he did.
>
> [45] The claimant's expert witnesses needed to have furnished this court, during the evidentiary phase of this trial, with the necessary scientific criteria such as would have served to have enabled me, as a trial judge to form my own

> independent judgment, by means of the application of those criteria to the facts proven in evidence."

He then rejected the evidence given by ASP Dixon.

[82] The learned judge, based on the above paragraphs, seems to have overlooked the sections in the report where ASP Dixon explained his methodology. In the section of the report entitled "Method of Examination", ASP Dixon stated:

> "The handwriting on each listed document has been carefully examined for the degree of slant, the size of letter, height, pen stroke movements, alignments and proportions. Individual letter forms have been examined and compared, each document was photograph [sic] and examined under a digital microscope and under a Video Spectral Comparator (VSC40)."

[83] The report indicates that the deceased's signature on the known documents was compared with the signature of the testator on the purported will. ASP Dixon also opined that the signature on the purported will was not written by the same person who signed the known documents. He lists the characteristics that informed his opinion as follows:

> "1. The master pattern of the questioned writing is inconsistent to that of the known writing.
>
> 2. The pressure pattern of the writing in questioned [sic] is inconsistent to that of the known writings.
>
> 3. The writing in questioned [sic] reflects criminal tremor.
>
> 4. The letter 'B' which is consistent in the known writing is not found in the questioned writing.
>
> 5. The master pattern of the letter "B" in the known is a very unique and significant character within the author [sic] known signature."

[84] Images of the signatures on the various documents were also included in the report. ASP Dixon noted the differences. Regarding one of those documents, ASP Dixon noted as follows:

"1. the base of first staff is angular in known writing well-rounded in the questioned writing;

2. Second base of letter is flattened in known exemplars. This master pattern was not observed in the questioned writing;

3. Final upward stroke of letter curves inwards in non writing and curves outwards in questioned writing."

[85] Before the court, ASP Dixon used a projector to display the various images when giving his evidence. In my view, this exercise would have assisted the learned judge in appreciating the basis on which ASP Dixon made his findings. He stated that the pressure points are visible in the letter "m" in the last name Williams. Those pressure points, he said, are not present in the questioned document.

[86] During cross-examination, he agreed that tremors in handwriting can occur due to age or illness. He did not agree that tremulous writing of the aged can be mistaken for criminal tremor, despite this being stated in a publication by a body of which he is a member. He maintained his position that tremulous writing of the aged cannot be mistaken for criminal tremor. When questioned further, he agreed that the deceased could have changed his signature between 1979, which was the date of the known documents, and 2006, when it is said that he executed the purported will. He also agreed it is best to have contemporaneous documents for the comparison of the signatures to be made between the known document and that in the questioned document, but none were submitted. He stated further that forged documents are usually full of hesitation, pen pauses and pen lifts. It was suggested to him that none of these signs were present in the questioned document, and he disagreed with the suggestion. When asked whether he had stated that in his report, he said "no" as he only stated the most telling characteristics.

[87] In **Hammersmith,** Jay J, in dealing with the nature of handwriting expertise and how the evidence of the handwriting expert was to be assessed, stated at paras. 176 and 180:

> "176. ….I agree with Mr Mylonas that it is unnecessary to characterise handwriting expertise as 'scientific' in order to render Dr Giles's evidence admissible. An expert witness may give evidence of her own observations, as well as opinion evidence based on her knowledge and experience of a subject matter. However, the more that it is demonstrable that an expert has applied scientific methods to her task, the greater the weight that should be accorded to her product…
>
> …
>
> 180. Doctor Giles's comparative evaluation of the signature on the Consent to Thaw form with ARB's known 'true' Signatures is less scientific, and more opinion based and experiential. Dr Giles has made a series of qualitative assessments, some of which are not particularly concrete: for example, the degree of fluency. This is not to undermine her judgments: it is merely to point out that they amount to matters of opinion which cannot be quantified. Caution needs to be exercised by me in the weight to be accorded to such matters. However, Dr Giles has also identified clear differences between the disputed signature and ARB's 'true' signatures about which in my view I need to be less cautious albeit always appropriately careful and analytical."

[88] In **Griffith**, Thompson-James J, in addressing the treatment of expert evidence, stated at paras. [66], [68] and [69]:

> "[66] It follows, therefore, in my view, that this case falls to be determined on the evidence regarding the signature on the Will itself. In assessing the evidence of Ms. Beverley East, **I consider that, though I may be guided by her evidence, I am not bound to accept her findings and conclusion.** The Jamaican Court of Appeal has long since accepted, in **Clarke v Beckford et al** JM 1993 CA 33, that expert evidence may be rejected with good reason:
>
> > 'The peril facing expert evidence is that, like any other evidence tendered, it may for good reason, be rejected. The trail [sic] judge had the benefit of listening to and observing this witness testify as he compared the disputed signature with the accredited signatures of the testatrix. Further, he had the benefit of addresses from counsel for both parties who

examined his evidence in great detail and then he demonstrated in his judgment his assessment of the evidence before concluding that he preferred the real evidence to the comparison evidence.'

[68] Further, in **Fuller v Strum** [2000] All ER (D) 2392, the Court, in rejecting the handwriting expert's conclusion that the Will was a forgery, aptly summed up the role of expert evidence and how the Court should treat with it:

> *'The training of experts enables them to identify facts which a lay witness or a judge could not identify, without expert help. Such evidence may truly be described a scientific and the radiologists' evidence as to when the injury occurred falls plainly within this category. But some expert evidence may amount to no more than the drawing of inferences from facts observable as much by the expert as by a lay witness; and the inferences to be drawn from those facts may be capable of being drawn as much by the expert as by a lay witness. Of course, in such a case, the views of the expert are entitled to be given great weight. After all, the expert 's training and experience will have equipped him or her to draw these inferences. But in relation to this type of expert evidence the judge, I think, is entitled to form his own view, having regard to, and balancing, the other evidence available to him in this case.*
>
> ***I consider that I am not only free to decide the forgery issue for myself but that it is my responsibility to do so, taking into account all the evidence before me**.'*

[69] The Deputy Judge also noted that handwriting expertise is manifested in both scientific evidence that may utilize methodology and equipment to bring about a conclusion not visible to the untrained eye, and also non-scientific evidence. In rejecting the expert's evidence, the learned judge assessed the expert's methodology, findings and conclusion, and the reasoning behind the conclusion, and having examined the signature herself, found that the main reason the expert concluded the Will was a forgery was owing to inferences she had drawn from the visible differences between the

> signatures, an inference which the judge was capable of making for herself." (Emphasis and italics as in original)

[89] A similar approach was used by Peter Leaver QC in **Supple v Pender**, who stated at paras. [66] and [70]:

> "[66] **I had come to my conclusions about the genuineness of the signatures and the Will independently of Dr Giles's opinion as to the genuineness of Leonard's signature.** Although Dr Giles gave her evidence first during the hearing, I took the view that it was better to exclude it from my consideration of the evidence, because it might colour my approach to the testimony of the important witnesses to whose evidence I have referred in detail. Although of, and by itself, Dr Giles's opinion would not have persuaded me that Leonard's signature was not genuine if I had believed Mr Tandy, I did not want to have that evidence in my mind when deciding whether or not Mr Tandy's evidence could be accepted.
>
> …
>
> [70] Miss Rich forcefully pointed out the limitations in Dr Giles's evidence. She stressed that the evidence was only opinion evidence, and was qualitative and not quantitative. I accept those criticisms, and have them well in mind. As I have made clear, **I have used Dr Giles's opinion for a limited purpose. However, I am satisfied that it is evidence which I can and should accept**. It fortifies the conclusion to which I had already come, about the signature on the Will which is said to be that of Leonard." (Emphasis supplied)

[90] In **Davie v The Lord Provost, Magistrates and Councillors of the City of Edinburgh** (1953) SC 34, the court addressed the issue of the treatment of expert evidence as follows:

> "Expert witnesses, however skilled or eminent, can give no more than evidence. They cannot usurp the functions of the jury or Judge sitting as a jury, any more than a technical assessor can substitute his advice for the judgment of the court – *S.S. Bogota v. S.S. Alconda* [1923 S.C. 526]. Their duty is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions

> so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence."

[91] This case was relied on by the respondent in support of the submission that the learned judge was correct when he stated that based on the insufficiency of the expert evidence, he could not make his own assessment. Respectfully, I do not think that this case takes the matter any further, as the methodology and criteria on which ASP Dixon made his findings were clearly stated in his report. ASP Dixon pointed to the differences between the known signatures and those on the purported will. He also gave his opinion on other characteristics, such as tremor and pressure points. ASP Dixon utilised a digital microscope and a video spectral comparator to assist him in his examination of the known signatures and the impugned signature and concluded that the impugned signature was not written by the same person who signed the known documents. His evidence, along with the evidence of the appellant and Winston Keen Jr, was to be considered by the learned judge.

[92] The learned judge, in the instant case, was also entitled to conduct his own independent assessment of the signatures in his consideration of the evidence as a whole. This approach was utilised in **Griffith** by Thompson-James, who stated:

> "[70] In the case at bar, I am in agreement with Ms. East's findings and conclusion. **Having myself examined the questioned signature on the Will, there are several differences that are visible to the untrained naked eye**. Ms. East concluded that it was her professional opinion that the deceased did not sign the Will, based on what she found to be eleven (11) inconsistencies in the questioned signature on the Will that according to her did not match the 'master pattern' of the 'known signatures'. **Having thoroughly gone through these 'known signatures' and each 'inconsistency', comparing them one by one, I was able to readily see these inconsistencies for myself, and I find favour with her conclusion.** These inconsistencies, taking into consideration the other evidence before the Court, I find are too many and too varied to be accounted for by natural variations due to the age, health,

> and other characteristics of the deceased and the conditions under which the Will was purportedly signed." (Emphasis supplied)

[93] And at paras. [74] and [75] she stated that:

> "[74] Simply put, from the naked eye, the signature on the Will looks clearly different from the "known signatures" of the deceased on the documents before the Court that were undisputedly signed by him, whether looking at the signature as a whole, or looking at the letters individually.
>
> [75] I have come to this conclusion bearing in mind the methodology used by Ms. East, as well as the weaknesses pointed out by the Defendant in relation to her report and evidence. Whilst, I agree that there are limitations in the methodology used, I disagree with the Defendant that these are of a nature and to the extent that the report should not be relied on. (See also **Supple v Pender** and **Fuller v Strum**)."

[94] It is accepted that the learned judge had the discretion to either accept or reject, in whole or in part, ASP Dixon's opinion pertaining to the authenticity of the testator's signature in the purported will. The bases on which an appellate court may intervene in matters involving the exercise of a trial judge's discretion are well known. This court will not intervene with the learned judge's exercise of his discretion unless it can be shown that he misunderstood the facts or law in arriving at his decision or arrived at a decision which no reasonable judge would have (see **Hadmor Productions Ltd and Others v Hamilton and Others** [1982] 1 All ER 1042).

[95] In this matter, the learned judge's pronouncement that ASP Dixon did not explain his methodology was, in my view, inaccurate based on the evidence. He also fell into error when he stated that, as a result of the quality of ASP Dixon's evidence, he was unable to make his own assessment of the purported signature of the deceased. The cases say otherwise. In addition, both the documentary and the *viva voce* evidence dealt with the differences between the "known signatures" and the purported signature on the

will. Grounds (v) and (vi) of the amended notice of appeal, therefore, succeed. Grounds 4 and 5 of the amended counter notice of appeal fail.

Issue 4: Whether there was sufficient evidence to prove forgery/fraud although the perpetrator was unknown (Ground (iv) of the amended notice of appeal and ground 1 of the amended counter notice of appeal)

Appellant's submissions

[96] Mr Foster submitted that although there was no proof that it was Mr Dyte who was responsible for the forgery of the will based on the combined evidence of ASP Dixon, the appellant and Winston Keen Jr, which the learned judge largely accepted as truthful, there was sufficient evidence to prove on a balance of probabilities that the purported signature of the deceased on the will was a forgery. He stated that, based on **Supple v Pender**, the identity of the forger need not be proved in these proceedings.

Respondent's submissions

[97] Mrs Gibson Henlin submitted that the learned judge was correct in his finding that the appellant had failed to discharge the burden of proving fraud. She stated that fraud was not pleaded by the appellant, although the particulars of claim included particulars of fraud. King's Counsel argued that the correct approach in matters where fraud is alleged is for the tribunal of fact to consider the evidence as a whole. In this regard, reliance was placed on **Gill v Woodall & ors** [2010] Ch 380 at paras. 22, 23 and 64.

Discussion

[98] In **Zakir Husman v Mumatz Husman**, Benjamin CJ stated that the assessment of a questioned signature was ultimately a question of fact. The limited role and the approach of an appellate court in dealing with appeals from findings of fact are well known. It is accepted that an appellate court will not lightly disturb the findings of fact of a trial judge unless it is satisfied that the judge was plainly wrong (see **Watt (or Thomas) v Thomas** [1947] AC 484 ('**Watt v Thomas**'). As stated by Brooks JA (as he then was) in **Veteran Security Limited & anor v Greenwood-Walker** [2021] JMCA Civ 5:

> "[97] …where there has been no misdirection as to the law, an appellate court is only entitled to come to a different conclusion than the trial judge based on the printed evidence, where it is satisfied that any advantage to be had by the trial judge of having seen and heard the witnesses, is not sufficient to justify the judge's reasons and conclusion."

[99] On this issue, counsel for the respondent directed our attention to **D & LH v The AG**, where McDonald-Bishop JA (Ag), as she then was, stated:

> "[30] Based on the grounds of appeal and the orders being sought by the appellants, it is clear that this court is being asked to disturb the learned trial judge's decision on matters pertaining to how she carried out her functions in treating with the facts. As such, it is necessary to note from the outset the applicable law that governs the approach of this court in dealing with the decision of the learned trial judge.
>
> [31] In a relatively recent case on appeal from Trinidad and Tobago, **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21, the Judicial Committee of the Privy Council was to again lend its voice to the issue as to the approach an appellate court should take in dealing with appeals from a trial judge's findings of fact. Under the heading 'The role of an appeal court', their Lordships undertook an extensive review of the numerous authorities that have treated with the question, including most importantly, the oft-cited **Thomas v Thomas** [1947] AC 484. The principles from those cases cited by their Lordships have been applied time and time again by this court and are, by now, so well-known to the extent that they are fast becoming trite.
>
> [32] Be that as it may, it is nevertheless necessary to simply indicate that the principles enunciated by their Lordships in **Beacon Insurance Company Limited v Maharaj**, as extracted from the various authorities cited by them, have provided the necessary guidelines within which the decision of the learned trial judge and the grounds of appeal have been considered. Their Lordships, after distilling the applicable principles from those cases, stated, at paragraph 12:
>
> > '…It has often been said that the appeal court must be satisfied that the judge at first instance has gone 'plainly wrong'…This phrase does not address the

> degree of certainty of the appellate judges that they would have reached a different conclusion on the facts…Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence…'

[33] The dictum of Lord Neuberger, in **re B (A Child)** [2013] 1 WLR 1911, cited by their Lordships in **Beacon Insurance Company Limited v Maharaj**, is also worthy of particular note within this context. In that case, his Lordship opined, at paragraph 53:

> 'This is traditionally and rightly explained by reference to good sense, namely that the trial judge has the benefit of assessing the witnesses and actually hearing and considering their evidence as it emerges. Consequently, where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it. This can also be justified on grounds of policy (parties should put forward their best case on the facts at trial and not regard the potential to appeal as a second chance), cost (appeals can be expensive), delay (appeals on fact often take a long time to get on), and practicality (in many cases, it is very hard to ascertain the facts with confidence, so a second, different, opinion is no more likely to be right than the first).'

[34] The burden on the appellants in this case is, therefore, to persuade this court to the view that the findings of fact of the learned trial judge, on which she has based her decision

> to grant judgment in favour of the respondents, are such as to warrant the interference of this court."

[100] In para. 1 of the fixed date claim form, the appellant claimed:

> "A declaration that the paper writing dated 6th day of November, 2006 pretended to be the Last Will and Testament of CALVIN BARTHOLOMEW WILLIAMS was obtained by fraud and the same is null and void for the reason that the execution of the said pretended Will was not executed by the late CALVIN BARTHOLOMEW WILLIAMS deceased".

Para. 10 (ii) of the particulars of claim alleges that:

> "The execution of the said pretended Will was obtained by forging the signature of [the deceased] thereon."

And para. 12 states:

> "The [deceased] at the time the pretended Will purported to have been executed did not know of or approve the contents thereof."

[101] The particulars of fraud allege that Mr Dyte knew that the will was not signed by the deceased and that he "tendered uttered and/or permitted to be fraudulently tendered or uttered a Grant of Probate by this Honorable Court paper writing dated the 6th day of November 2006 purporting to be the Last Will and Testament of [the deceased], knowing full well that the said paper writing was not signed by [the deceased]". It was also alleged that Mr Dyte fraudulently created and/or permitted the use of the deceased's signature to fraudulently execute the will.

[102] The learned judge's discourse on the issue of forgery began with the statement that forgery is a criminal offence by virtue of section 3 of the Forgery Act. His view of the evidence given by the appellant and Mr Keen is contained in para. [35], where he stated:

> "[35] The court wishes to make the observation that for the most part, the evidence of the lay witnesses was insignificant with respect to this court's adjudication upon the issue as to whether or not the disputed will was forged. That is though,

> unsurprising, since expert evidence will typically be necessary to prove same. This court does accept though, that expert evidence can be provided by a person who is not possessed of any specialized academic training or knowledge as regards the expertise on the particular subject matter, that he or she claims to be possessed of."

And at para. [58]:

> "This court has accepted as truthful and accurate, at least in large measure and certainly as regards any fairly insignificant issues which arose in this case, all of the evidence of the respective lay witnesses - those having been for the claimant, two fairly close blood relatives of the deceased - a nephew and a grand-nephew respectively and for the defendant an attorney for the person now deceased. **Ultimately though, this court needed to have had the benefit of cogent expert evidence, coupled with the evidence of lay witnesses being the claimant and his son, respectively in order to properly have found this claim to have been duly proven**. To my mind, **this court only had the benefit of the latter, the court did not have the benefit of the former-mentioned, of those two necessary facts**." (Emphasis supplied)

[103] These two paragraphs seem to suggest that the evidence of the appellant and Mr Keen Jr, although accepted, was insufficient to prove that the purported signature of the deceased on the will was a forgery unless supported by "cogent" expert evidence. That proposition, without more, is, in my view, incorrect. The assessment of their evidence must be based on the particular circumstances of the case, and the learned judge found that their evidence was not enough to prove that the deceased's signature was a forgery.

[104] At para. [34], the learned judge correctly stated that fraud must be specifically pleaded and proved. At para. [38], the learned judge stated:

> "In any event though, bearing in mind how serious any allegation of forgery is, whether any particular person is named in the particulars of fraud as having committed said forgery or not to my mind, the proof of same in civil court, requires cogent/strong evidence to be led by the claimant, in

> order to prove same to the requisite standard, that being the standard of a balance of probabilities."

[105] His findings are contained in paras. [42] and [44] of the judgment. Para. [42] states:

> "[42] It is clear to this court, that the claimant has not proven this claim on the basis of fraud, to the requisite standard."

Para. [44] has been set out in para. [77] of this judgment and need not be repeated. The learned judge stated at para. [48]:

> "[48] Whilst in respect of the matter at hand, there exists ample basis for reasonable suspicion that the purported signature of the [deceased], on the disputed will, may indeed, have been forged thereon, that is not to be equated with proof of forgery."

[106] The basis on which the above conclusion was reached is contained in the following paragraphs:

> "[45] The claimant's expert witnesses [sic] needed to have furnished this court, during the evidentiary phase of this trial, with the necessary scientific criteria such as would have served to have enabled me, as a trial judge, to form my own independent judgment, by means of the application of those criteria to the facts proven in evidence.
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> [46] The claimant's expert in this case, had only, to a very limited extent, while being cross examined, in one particular aspect, explained the reason(s) for at least one aspect of that which was his ultimate conclusion, as regards the disputed will, that being that the disputed will was forged. That to my mind, was inadequate overall, bearing in mind that the evidence led in support of the claimant's allegation of forgery, needed to have been cogent.
>
> [47] In the matter at hand, the claimant's expert witness either failed, in some respects, altogether or at least in the most part, to explain to this court how it was that he reached the conclusion which he did. In any event though, it is judges who decide cases, and not experts. It is the role of the judge to scrutinize the evidence thoroughly and to ascribe to it, only

> such weight as he (the trial judge), thinks fit. It is for the judge and not any expert witness, to decide on each and every critical issue in any case. An expert witness is not a surrogate judge.
>
> …
>
> [50] It is recognized by this court and indeed the expert witness, whose evidence is being relied on by the claimant, that it can be that over time, a person's signature may change. That is why it was necessary for the expert witnesses [sic] to have explained his methodology, in arriving at the conclusion which he did, so that I could have as the trial judge, properly then been left to assess what weight was to be given to that conclusion and hopefully too, at least from the claimant's standpoint reached the same conclusion, albeit on a balance of probabilities that a [sic] ASP Dixon did. Regrettably, at least from the perspective of the claimant, with the same not having, to my mind, being [sic] sufficiently and/or appropriately done, this court has been unable to reach that conclusion."

[107] In this matter, the learned judge, as stated previously, appears to have overlooked and/or not considered the section of the expert's report that dealt with the methodology used by ASP Dixon to arrive at his conclusion. Additionally, the learned judge failed to make his own independent examination and assessment of the signatures as he was lawfully entitled to do. His findings were not based on any negative view of the credibility of the witnesses who gave evidence on the appellant's behalf. The learned judge found that the expert evidence was insufficient due to the expert's alleged failure to explain his methodology. That was a finding that was not supported by the evidence. In this regard, he was plainly wrong. In addition, the learned judge misdirected himself regarding the burden of proof, having found that the presumption of due execution had been rebutted. In those circumstances, the interference by this court with the learned judge's findings of fact would not violate the principle in **Watt v Thomas**, **D & LH v The AG** and **Beacon Insurance Company Limited v Maharaj** [2014] UKPC 21.

[108] Based on the above, this court is at liberty to assess ASP Dixon's report and can examine the signatures on the known documents and compare them with the purported signature on the will.

[109] ASP Dixon in his report highlighted the "significant and fundamental" differences between the signatures of the deceased on the known documents and his purported signature on the will. I have noted that the letter "B", which is a feature of the deceased's signature in the known documents, is absent from his purported signature in the will. The details of ASP Dixon's comparison of the signatures on the known documents with the purported signature of the deceased in the will were detailed in paras. [76] – [79] of this judgment and have been duly noted.

[110] Based on the evidence of ASP Dixon, the appellant and Mr Keen Jnr, there is, in my view, sufficient evidence to support a conclusion on a balance of probabilities that the purported signature of the deceased on the will was a forgery.

[111] There was, however, no evidence before the learned judge pertaining to the identity of the forger. This is not necessary. In **Supple v Pender**, in which the will was found to be a forgery, the court stated at para. [64]:

> "The consequence of my conclusion but I cannot accept Mr. Tandy's evidence, that he witnessed Leonard signing the Will, is that I have also concluded that the Will was a forgery, and that neither of the signatures on the Will which purport to be Leonard's signature are, in fact, Leonard's signature. I do not propose to speculate as to why it was forged, or when or how the document came into existence, but there can, in my judgment, looking at the evidence as a whole, be no other conclusion."

[112] Based on the above, I am of the view that the learned judge's finding that there was insufficient evidence to prove that the deceased's signature on the will was forged ought to be set aside. Ground (iv), therefore, also succeeds. Ground 1 of the amended counter notice of appeal fails.

Conclusion

[113] It is noted that the appellant has asked for judgment to be entered in his favour. Among the reliefs sought in the court below was a declaration that the will was obtained by fraud and is null and void, as it was not executed by the deceased.

[114] In this court's view, there was enough evidence before the learned judge to find that the signature of the deceased was a forgery. The learned judge erred in not recognising that the burden of proving regularity or due execution was on the propounder of the will, not the appellant. Since the respondent did not present any evidence, she failed to meet that burden. In light of my conclusion that the signature of the testator was a forgery, I am of the view that the declaration ought to be granted.

[115] I would, therefore, propose that the following orders be made:

1. The appeal is allowed.

2. The amended counter notice of appeal is dismissed.

3. The order of K Anderson J dated 2 July 2021, granting judgment and costs to the respondent, is set aside.

4. It is declared that the paper writing purporting to be the last will and testament of Calvin Bartholomew Williams, deceased, late of 2 Montclair Drive, Kingston 6 in the parish of Saint Andrew, dated 8 November 2006, is a forgery, and is accordingly null and void and of no legal effect.

5. It is declared that Calvin Bartholomew Williams, deceased, late of 2 Montclair Drive, Kingston 6 in the parish of Saint Andrew, died intestate.

6. Costs of the appeal and in the court below to the appellant, to be agreed or taxed.

DUNBAR-GREEN JA

[116] I, too, have read the draft judgment of Simmons JA and agree with her reasoning and conclusion.

F WILLIAMS JA

ORDER

1. The appeal is allowed.

2. The amended counter notice of appeal is dismissed.

3. The order of K Anderson J dated 2 July 2021, granting judgment to the respondent, is set aside.

4. It is declared that the paper writing purporting to be the last will and testament of Calvin Bartholomew Williams, deceased, late of 2 Montclair Drive, Kingston 6 in the parish of Saint Andrew, dated 8 November 2006, is a forgery, and is accordingly null and void and of no legal effect.

5. It is declared that Calvin Bartholomew Williams, deceased, late of 2 Montclair Drive, Kingston 6 in the parish of Saint Andrew, died intestate.

6. Costs of the appeal and in the court below to the appellant, to be agreed or taxed.