JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 69 of 1991

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

BETWEEN	PEARL CLARKE	DEFENDANT/APPELLANT
AND	VIVIAN BECKFORD	
AND	ALMA MAY ELAINE CATER	PLAINTIFFS/RESPONDENTS

Maurice Frankson instructed by
Messrs. Gaynair & Fraser for the appellant

D. Scharschmidt, Q.C. instructed by
John Graham for the respondents

November 9 & 10, 1992 and May 3, 1993

WRIGHT, J.A.:

This appeal seeks to set aside two orders made by Harrison, J. on July 31, 1991, in the Estate of Eliza Drummond, deceased, viz:

1. An order declaring null and void Letters of Administration granted to the appellant Pearl Clarke in the said estate on January 15, 1986.

2. An order decreeing Probate of the Last Will and Testament of the said Eliza Drummond dated September 8, 1981 in solemn form.

Two main problems confront the propounding of the Will as genuine, viz:

(a) Proof of the testatrix's signature on the Will, and

(b) Proof of the testatrix's knowledge of the contents of the Will.

These problems stem from the fact that although the testatrix was able to sign her name she could not read. The evidence

advanced to resolve these problems must, therefore, attract very careful scrutiny against the background of the challenge mounted by the appellant. However, before embarking upon this exercise it is pertinent to set out the evidence of the relationship between the deceased and the appellant.

The relationship between the appellant and the deceased

Eliza Drummond died childless in her eighties and although the appellant was her niece the latter said of her, "I considered myself to be my aunt's child." She had known her aunt from her childhood and it would seem from her testimony that much of her youth was fostered by the testatrix, an indulgent aunt, whom she styled "Aunt D". Aunt D would not deny her anything she requested and she always gave her the best. She paid her school fees while she attended Waulgrove College. This indulgence persisted beyond the death of Aunt D's husband. Peculiarly, however, she said, almost in the same breath, that her aunt had to struggle to maintain her beneficence. Before her marriage in 1968 the appellant lived for some time at her aunt's residence at 11 Harcourt Road. After marriage she moved to 27 Harcourt Road and then in 1972 she migrated to Bermuda but returned to live at 11 Harcourt Road until March 1979 when she returned to Bermuda. While she lived abroad she maintained correspondence with her aunt and would send her presents from time to time. Letters from her aunt would be written by a friend but they were not signed by her.

As a footnote to this evidence of the relationship, it is relevant to observe that the appellant was not made aware of the existence of the Will in question. Indeed, the appellant returned to Jamaica in March 1985 to find her aunt hospitalized. When the aunt was discharged from hospital she took her home and it was her evidence that the aunt awoke her about 2 o'clock the following morning telling her that she wanted to make a Will so she should fetch Mrs. Olive Gordon and her husband and her friend Gordon. However, strange though it may seem, she did not oblige.

It could not be long after she had returned to Bermuda that her aunt died on April 20, 1985. Within four days, that is April 24, she was back in Jamaica.

The next question to be considered is the making of the Will before the Court. But before doing so I will set out the contents of the Will:

> "THIS IS THE LAST WILL AND TESTAMENT of me ELIZA DRUMMOND of 11 Harcourt Road, Kingston 16 in the Parish of Kingston, Widow.
>
> 1. I HEREBY REVOKE all former Wills and Testamentary dispositions heretofore made by me and declare this to be my last Will and Testament.
>
> 2. I APPOINT Sister MARY ALMA ELAINE CATER of Stella Maris Convent, 62 Shortwood Road in the Parish of Saint Andrew and VIVIAN BECKFORD of 6, Summit Drive, Kingston 8, Businessman to be the Executors of this my Will.
>
> 3. I GIVE AND BEQUEATH my property known as 11 Harcourt Road in the Parish of Kingston to my said Executor Vivian Beckford, Anne Beckford the wife of Vivian Beckford, Tracey Beckford the daughter of Vivian and Anne Beckford and Rebecca Clarke now residing in Nassau Bahamas as tenants in common in equal shares.
>
> 4. I MAKE THE FOLLOWING PECUNIARY BEQUESTS:
>
> (a) To Hazel Grossett of 17 Harcourt Road the sum of ONE HUNDRED DOLLARS ($100.00)
>
> (b) To Vernon Grossett of 17 Harcourt Road the sum of ONE HUNDRED DOLLARS ($100.00)
>
> (c) To Mr. Grossett of 17 Harcourt Road the father of Vernon Grossett the sum of ONE HUNDRED DOLLARS ($100.00)
>
> 5. I GIVE AND BEQUEATH to the said Anne Beckford my Combination Buffet with glasswares therein, my radio, my book case with figurines, three lounge chairs and my dining table and six chairs for herself absolutely.
>
> 6. The Rest Residue and Remainder of my estate both Real and Personal I give and bequeath to Vivian Beckford, Anne Beckford, Tracey Beckford and Rebecca Clarke as to the Real Estate as tenants in common in equal shares and as to the Personal Estate in

" equal shares for themselves absolutely.

IN WITNESS WHEREOF I have hereunto set my hand this 8th day of September, One Thousand Nine Hundred and Eighty One.

ELIZA DRUMMOND

SIGNED by the Testatrix the said ELIZA DRUMMOND as her last Will and Testament in the presence of us both being present at the same time, who in her presence, and in the presence of each other have hereunto subscribed our names as witnesses

G. Lawrence
14 Constant Spring Grove, Kingston 8
Mechanic

S. Tallow
Apt. 9A Georgina Close
Kingston 3
Pump Attendance."

The making of the Will

It is contended that the Will was prepared by Mr. Frederick Keith Anderson, Attorney-at-law with offices at 61-63 Barry Street, Kingston, who at the time of the trial of this case had been qualified for fifty years. He gave evidence of the system employed by him in the preparation of Wills for clients. The other witness was Sylbert Tallow, one of the attesting witnesses.

Mr. Anderson identified a photograph of Mrs. Drummond (Exhibit 1) as being a younger version of the person who came to his office and gave him instructions for the preparation of her Will. He also identified the signature of one Miss Barbara Dixon, his secretary at the time, on a receipt No. 95400 bearing date 8/9/81 which reads:

"$50 - received from Eliza Drummond on account costs re Will.

F.K. Anderson

Per Dixon"

which was admitted in evidence as Exhibit 3 as corroborating his evidence that the testatrix did attend at his office about that time for the purpose of having her Will prepared. The Will is in fact dated 8/9/81.

He recalled that the testatrix was an elderly person,

in good health but weak and had to be assisted in her movements. She gave him instructions and he prepared the Will. Looking at the Will (Exhibit 3) he said:

> "This document was typed on my typewriter which I still have."

Then he said:

> "I cannot recall - re this matter - Will not signed in my presence."

Here it appears he was responding to a question relating to the signing of the Will. It may be more convenient to relate the evidence-in-chief of his system as it appears at page 21 of the record:

> "My practice then was - Will brought to me - I would then speak with testator and then I instruct my secretary if witnesses in office to have testator sign Will in presence of witnesses. Witnesses not present in office - I would give instructions to testator or testatrix as to manner in which Will to be executed. I would instruct my secretary - to preserve privacy of document. Secretary in inner section of office - Secretary's compartment - private and it would be in that compartment - she would speak to proposed testator or testatrix. It was my practice to give instructions to my secretary - to preserve contents - I would tell proposed witnesses they only concerned with signature - of party making Will and not with contents of it - as people usual want to know what they signing. If Will short enough to hold on one page I don't think I would have given any specific instructions to preserve contents of privacy of document - if all one page."

In cross-examination, he recalled that when the testatrix attended at his office she was accompanied by one or two persons but when he took instructions from her in his room she was unaccompanied. Quite understandably, he could not recall specifically the instructions he had received but he knew that he did see the Will after it was typed and that he gave instructions for the signing thereof, but that it was not signed in his presence.

Cross-examination focussed on the characteristics of certain letters in the Will, e.g. were some letters brighter

than others thus evidencing corrections, but this line of cross-examination was not productive of anything significant in the absence of any sample typings from the machine to determine whether there were any defects which would account for the matters in question. Though he could not recall the specific instructions his contention that the Will was prepared on the instructions of the testatrix was aided by reference to the Will and the receipt of even date.

Of the two attesting witnesses, Sylbert Tallow and Glasford Lawrence, both of whom were at the time employed to Vivian Beckford, an executor and a beneficiary under the Will, only Sylbert Tallow was called to testify. It was his testimony that he had lived with Mrs. Gertrude Cater, the mother of Alma May Elaine Cater, his godmother, from 1970 to the time of her death in 1979. Mrs. Cater and the testatrix were close friends. He was their go-between conveying messages and articles from one to the other. The testatrix, he said, used to visit Mrs. Cater's home at 11 Grafton Road. He identified the testatrix from a photograph of her dated 1977 (Exhibit 1). In 1980 he began working as a Pump Attendant at Vivian Beckford's Service Station and was still so employed in 1981. At the time of the hearing he had risen to the position of Assistant Manager there. On the day the Will was made, the testatrix came to his workplace and requested that he accompany her to witness a Will. With Mr. Beckford's permission, he went along with her in a vehicle driven by Glasford Lawrence to a lawyer's office between 10:00 a.m. and 11:00 a.m. He had not known the lawyer before nor did he know his name. The three of them entered the office and while the testatrix spoke with the secretary, himself, and Lawrence were seated in the waiting room. Next the secretary and the testatrix entered the lawyer's office after which they both returned - the testatrix to sit with himself and Lawrence, the secretary to her desk where she typed a document. When the typing was completed the secretary summoned the three of them

into her office and the lawyer, a gentleman, came from his office and explained to himself and Lawrence that they would be required to sign the Will as witnesses but they would not be able to read the contents of the Will. The testatrix then sat in a chair at the secretary's desk while himself and Lawrence stood by and watched her as she signed her name to the first page of the two-page document which was folded so that they could not see the whole of that page. This is consistent with Mr. Anderson's testimony that steps were taken to preserve the privacy of the document.

Mr. Tallow said that the testatrix seemed nervous as she signed. It took her a long time which he estimated to be five to seven minutes. Thereafter both he and Lawrence signed their names in her presence while the other looked on. They both signed on the second page of the document. As he put it:

> "Document I signed separate from document deceased signed but it was attached to it by a staple. At time I signed I could not see the signature of deceased. When Lawrence signing I could not see signature of Mrs. Drummond."

Cross-examination of this witness elicited details which, rather than discrediting his evidence, confirmed him. He said he did not know that the testatrix was illiterate but having regard to the length of time which she required to sign her name he suspected that she was illiterate. He elaborated that when the testatrix and the secretary entered the lawyer's room they spent between forty-five minutes and one hour before coming out. After the signing was completed the secretary handed the Will to the testatrix who had remained seated throughout the signing ceremony. The testatrix travelled back to his workplace along with the witness. Of the Will he could say nothing more as he never saw it again until about one year before the date of the hearing when it was shown to him by the attorney-at-law for the plaintiffs/respondents. Concerning the testatrix, the witness said he had seen her attend at the Holy Rosary Church.

That was the evidence in favour of the authenticity of the Will.

Evidence seeking to impeach the Will

This evidence was supplied by the appellant, Pearl Rebecca Clarke, and Carl Major, Superintendent of Police and Handwriting Examiner in charge of Questioned Documents at the Police Forensic Laboratory at Hope. As stated before, the appellant was not in Jamaica when her aunt died but within days she returned having previously arranged for Mrs. Anne Beckford, wife of Vivian Beckford, to meet the funeral expenses which she made good on her return. She testified that both when she had visited her aunt in hospital in March 1985 and after she had taken her home she found her alert and oriented to persons, place and time. Although she did not know the amount of the indebtedness, despite her enquiries, she knew that at the time of her aunt's death there was still outstanding a portion of a loan which Vivian Beckford had made to her aunt for effecting repairs to her house. However, she made a payment of $1,000 towards that debt. Responding to an invitation from Sister Alma Cater, she visited her at the Holy Childhood High School during the second week following the death of the testatrix where Sister Cater, whom she had first met at her aunt's funeral, introduced her to Sister Stephanie. While she was there Mr. Beckford arrived. Sister Stephanie said to her:

> "Your aunt left something here, but I sent it down to be photocopied."

Thereafter two copies of the disputed Will were produced by Sister Stephanie who handed them to Mr. Beckford and he, in turn, handed one to her. She was quick in denouncing the Will as a forgery because of the signature of the testatrix and the fact that her address was stated as Bahamas. She admitted to having visited Nassau, Bahamas, but denied having ever lived there. She had lived in Bermuda and latterly in Fort Lauderdale, U.S.A. In pursuance of her belief that the Will was a forgery,

she lost no time in reporting the matter to the Police and thereafter consulted with an attorney-at-law. However, it does not seem to be his advice that determined her next step. Rather, it was the advice of her two aunts which she took and so applied for Letters of Administration, which were granted on January 15, 1986.

In the meantime, from among the deceased's personal effects, she had handed over to the Police certain documents on which there were the undisputed signatures of the deceased to afford comparison with the signature of the testatrix on the Will. But that issue seem not to have been resolved, at least not up to April 17, 1991, at the hearing of this case because on that date Mrs. Forte, who appeared for the appellant, was obliged to apply for an adjournment stating as her reason that some of the documents were in the possession of the Director of Public Prosecutions. Those documents are:

1. Passpost No. 251296 - Ex. 4
2. Certificate of Enumeration - Ex. 5
3. Letter dated 29.4.76 from First National Bank of Chicago - Ex. 6
4. Decision Card for Christ dated 17.2.80 - Ex. 7
5. National Commercial Bank Credit Slip - Ex. 8
6. Envelope re maintenance of charities - Ex. 9
7. PNP Voter's Identification Card (Franklyn Town Division) - Ex. 10
8. 2 U.S. Postal Service Receipts dated 29.9.83 and 21.3.84. - Ex. 11

The appellant criticized the signature of the testatrix on the Will by comparison with letter formations in her signatures on the documents listed above.

In cross-examination, she conceded that the quality of her aunt's signature would depend on the level of preparation which she had had as well as the company present at the signing. Among strangers she would be less comfortable and this would be

reflected in her writing. In this regard if Sylbert Tallow's evidence is accepted he was well known to her. In fact he said it was she who requested him to witness the Will. She had to admit that during the years that she lived abroad her aunt would have signed documents without the benefit of her assistance. She denied that her challenge to the authenticity of the Will was due to the fact that she was not left the bulk of the estate but she was spared the embarrassment of having to answer whether her attitude would have been different had she been left the whole or the bulk of the estate. I think the answer to that question is not far to seek. During cross-examination there was shown to the witness a Registered Post return receipt dated 8/11/84 (exhibit 11) with a signature which she admitted was that of the testatrix. She claimed there are similarities with the other documents, nevertheless she had to look at Exhibit 11 carefully.

Regarding the Beckfords - Vivian and his wife Anne - the appellant testified that although she did not meet them until 1983 the testatrix had known them before. Indeed, she said the testatrix had known Mrs. Cater, that is Mrs. Anne Beckford's mother, for over fifty years and during the period 1979-1983, while the appellant lived abroad, the Beckfords assisted her aunt Mrs. Olive Gordon with the affairs of the testatrix. Accordingly, if the Will is genuine then its custody having been entrusted to the Catholic Sisters is not surprising because the appellant who was herself brought up in the Roman Catholic faith knew that the testatrix was also of that faith and had heard her speak of Sister Cater.

The gist of the evidence of Superintendent Carl Major is as follows:

> "I carried out an examination of the writing on the eight documents as also the examination of writing on Will - signature Eliza Drummond and it is my opinion that the writing on signature Eliza Drummond on the 8 documents were written by one and the same person. The reason being that I had found significant features in that signature common to those8

> "signatures - so I formed the opinion from the examination that all 8 were written by one and the same person.
>
> In comparison with the signature Eliza Drummond on the Will I examined I made comparison with that signature with the 8 signatures and from my examination my opinion is that there are distinct differences and outstanding differences in the Eliza Drummond and the Will as against the features which are common to the signatures on the 8 documents.
>
> Differences I found in the signature on the Will.
>
> From that examination I am of the opinion that the signature Eliza Drummond on the Will and these signatures on the 8 other documents are of different authorship."

Thereafter, he identified, for the benefit of the Court, the points of difference on which he based his opinion.

In cross-examination he was referred to Exhibit 11 on which the appellant had identified the signature of the testatrix. His response was as follows (page 40):

> "This is not one of the documents I examined - this is dated 4/11/84. Signature of this document - I could identify it as Eliza Drummond. A certain amount of assistance given in what purports to be Eliza Drummond. I now say what purports to be given as Eliza Drummond certain assistance may have been given by postal clerk. I cannot come to an opinion as to who was author of the signature. Because all the letters not complete - letters relate to each other. Letters making up the word Eliza are not all there - because they not all there why I come to that conclusion."

Among factors affecting one's handwriting, the witness listed the state of one's health as being significant. The passage of time may also bring about changes in one's signature. Then, too, posture, that is whether sitting or standing, is a relevant factor. Regarding the fact that some letters were brighter than others, he said that accumulation of ink on the tip of the pen could be responsible. It was also his evidence that the signature on the Will revealed a greater fluency than the signatures on the specimens. Concerning the signature on the Passport

(Exhibit 4) he said:

> "On Exhibit 4 it seems more like the Will - but writing seems a heavy incline in line quality. This suggests slower writing."

No evidence was adduced with respect to the signing of the Passport. The appellant testified that the testatrix left with the passport application form and later returned with it signed. However, the evidence of Sylbert Tallow was that the signing of the Will took some five to seven minutes which accords with the expert witness' opinion that it was a slow writing.

The trial judge gave very detailed consideration of the evidence before concluding:

> "In all the circumstances this Court finds that on a balance of probabilities it prefers the real evidence of Ex. 3 and the testimony of witnesses Tallow and F.K. Anderson as to the execution of Ex. 2 by the deceased to the comparison conclusion of the defendant's witness."

He then made the declarations against which this appeal has been brought.

The challenge to the judgment

Seven grounds of appeal were filed in respect of which written submissions were made which were amplified in argument before us. The grounds of appeal are as follows:

> "1. The Learned Judge erred when he concluded that the Will is valid for the reason that the unchallenged evidence was that the deceased could not read and there was no evidence that the Will was read over to the Testatrix before the execution of same.
>
> 2. The Learned Judge erred in his assessment of the unchallenged evidence of Carl Major the handwriting expert in so far as he failed to evaluate, assess or give sufficient weight to that evidence.
>
> 3. The Learned Judge erred when he concluded that Silbert Tallow had no interest to serve when the evidence for the Plaintiff/Respondent was to the effect that Silbert Tallow is employed to the First Plaintiff/ Respondent and was brought up by the mother of the Second Plaintiff/ Respondent and the mother in law of

"the First Plaintiff/Respondent and the evidence of F.K. Anderson, Attorney-at-law was vague and inconclusive.

4. The Learned Judge erred when he found that the Testatrix must have been assisted in practice of her signature or must have practised same in September 1981 as a result of which variations occurred.

5. The Learned Judge erred in coming into his conclusion that the alleged Will is valid when he relied on the fact that Vivian Beckford, First Plaintiff/Respondent did not have access to the alleged Will as it was not the case for the Defence that there was any complicity by the First Plaintiff/Respondent in the alleged Will.

6. The Learned Judge erred in his conclusion when he relied on the fact that the deceaseed consulted an attorney-at-law as the said attorney:

(a) gave no specific evidence as to the alleged instructions given by the deceased for preparation of the alleged Will, and

(b) gave no evidence that the contents of the Will complied with the alleged instructions.

7. The Learned Judge erred when he failed to admit in evidence statement made by deceased re: Receipt of monies."

No submissions were made in respect of Ground 7. Grounds 1 and 6 were considered together, reflecting as they do on the deceased's knowledge of the contents of the Will. The burden of the submissions on these two grounds is that there is no evidence that the testatrix understood the contents of the document she is alleged to have signed. In order to deal with an incongruity in the grounds as drawn, it is necessary to consider Ground 2 at the same time. It must be borne in mind that none of the grounds has been stated in the alternative. The real complaint in Ground 2 is that the evidence of the handwriting expert ought to have been accepted, the result of which would have been to deny probate of the Will. That would have meant that the evidence of the creation of the Will would also have to be rejected. How then does ground 6 contend there was neither proof of instructions

given nor of compliance with those instructions and ground 1 maintain lack of knowledge of the contents of the Will by the testatrix? There can be no quarrel with the proposition that when an illiterate testator gives instructions to an attorney-at-law for the preparation of a Will it is incumbent on the propounder of such a Will to show to the satisfaction of the Court that such a testator was able to appreciate what he was doing and that he had knowledge of and approved the contents of the resultant document. The appellant invoked the provisions of Halsbury's Laws of England (3rd edition) Vol. 39 para. 1293 which reads (insofar as it is relevant):

> "It is necessary for the validity of a Will that the testator should be of sound mind, memory and understanding, words which have consistently been held to mean sound disposing mind and to import sufficient capacity to deal with and appreciate the various dispositions of property to which the testator is about to affix his signature."

In this regard it is pertinent to observe that the only incapacity alleged in the testatrix is illiteracy. Her mental capacity was not an issue in the case and Mr. Scharschmidt quite correctly objected that if mental incapacity was being relied on it ought to have been pleaded, because it is trite learning that the purpose of pleadings is to identify the issues which the litigation is called upon to determine. It was also, I think, a valid contention on his part that the question of the illiteracy of the testatrix should have been put to Mr. Anderson seeing it is now sought to be made so important an aspect of the challenge to the genuineness of the Will although it was not pleaded. It is evident that the issue of illiteracy is an afterthought because it was not pleaded even by way of an amendment. The real issue joined on the pleadings is that of the creation of the Will. Paragraph 4 of the Defence puts the issue thus:

> "The Defendant denies that the document dated the 8th day of September, 1981 is the Will of the said ELIZA DRUMMOND and denies that it was signed by her."

The thrust of the cross-examination of Mr. Anderson was aimed at the actual making of the Will and although his evidence under cross-examination covers roughly one and one half pages of the typescript there is not even one word which even vaguely relates to the illiteracy of the testatrix.

The evidence of the making of the Will conforms to the requirements of section 6 of the Wills Act which, so far as is relevant, states:

> "No will shall be valid unless it shall be in writing, and executed in manner hereinafter 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; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses who shall attest and subscribe the will in the presence of the testator but no form of attestation shall be necessary."

The contention regarding the rejection of the handwriting expert may conveniently be disposed of at this point before proceeding with a consideration of the maker. This evidence was part of the ammunition aimed at disproving that Eliza Drummond made a Will in conformity with the requirements of the law and as set out in the evidence. The peril facing expert evidence is that, like any other evidence tendered, it may, for good reason, be rejected. The trial 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.

Be it noted that Superintendent Major had himself issued a caveat against his own evidence when he failed to identify

the signature on Exhibit 11, admittedly that of the testatrix, as being of the same authorship as the signatures on the documents which he had examined. In addition, the witness admitted to variations in the specimen signatures on Exhibit 8 - the N.C.B. Credit slip - all of which were written by the testatrix. These are but additions to the concessions made by the witness as to the effect on one's signature of the passage of time, age, state of health and the posture in writing. These factors, in addition to such assistance as the testatrix received, quite properly entitled the trial judge to conclude, as he did, that "there was no developed consistency to the deceased handwriting in view of these variations." These are variations which are evident even to the non-expert eye. For instance, the signatures on the following documents require very generous concessions to be accepted as being Eliza Drummond's, viz:

1. Certificate of Enumeration (Ex. 5)
2. Decision for Christ card (Ex. 7)
3. N.C.B. Slip (Ex. 8) - two of four specimen signatures thereon
4. Postal Service slip dated 29.8.83
5. Postal Service slip dated 21.3.84.

On the other hand no such generosity is required in respect of the signatures on the following documents:

1. The passport (Ex. 4)
2. N.C.B. slip (2 of the 4 signatures thereon) (Ex. 8)
3. Copy letter from First National Bank of Chicago - two signatures thereon (Ex. 6)
4. The Will (Ex. 2)

It is readily observable that the signature in the passport as well as on the five documents listed in the first group (supra) exhibit a difficult relationship to a straight line. Of the signatures in question, the more easily legible are those on:

(a) the passport

(b) the N.C.B. slip (2)

(c) the copy letter from the First National Bank of Chicago (2)

(d) the Will.

Regrettably, no comment is possible on Exhibit 11 which was omitted from the record of appeal. I have taken care to set out these details of the evidence to demonstrate that there was ample justification for the trial judge's acceptance of the authorship of the Will.

Having settled the question of authorship of the Will and despite the indifferent manner in which the issue of illiteracy and its possible consequences on the validity of the Will has been introduced, it is still the duty of the Court to deal with the issue. It was Mr. Scharschmidt's submission that not having been called upon to meet the contention directly the respondents may nevertheless answer the question inferentially. In Tristam & Coote on Probate & Practice 24th edition at page 669 the learned authors, in dealing with the question of Want of Knowledge and Approval under the sub-head "Blind person or illiterate", said this:

> "The court must always be satisfied that such testators knew and approved the contents of the will. If the will is proved to be in conformity with instructions of the testator, that will suffice, even though the will may not have been read to the testator."

[Emphasis added]

The case cited for that proposition of the law is Fincham v. Edwards (1842) P.C. 198. In that case the testatrix, one Martha Yeomans, with interventions from one Mrs. Evans, the residuary legatee, gave instructions for the making of her Will to a solicitor who was of the opinion that she was totally blind. That Will was prepared and executed. Months later the same solicitor was called again to prepare a new Will, instructions for which were in the form of interlineations in the previous Will. The solicitor testified that he read to her the altered copy of the Will to ensure that she knew and approved

of the alterations. She approved the new instructions though with a great imput from Mrs. Evans. The new Will was prepared accordingly.

The new Will was executed by the testatrix in the presence of her medical attendant, Mr. Hacon, and Mr. Ashby, a baker. Both testified that she acknowledged to them that the paper which she was about to sign was her Will and that she requested them to witness it. But neither heard the Will read over to her nor did they hear her declare that she understood its contents.

Opposition to the validity of the Will was based on influence by Mrs. Evans and the absence of satisfactory proof that the Will was read over to the testatrix before execution. Without calling upon the respondent's counsel, the Privy Council, in dismissing an appeal from the Prerogative Court of Canterbury, held:

> "The proofs in this case are quite sufficient; the two witnesses, Hacon and Ashby, prove the act of execution, and the sanity of the Testatrix. The instructions for the Will were taken by Blake, the same person who took the instructions for and drew the first Will, a very few months before. As to the objection that, the Testatrix being blind, the Will ought to have been read over to her, their lordships are of opinion, that in the case of a blind person, there must be a clear knowledge of the contents of the instrument; but that it is not necessary to produce evidence of the identical paper having been read over to the party. In this case the identical paper which the Testatrix signed as her Will, is proved by Blake to be the very Will which he constructed by the directions of the Testatrix. Their lordships are of opinion that the Appeal must be dismissed with costs."

The resemblance between Fincham's case and the instant case is that the identical paper which the testatrix signed as her Will is proved by Mr. Anderson to be the very Will which he constructed by the directions of the testatrix and which she thereafter treated as her Will, and that the attesting witness did not testify that he heard the Will read over to the testatrix. But consistent

with the policy of Mr. Anderson in preserving the privacy of the Will, the witness Tallow would certainly not have been privy to the reading of the Will, if it was in fact read to her. Accordingly, Mr. Anderson was the only witness called from whom such information could have been elicited, but having regard to the manner in which the matter was dealt with the opportunity was missed. And yet in considering this question of the testatrix having knowledge of the contents, regard must be had for her personality as it appears from the evidence. Despite the contention that she was illiterate it is indicative of the level of her intelligence that she acquired the skill to write her name and in so doing bolster her self-worth. Thus equipped, she conducted her affairs at the bank, recording her signature there despite the effort involved, she signed her passport, she signed for packets at the post office, she signed her decision for Christ card, she signed her enumeration card. I think these undertakings reflect the personality to which the appellant bore witness when she testified that the testatrix was "a very disciplined and strict person." Inasmuch, therefore, as Mr. Anderson was a stranger to her, I think it was well within her competence to transact such business as she did with him and to be fully cognizant of the contents of the Will without disclosing her literary incapacity. The length of time spent in writing her signature could well have been attributed to factors other than illiteracy.

Were Fincham v. Edwards (supra) the only authority to which reference could be made, I should nevertheless be satisfied that it supports a conclusion adverse to the appellant. But there are other decided cases which strongly favour such a decision and I will now turn to those cases. Although Christian v. Intsiful (1954) 1 W.L.R. 253 was decided on the basis of a statutory provision, viz. Ord. 49 r. 29 in Schedule to Courts Ordinance C. 4 of 1936 Revision Laws of the Gold Coast, it is

nevertheless helpful in showing what inferences can be drawn from the contents of a Will. Ord. 49 r. 29 provides:

> "Where the testator was blind or illiterate, the court shall not grant probate of the will, or administration with the will annexed, unless the court is first satisfied, by proof or by what appears on the face of the will, that the will was read over to the deceased before its execution, or that he had at that time knowledge of its contents."

The facts of that case, as appears from the headnote, are as follows:

> "An elderly testator, whose eyesight was defective, handed a document to a man who had been a solicitor's clerk who, at the testator's request, typed it out for him. It was then signed by the testator and witnessed as his will without it having been read over to him. The will was an elaborate one, leaving to a large number of parties, relations and friends of the deceased, various sums of money, and it was never suggested to the solicitor's clerk that he had any such knowledge of the testator's relationships and friendships. The evidence did not establish that the testator was incapable of reading the document."

The Privy Council, affirming the judgment of the West African Court of Appeal, held:

> "That if it could be shown plainly that the testator was incapable of reading, that would be sufficient proof that he was 'blind' in this context; but that, even assuming that he was blind, the court, in determining under Ord. 49, r. 29, whether it was satisfied 'by what appears on the face of the will... that he had at that time' - when the will was made - 'knowledge of its contents,' was entitled to take cognizance of the elaborate nature of the contents of the will, which was not a document which one who was not intimately acquainted with the testator's life could possibly have devised. Taking that matter into consideration, as well as the question of the testator's eyesight, it appeared that the testator in fact understood what he was doing and intended to do it, and the will was accordingly valid."

It is instructive to observe that, as in the instant case, there was a difficulty which Lord Porter, in delivering the judgment, stated at page 255 thus:

> "The difficulty rather occurs because certain matters which might have been elucidated in those courts were not dealt with, and consequently their Lordships are obliged to come to a conclusion upon the case as presented and to give their advice accordingly."

As can be seen, the judgment of the court was guided by the contents of the Will which could not have been prepared by a stranger to the testator's affairs. Another factor of significance is that by depositing the Will in the Court for custody he was indeed treating it as his Will which should bind his estate.

Parallels in the instant case are:

(a) The fact that the issue of the testatrix's illiteracy was not dealt with in the Court below as well as it might have been done.

(b) The contents of the Will which could not have come from Mr. Anderson's knowledge because he was a stranger to the testatrix.

(c) The testatrix by depositing the Will in the custody of the Church clearly recognized it as her Will and clearly indicated her estate to be bound by it.

In Parker v. Felgate (1883) 8 P.D. 171 a Will was opposed on the basis that it had not been duly executed, that the deceased was not of sound mind, memory, and understanding at the time of the execution of the Will and that she did not approve of the contents of the Will. It was held that:

> "If a testatrix has given instructions for her Will, and it is prepared in accordance with them, the will will be valid though at the time of execution the testatrix merely recollects that she has given those instructions but believes that the will which she is executing is in accordance with them."

This case supports the respondents' contention that the Will was prepared in accordance with instructions given by the testatrix and that she treated the Will as having been so made. Parker v. Felgate was followed in Perera v. Perera (1901) A.C. 354 in which it was held:

> "Where a testator is of sound mind when he gives instructions for a will, but at the time of signature accepts the instrument drawn in pursuance thereof without being able to follow its provisions, (held that) he must be deemed to be of sound mind when it is executed."

Barry v. Butlin (1838) 2 Moore 480 was cited by Mr. Scharschmidt in support of his submission that although evidence of the instructions given by the deceased and the reading over of the instrument are the most satisfactory proof of the testator's knowledge of the contents, they are not the only description of proof by which the cognizance of the contents of the Will may be brought home to the deceased, even in a case of doubtful capacity.

In that case suspicion arose from the fact that the solicitor who prepared the Will of a testator who was weak but of testable capacity, took a considerable benefit (one fourth of the estate) while the testator's only son was excluded. This gave rise to charges of conspiracy and fraud which were dismissed. The Privy Council (per Mr. Baron Parke), in confirming the validity of the Will as declared by the Prerogative Court, based its decision on:

(a) the probabilities arising on the evidence, and

(b) on the factum of execution.

The evidence considered covered fifty years of the testator's life and it recorded not only the testator's capacity but that for thirteen years prior to the date of the Will communication between the testator and his son had ceased. Hence his exclusion from the Will could be readily understood. The openness of the execution of the Will in the presence of respectable witnesses was accorded great significance by the Court. Accordingly, although there was no evidence of the reading over of the Will to the testator or of his orally acknowledging the contents, the Will was proclaimed valid.

Conclusion

In all the cases, the paramount consideration is the ascertainment of the real wishes of the testator and if those wishes are expressed in a manner consonant with the law the Court will pronounce in favour of the validity of the Will. As was the case in Barry v. Butlin, there is here good reason why the testatrix would favour persons of whom the appellant obviously does not approve. Even if it is true that when the appellant was a child the testatrix showed her great indulgence, the evidence does not disclose any basis for thinking that now that she is a married woman forty-three years of age, living overseas while the testatrix was cared for by beneficiaries under her Will, the testatrix should still be similarly disposed toward her. In my judgment, the challenge to the validity of the Will has been amply met. I would dismiss the appeal and affirm the judgment of the Court below insofar as it relates to the prayer for the Revocation of the Grant of Letters of Administration and declare that the Will be admitted to Probate. But that does not dispose of the plaintiff's claim in full. The claim reads:

> "(i) Revocation of the Grant of Letters of Administration made on the 15th day of January, 1986.
>
> (ii) That this Honourable Court will grant Probate of the Will dated the 8th day of September, 1981 in Solemn Form of Law.
>
> (iii) That the Defendant be made to account for all the benefits derived from the estate.
>
> (iv) That this Honourable Court grant such directions and orders for enquiries as it deems fit.
>
> (v) Further and other relief."

I therefore agree with the order proposed by Downer, J.A. on the remainder of the plaintiff's claim.

Order

Appeal dismissed and judgment of the court below partially

affirmed as stated above. The aspects of the statement of claim which have not been dealt with to be referred to the Registrar for the taking of accounts to determine the profits of the estate from the date when the appellant became accountable. Costs to the respondents in this Court and the Court below on trustee basis to be paid out of the estate.

DOWNER J.A.

The appellant Pearl Clarke was the niece of the deceased Eliza Drummond. The respondents Vivian Beckford and Alma Cater are the executors of Eliza's Will. The issue in this appeal is to determine whether Harrison J., was correct in ruling that the Will was valid, and therefore ready for probate. Despite knowing of the existence of the Will, the appellant Pearl had secured letters of administration for Eliza's estate. As she contended that the Will was invalid, her stance was that her aunt died intestate. If the decision on appeal is in favour of the respondent executors, then the letters of administration must be cancelled and an enquiry made after probate so that the appellant Pearl be made to render an account to the executors for the profit from the estate.

The respondents case for the validity of the Will

The principal witnesses for the respondent executors in the court below were Mr. F.K. Anderson an experienced attorney-at-law, who prepared the Will pursuant to instructions from the testatrix and Mr. Sylbert Tallow who witnessed it. Mr. Anderson related that he charged a fee of $60 for which a receipt (Exhibit 3) was issued. The receipt bears the same date 8th September 1981 as the date on the Will. Further, he gave instructions in accordance with his usual practice as to how the Will should be signed and witnessed.

Sylbert Tallow knew the testator from 1970 and he told the court that she was a good friend of his god-mother, Mrs. Gertrude Cater. His evidence was that he was present when the testator signed the Will and the other witness was Mr. G. Lawrence. Both were employees of the respondent, Beckford. Be it noted that Mrs. Cater was the mother-in-law of the respondent executor so that the disputants are related by blood or marriage.

It was against that background that Tallow gave evidence that the testatrix requested him along with Lawrence to give her a lift to the lawyer's office.

As for the evidence on behalf of the appellant, she testified that she knew the testatrix's handwriting as she always lived with her and was like a daughter to her aunt. Her knowledge was that the testatrix was illiterate and could barely write her name and when it was necessary for her to do so she had to practice. She had been living in Bermuda for some years but, kept in touch with her aunt by letters and remittances and she visited her in 1985 when her aunt was in hospital. In her opinion, the signature on the Will was not that of her aunt and she supported this evidence by the opinion of a handwriting expert, Superintendent Carl Major. He compared eight specimen documents which the testatrix had signed with her signature on the Will and it was his opinion that the signature on the Will was by a different hand from that on the eight documents examined. It is also important to mention that the Will was in the custody of Sister Stephanie who gave two copies of the Will to the respondent executor Beckford, in the presence of the appellant.

It is against this background that Harrison J., preferred on balance of probabilities, the evidence of Tallow who witnessed the testatrix's signature, to the opinion of the respondent hand-writing expert. Be it noted that Tallow, although called by the respondent, was a witness of the court: Harwood v. Baker [1840] 3 Moo P.C.C. 282 at 291 or 13 E.R. 117 see also Vol. 17 3rd ed. Halbury's Laws paragraph 892.

The crucial finding of the learned judge reads as follows:

> "7. In all the circumstances this Court finds that on a balance of probabilities it prefers the real evidence of Ex. 3 (receipt) and the testimony of witnesses Tallow and F.K. Anderson as to the execution of Ex. 2 (Will) by the deceased to comparison conclusion of the defendant's witness."

In coming to this conclusion, the learned judge relied on the credibility of Tallow and the inherent weakness in the expert evidence. The expert admitted that variations in handwriting could be accounted for in terms of age, posture and the amount of practice before a specific signature was made. The specimen signatures ranged over the years 1972 to 1983 while the Will was signed in 1981. The testatrix was born in 1907. Furthermore, the appellant Pearl recognised the signature of her aunt on a postal document (Exhibit 11), introduced in court by the respondent, while the expert evidence was that he could not come to an opinion as to who was the author of that exhibit.

Mr. Scharschmidt supported the validity of the Will by the principle of law stated in the headnote in Barry v. Bultin [1838] 2 Moore P.C. 480 at 482 or 12 E. R. 1089. It reads thus:

> "The onus of proving a Will being on the party propounding it, is in general discharged by proof of capacity, and the fact of execution; from which the knowledge of and assent to its contents by the testator will be assumed."

The principle was restated in Parker v. Felgate 8 P.D. 171 and approved in Perera v Perera [1901] A.C. 354 at 361. It ran thus:

> "... If a person has given instructions to a solicitor to make a will, and the solicitor prepares it in accordance with those instructions, all that is necessary to make it a good will, if executed by the testator, is that he should be able to think thus far: 'I gave my solicitor instructions to prepare a will making a certain disposition of my property; I have no doubt that he has given effect to my intention, and I accept the document which is put before me as carrying it out.' "

When this principle is applied to the facts of this case, there is no warrant for setting aside the substance of the learned judge's finding that probate ought to be granted.

The appellant sought to raise the issue of incapacity of the testatrix by suggesting that she was illiterate and that the Will was never read over to her by Anderson. The issue was

never pleaded or explored by cross-examination of Mr. Anderson in the court below. That was an evidential matter and could not be decided in favour of the appellant by this Court on the state of the pleadings or the evidence. It is, however, pertinent to cite the dictum of The Right Honourable Dr. Lushington in **Edwards v. Fincham** [1842] P.C. 198. At p. 206 he said:

> "... The proofs on this case are quite sufficient; the two witnesses, Hacon and Ashby, prove the act of execution, and the sanity of the Testatrix. The instructions for the Will were taken by Blake, the same person who took the instructions for and drew the first Will, a very few months before. As to the objection that, the Testatrix being blind, the Will ought to have been read over to her, their lordships are of opinion, that in the case of a blind person, there must be a clear knowledge of the contents of the instrument; but that it is not necessary to produce evidence of the identical paper having been read over to the party. In this case the identical paper which the testatrix signed as her Will, is proved by Blake to be the very Will which he constructed by the directions of the Testatrix. Their lordships are of opinion that the Appeal must be dismissed with costs."

Be it noted that Mr. Anderson testified that the Will he identified in court was the very Will he prepared from instructions of the testatrix. In this regard, it is necessary to delineate how the issues were pleaded in the court below. Paragraph 3 of the statement of claim reads:

> "3. The aforesaid Eliza Drummond died on the 20th day of April, 1985 leaving a Will dated the 8th day of September, 1981."

The defence and counterclaim shows how this issue was contested. Paragraph 4 reads:

> " The defendant denies that the document dated the 8th day of September, 1981 is the Will of the said ELIZA DRUMMOND and denies that it was signed by her."

That capacity, if challenged, ought to have been pleaded and explored in cross-examination is illustrated by the following passage in Cleare & Foster v. Cleare 1 L.R. P & D 655 at 657 Lord Penzance said this:

> "This was an application to strike out a plea, or, at any rate, a notice filed by the next of kin. The next of kin having traversed the due execution of the will and the capacity of the deceased, further pleaded that the deceased at the time of the execution of the alleged will, did not know and approve of the contents thereof, and he gave notice that he only intended to cross-examine the witnesses produced by the plaintiffs in support of the will. I hold it to be clear, since the careful decision in the case of Sutton v. Sadler 3 C.B. (N.S.) 87; 26 L.J. (C.P.) 264, that in all cases, whether through the medium of a presumption unrebutted, or of positive evidence to that end, the party who puts forward a document as the will of a testator, must establish the fact that the testator was competent to make a will when he executed it. This competency forms part of the proposition that a will was made. For if there is no competency—no testable capacity—there can be no will. I am of opinion that the testator's knowledge of the contents of his alleged will stands upon the like footing. That he knew and approved of the contents is a proposition implied in the assertion that a will was made by him." (Emphasis supplied)

It follows then that since the Will was valid pursuant to section 6 of the Wills Act, that the letters of administration were null and void and ought to be set aside as ordered below. There was, however, an omission to deal with the prayers at (iii) and (iv) in the statement of claim. They read as follows:

> "(iii) That the Defendant be made to account for all the benefits derived from the estate.
>
> (iv) That this Honourable Court grant such directions and orders for enquiries as it deems fit."

To appreciate these claims, it is pertinent to set out the following paragraphs of the Will:

> "2. I APPOINT Sister MARY ALMA ELAINE CATER of Stella Maris Convent, 62 Shortwood Road in the Parish of Saint Andrew and VIVIAN BECKFORD of 6, Summit Drive, Kingston 8, Businessman to be the Executors of this my Will.
>
> 3. I GIVE AND BEQUEATH my property known as 11 Harcourt Road in the Parish of Kingston to my said Executor Vivian Beckford, Anne Beckford the wife of Vivian Beckford, Tracey Beckford the daughter of Vivian and Anne Beckford and Rebecca Clarke now residing in Nassau Bahamas as tenants in common in equal shares.
>
> 4. I MAKE THE FOLLOWING PECUNIARY BEQUESTS:
>
> (a) To Hazel Grossett of 17 Harcourt Road the sum of ONE HUNDRED DOLLARS (100.00)
>
> (b) To Vernon Grossett of 17 Harcourt Road the sum of ONE HUNDRED DOLLARS ($100.00)
>
> (c) To Mr. Grossett of 17 Harcourt Road the father of Vernon Grossett the sum of ONE HUNDRED DOLLARS ($100.00).
>
> 5. I GIVE AND BEQUEATH to the said Anne Beckford my combination Buffet with glasswares therein, my Radio, my Book Case with figurines, three Lounge Chairs and my Dining Table and six chairs for herself absolutely.
>
> 6. The Rest Residue and Remainder of my estate both Real and Personal I give and Bequeath to Vivian Beckford, Anne Beckford, Tracey Beckford and Rebecca Clarke as to the Real Estate as tenants in common in equal shares and as to the Personal Estate in equal shares for themselves absolutely."

This aspect of the statement of claim should therefore be referred to the Registrar to take accounts so that the profits of the estate from the appropriate date be apportioned in accordance with the testatrix's bequests after there has been probate. To this extent, the order below is varied.

Costs are to the respondents both here and below, pursuant to section 47 Judicature (Supreme Court) Act and <u>In Re Grimthorpe</u>

[1958] 1 Ch. 615. Such costs ought to be paid from the estate on a trustee basis.

GORDON, J.A.:

I agree.

CA Nfld Probate Action — Execution of will — testatrix's knowledge and approval of contents — testatrix able to sign name but unable to read. Action for revocation of grant of letters of administration and for grant of will in solemn form and for accounts for benefit of estate. Whether will duly executed — whether testatrix had knowledge and approval of contents of will. Appeal against judgment declaring letters of administration null and void and decreeing probate in solemn form dismissed. Judgment varied in that claim for account and enquiries referred to Registrar to take accounts. Costs to be respondent's costs payable out of estate on a trustee basis.

Cases referred to:

Fuchard v Edwards (1842) P C 108.

Christian v Intsyfut (1954) 1 W.L.R 253

Parker v Felgate (1883) 8 P D 171

Perera v Perera (1901) A C 354

Barry v Butlin (1838) 2 Moore P C 480

Harwood v Baker (1840) 2 Moo P C C 282

Clare & Foster v Clare 1 L R P & D 655

In re Grimthorpe (1958) 1 Ch 615