[2020] JMCA Civ 19

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 70/2013

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE P WILLIAMS JA

IN THE MATTER of the Estate of CHARLES LEOPOLD LEIBA late of Lot 7, 3 Liguanea Avenue in the parish of Saint Andrew, Barrister, deceased, Intestate

AND

IN THE MATTER of an Application by BEVERLY VALLETA WARREN to be declared the daughter of CHARLES LEOPOLD LEIBA, Barrister, deceased, Intestate

AND

IN THE MATTER of The Status of Children Act

BETWEEN	**WINSTON LEIBA**	**1st APPELLANT**
AND	**BLANCHE BAILEY**	**2nd APPELLANT**
AND	**INEZ BERNARD**	**3rd APPELLANT**
AND	**LUCILDA KURLAND**	**4th APPELLANT**
AND	**LURLINE LEIBA**	**5th APPELLANT**
AND	**BEVERLY VALETTA WARREN**	**RESPONDENT**

Emile Leiba and Mrs Trudy-Ann Dixon-Frith instructed by DunnCox for the appellants

Hugh Small QC instructed by Lex Forte for the respondents

5, 6 November 2018 and 19 May 2020

MORRISON P

Introduction

[1] The late Charles Leopold Leiba (the deceased) died on 27 August 2011 without leaving a will. He was born in 28 October 1927 and was therefore 83 years of age at the time of his death. He had never married.

[2] By a fixed date claim form filed on 21 November 2011, Mrs Beverly Valetta Warren ('the respondent') applied for a declaration that she is the daughter of the deceased. The claim was brought pursuant to section 7(1)(b) of the Status of Children Act ('the Act'), on the basis that, during his lifetime, the deceased had admitted that he was the respondent's father.

[3] The appellants are all siblings of the deceased. By an order made by a judge of the Supreme Court on 14 June 2012, they were given permission to intervene in the proceedings for the purpose of challenging the respondent's application for a declaration of paternity.

[4] The respondent's application was heard by Batts J ('the judge'). In a judgment given on 19 July 2013, the judge made the following declarations and orders:

"1. That Beverly Valleta Warren is the daughter of Charles Leopold Leiba, deceased.

2. Paternity had been admitted by her father Charles Leopold Leiba during his lifetime. This declaration is made for the purposes of Section 7(1)(b) of the Status of Children Act.

3. Costs to the Applicant against the Interveners such costs to be taxed if not agreed."

[5] This is an appeal against the judge's judgment. In general terms, the appellants contend that the judge (i) misinterpreted the provisions of the Act as regards the appropriate standard of proof to be applied in applications for declarations of paternity under section 7(1)(b) of the Act; (ii) allowed various matters into evidence in breach of the rule against hearsay and other exclusionary rules; and (iii) came to the incorrect conclusion on the evidence. For her part, the respondent contends that, for the reasons given by the judge, the decision was correct and should not be disturbed.

[6] For the reasons which follow, after considering the provisions of the Act, the evidence, the careful submissions of counsel and the authorities, I have come to the conclusion that the appeal should be dismissed, with costs to the respondent to be agreed or taxed.

The statutory framework

[7] The Act came into force on 1 November 1976. As is well known, its principal objective was to abolish the status of illegitimacy of children born out of wedlock. Section 3(1) accordingly provides that, "for all purposes of the law of Jamaica the relationship between every person and his father and mother shall be determined

irrespective of whether the father and mother are or have been married to each other …"

[8] For present purposes, the relevant provisions of the Act are contained in sections 7, 8 and 10.

[9] Section 7(1) provides as follows:

> "The relationship of father and child, and any other relationship traced in any degree through that relationship shall, for any purpose related to succession to property or to the construction of any will or other testamentary disposition or of any instrument creating a trust, be recognized only if –
>
> (a) the father and the mother of the child were married to each other at the time of its conception or at some subsequent time; or
>
> (b) **paternity has been admitted by or established during the lifetime of the father (whether by one or more of the types of evidence specified by section 8 or otherwise)**:
>
> Provided that, if the purpose aforesaid is for the benefit of the father, there shall be the additional requirement that paternity has been so admitted as established during the lifetime of the child or prior to its birth." (My emphasis)

[10] Section 7(1)(b) directs attention to section 8, which is in the following terms:

> "(1) If, pursuant to section 19 of the Registration (Births and Deaths) Act or to the corresponding provisions of any former enactment, the name of the father of the child to whom the entry relates has been entered in the register of births … a certified copy of the entry made or given in accordance with section 55 of that Act or sealed in accordance with section 57 of the said Act shall be *prima*

facie evidence that the person named as the father is the father of the child.

(2) Any instrument signed by the mother of a child and by any person acknowledging that he is the father of the child shall, if executed as a deed or by each of those persons in the presence of an attorney-at-law or a Justice of the Peace or a Clerk of the Courts or a registered medical practitioner or a minister of religion or a marriage officer or a midwife or the headmaster of any public educational institution as defined in the Education Act be *prima facie* evidence that the person named as the father is the father of the child.

(3) …

(4) Subject to subsection (1) of section 7, a declaration made under section 10 shall, for all purposes, be conclusive proof of the matters contained in it.

(5) An order made in any country outside Jamaica declaring a person to be the father or putative father of a child, being an order to which this subsection applies pursuant to section 6, shall be prima facie evidence that the person declared the father or putative father, as the case may be, is the father of the child.

(6) The Minister may from time to time, by order, declare that subsection (5) applies with respect to orders made by any court or public authority in any specified country outside Jamaica or by any specified court or public authority in any such country."

[11] And section 10 provides as follows:

"(1) Any person who –

(a) …

(b) alleges that the relationship of father and child exists between himself and any other person; or

(c) …

> may apply in such other manner as may be prescribed by rules of court for a declaration of paternity, and if it is proved to the satisfaction of the Court that the relationship exists the Court may make a declaration of paternity whether or not the father or the child or both of them are living or dead.
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> (2) Where a declaration of paternity under subsection (1) is made after the death of the father or of the child, the Court may at the same or any subsequent time make a declaration determining, for the purposes of paragraph (b) of subsection (1) of section 7, whether any of the requirements of that paragraph have been satisfied.
>
> (3) …
>
> (4) …"

[12] Taken together, these sections establish two routes to the establishment of paternity, depending on the purpose for which the order is being sought. Firstly, for any purpose relating to succession to property, or construction of a will, or other testamentary disposition, or any instrument creating a trust, paternity will be recognised only if (a) the father and mother of the child were married to each other at the time of conception, or at any time after that; or (b) paternity has been admitted by or established during the lifetime of the father. In the latter instance, paternity must have been established "by one or more of the types of evidence specified in section 8 **or otherwise**" (my emphasis).

[13] The types of evidence specified in section 8 may be summarised as (i) where the father's name has been entered in the register of births as father of the child, a certified copy of the relevant entry; (ii) an instrument in writing signed by the mother and any

person acknowledging paternity of the child in question, provided that it is either executed as a deed or signed in the presence of one of the categories of persons mentioned in subsection (2); (iii) a declaration of paternity under section 10; and (iv) an order made in any country outside of Jamaica declaring a person to be father or putative father of a child, provided that the Minister has by order declared that orders made by any court or public authority in that country shall be so recognised in Jamaica. Production of any the items of evidence listed at (i), (ii) and (iv) above will be *prima facie* evidence that the person named as the father is the father of the child; while production of the declaration of paternity listed at (iii) shall, subject to section 7(1), be conclusive proof of paternity. The significance of a declaration of paternity under section 10 being made subject to section 7(1) is that, where matters relating to succession to property and the like are in issue, the requirements of proof for a declaration under the latter section will also need be satisfied.

[14] Secondly, for any purpose not related to succession and the like, a declaration of paternity may be sought under section 10. In such cases, it must be proved "to the satisfaction of the Court" that the relationship of father and child exists.

[15] The first of the principal questions of law which arise on this appeal is whether the words "or otherwise" in section 7(1)(b) of the Act are to be interpreted restrictively, that is, as strictly referable only to "the types of evidence specified in section 8"; or whether they are to be taken as having enlarged the categories of evidence upon which reliance may be placed for the purposes of establishing paternity. Or, to put it in

language more familiar to lawyers, are the words "or otherwise" to be interpreted *ejusdem generis* with the types of evidence specified in section 8?

[16] The second, related, question is what is the standard of proof to be applied by a judge in determining a claim to paternity under section 7(1)(b)?

The evidence in summary

[17] All of the evidence was given on affidavit, supplemented in the case of the majority of them by cross-examination. In addition to her own evidence, the respondent relied on the evidence of a number of witnesses. For their part, the appellants placed full reliance on the evidence of the first named appellant, Mr Winston Leiba. So as to avoid confusion with Mr Emile Leiba, who appeared for the appellants, and without intending any disrespect, I will refer to Mr Winston Leiba as 'Winston' for the remainder of this judgment.

[18] The deceased lived a long and, from all indications, a rewarding life. Called to the Bar in the early 1960s, he practised from chambers at 66a Duke Street in Kingston, first, as a barrister-at-law and then, after 1972, as an attorney-at-law. It appears that over time he became a skilled and avid investor, with substantial share-holdings in several well-known publicly traded companies. He also owned homes in Jamaica and in Canada, with the latter being a country which he liked and visited often, especially in the last 10 years of his life.

[19] The respondent[1], who was born on 11 April 1946 at the Public General Hospital in Port Maria in the parish of Saint Mary, has lived in Canada for virtually all of her adult life. Her mother was one Miss Ena Johnson, who was 18 years of age at the time of her birth. Although the respondent was registered at birth as 'Beverly Valleta Wong', her father's name does not appear in the relevant entry in the Register of Births. As far as the respondent was aware, her mother, who died on 6 October 1997, was not at any time married to, or involved in, a relationship with a Mr Wong.

[20] The respondent grew up with her mother in Kingston. She gave birth to her first child, Gary Charles Anthony Williams ('Mr Williams'), at the Victoria Jubilee Lying-in Hospital in 1961. At age 22, she relocated to Toronto, Canada, where she married James Warren in 1971. She is the mother of two other children and, as at the date of commencement of these proceedings, grandmother to six grandchildren.

[21] Her evidence was that she first met the deceased, referred to by her as "my father", when she was five years of age. During her childhood years, the deceased visited her regularly and she spent time visiting with him and his parents at their home in Kingston. She developed a close relationship with the deceased and she stated[2] that "during his lifetime [the deceased] openly acknowledged me as his daughter". So much so, that the deceased would include her in his investments and financial affairs. And her children and grandchildren acknowledged and accepted the deceased as their

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[1] The respondent provided two affidavits in support of her claim: Affidavit of Beverly Valetta Warren, sworn to on 1 November 2011 and Affidavit of Beverly Valleta Warren sworn to on 18 February 2013.
[2] Respondent's first affidavit, para. 9

grandfather and great grandfather. She knew and was well known to members of the deceased's family since childhood and over the years was in occasional contact with some of them. She and the deceased enjoyed a harmonious relationship, which lasted right up to the time of his death from complications of a heart attack at a health care centre in Mississauga, Canada on 27 August 2011. At the time of his death, the deceased was in Canada visiting with the respondent and her family and she saw to all of his funeral arrangements.

[22] The respondent produced a number of documents, the admissibility of many of which was challenged by the appellants. Among other things, she exhibited a certified copy of a hand-written letter dated 30 May 2000 (which was admitted in evidence as 'BVW17'). The note was written on what appeared to be the deceased's professional note-paper, with the printed details of his office address ("66a Duke Street, Kingston") struck out. In the note, which was addressed "Dear Bev" and signed "Daddy", the deceased conveyed information about an investment which he had made at a bank, apparently for the respondent's benefit. The respondent also exhibited a copy of a letter from The Bank of Nova Scotia in Mississauga dated 7 October 2011 (which was admitted in evidence as 'BVW19'). This letter confirmed the existence of a savings account at that branch of the bank, held in a joint account in the names Charles L Leiba and Beverly V Warren. The account, which was in good standing, was opened on 7 August 2001 and the signing authority was "anyone to sign". And finally, there was a Father's Day card, which, according to the respondent, was sent to the deceased by her grandchildren, Symone and Shynice, on 19 June 2011. The inscription on the card read,

"Dear Grandpa Charles, I hope you have an amazing Father's day, you deserve it. Welcome back to Canada by the way".

[23] The respondent relied on the evidence of several witnesses. Mr Crafton Stephen Miller, a well-known attorney-at-law, testified[3] to a 50-year personal and collegial relationship with the deceased. Among other things, Mr Miller testified that in or about "early 2006" the deceased visited him at his office in Kingston and introduced Mr Gary Williams to him as his grandson. Mr Williams was in need of assistance with a legal matter. At that time, the deceased told Mr Miller that he was "quite prepared to assist Gary in any Legal Cost should the circumstance arise"[4], and Mr Williams had remained a client of his firm since that time.

[24] Miss Jean Elizabeth Forde[5], a 68 year old librarian residing in Canada, described the deceased as a "friend of my family for many years"[6]. She first met him in 1986. She became and thereafter remained his friend and confidante for the rest of his life. Initially, they would meet and spend time together during her annual visits to Jamaica, but they also remained in touch otherwise. In or about 2002, the deceased purchased a house in Mississauga and began spending his summers in Canada. While there, they would meet regularly for lunch and occasionally went out in the evenings. The deceased also acted as her legal counsel and provided her with transportation and

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[3] Affidavit of Crafton Stephen Miller, sworn to on 28 October 2011
[4] Ibid, para. 8
[5] Miss Forde provided two affidavits in support of the claim: Affidavit of Jean Elizabeth Forde, sworn to on 14 November 2011, and Affidavit of Jean Elizabeth Forde, sworn to on 7 February 2012.
[6] Miss Forde's first affidavit, para. 3

accommodation at his home on Liguanea Avenue in Kingston when she was in Jamaica. Over the years, they spoke regularly by telephone, "many hours at a time, often late into the night, whether he was in Jamaica or Canada"[7]. During these conversations, the deceased would share with her "intimate details of his personal life and business affairs"[8].

[25] Of particular relevance to the issue before the court, Miss Forde added the following[9]:

> "17. That [the deceased] shared with me stories about his siblings, his daughter BEVERLY VALLETA WARREN, his grandchildren (in particular GARY WILLIAMS) and his great grandchildren.
>
> 18. That [the deceased] spoke frequently about his daughter BEVERLY VALLETA WARREN who lives in Canada and with whom he established a joint account the proceeds of which were for her future use and benefit.
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> 19. That [the deceased] spoke frequently about his affection for his grandson GARY WILLIAMS and his reliance on his grandson GARY WILLIAMS to look after his affairs in Canada during his absence ..."

[26] On 12 December 2011, some three and a half months after the deceased had passed on, Miss Forde accompanied Mr Williams to the deceased's home at Lot 7, 3 Liguanea Avenue, Kingston 6. A number of what appeared to be personal items were found in a garbage bag in the house. Among other things, they included a Christmas

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[7] Ibid, para. 14
[8] Para. 15
[9] Paras 17-20

card "to Dad from Bev and Jim", a birthday card "to Great Grandpa from Symone and Shynice", a handwritten thank you card "to Great Grand Father", from Shynice, photographs of the deceased, the respondent and members of her family, other Christmas and Father's Day cards and personal notes from members of the respondent's family in Canada, and a folder with stationery headed "Chambers, 66a Duke Street, Kingston".

[27] All of the items found in the garbage bag were produced by Miss Forde[10] and, again over objection from the appellants, the judge admitted them in evidence. Although the reason for admitting the documents was not precisely stated by the judge in his judgment, it may, I think, be gleaned from the following passage[11]:

> "[12] Counsel for the [appellants] objected to the documents which were attached to the affidavit of Jean Forde. Miss Mayhew[12] submitted that what was important was not the truth of the contents of the documents but whether they were found among the personal possessions of the deceased … I ruled that the documents were admissible."

[28] Mr Williams was over 50 years of age by the time of the deceased's passing. He described his relationship with the deceased in this way[13]. When he first met the deceased at his home in Canada some 10 years before his death, the deceased

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[10] Miss Forde's second affidavit, para. 6, exhibits "JEF 1- JEF 10"
[11] At para. [12]
[12] The respondent was represented at the trial by Mrs Symone Mayhew
[13] Mr Williams also provided two affidavits in support of the claim: Affidavit of Gary Charles Anthony Williams, sworn to on 17 October 2012, and Affidavit of Gary Charles Anthony Williams, sworn to on 17 February 2013

introduced himself to him as his grandfather. During their discussions on that occasion, the deceased told him that his mother, the respondent, had named him 'Charles' after him. When the deceased decided to purchase a house in Canada in or around May 2002, he entrusted Mr Williams with the responsibility of assisting him with the purchase, identifying a suitable house and making payments on his behalf.

[29] Over time, they developed a close relationship. The deceased would usually introduce him as his grandson, as he did, for instance, when he introduced him to Mr Crafton Miller in Kingston. Winston was known to him as the deceased's brother. On one occasion, in a telephone conversation between him and Winston while the deceased was still alive, Winston referred to the deceased as "your grandfather". And, in another telephone conversation, shortly after the deceased's passing, Winston told him that the respondent was the only person the deceased had ever mentioned to him as his child. Mr Williams produced an audio recording which he had made of this last conversation with Winston and the transcript of the recording supported his account of what Winston told him about the respondent's status as the deceased's only child.

[30] Mr Williams confirmed Miss Forde's account of their visit to the deceased's home at Liguanea Avenue on 12 December 2011 and the finding of the items exhibited to her affidavit in a garbage bag inside the house.

[31] Other witnesses also spoke to the deceased having family in Canada. These were Mr Enos Levi Forrest, who described himself as a friend of the deceased of many years; Ms Yvonne Tillica Carty, a longstanding tenant of the deceased, who lived at one of

several apartments which he owned at Camp View Apartments in Kingston; and Mr Newton George Gooden, another of the deceased's tenants at Camp View Apartments[14]. All three witnesses stated that they enjoyed a good relationship with the deceased, and that he often mentioned his daughter and her children in Canada, and his regular visits to them.

[32] Winston was the appellants' only witness[15]. He accused the respondent of seeking to mislead the court by claiming to be the daughter of the deceased. He said that he had known the deceased all his life and that they had a close relationship. When the deceased was in Jamaica, they would meet each other as often as two to three times each week. He lived with his parents in their home for almost all of his life until they died and at no time did any daughter of the deceased visit the home. As a result of a visit to Canada in 2001, the deceased fell in love with the country, bought a house there in 2002 and begun to spend the summer months in Canada and return to Jamaica in the winter. For most of the deceased's trips to Canada, he was the one who usually took him to the airport and met him on his return. The deceased at no time indicated to him that he had any biological offspring in Canada or anywhere else. While in Canada, the deceased formed relationships with various persons with Jamaican connections. He also assisted a large number of persons with school fees, medical

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[14] See Affidavit of Enos Levi Forrest, sworn to on 13 September 2012; Affidavit of Yvonne Tillica Carty, sworn to on 16 September 2012; and Affidavit of Newton George Gooden, sworn to on 13 September 2012.

[15] Winston swore two affidavits: Affidavit of Winston Leiba, sworn to on 25 May 2012 and Affidavit of Winston Leiba, sworn to on 23 January 2013

expenses and monetary gifts from time to time. He also acted as foster parent and foster guardian to many persons with whom he formed close relationships. But the deceased never once mentioned the respondent's existence to him or any of his siblings.

[33] Winston's theory of the case was encapsulated in the following paragraph of his first affidavit[16]:

> "20. My own view is that [the deceased], while in Canada for approximately 6 months each year from 2002 until his death had a close relationship with [the respondent] and her children. [The deceased] may have taken on the role of a foster parent in that relationship. During conversations these persons would have learnt a great deal about his life. These bits of information along with his repeated acts of kindness and generosity are now being used to build a case to claim paternity now that [the deceased] has passed."

[34] In his second affidavit, Winston provided additional details to demonstrate the closeness of his relationship with the deceased and the role he would play in relation to the deceased whenever he travelled to Canada. In specific response to the evidence of Mr Gary Williams, Winston denied his account of the telephone conversations between them. He insisted that he at no time referred to the deceased as Mr Williams' grandfather, nor did they have any conversation about how many children the deceased

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[16] Para. 20

had. He reiterated[17] that he had "never known or heard from [the deceased] or anyone else that he had a biological child". The affidavit ended on this note[18]:

> "I was informed by [the deceased] and verily believe. That when he established contact with [the respondent] and her family they responded with great enthusiasm and that the display of affection was largely due to their belief, as a result of his disclosures of his wealth, that he was a very rich man."

[35] Save for Mr Crafton Miller and Mr Enos Forrest, all of the witnesses who provided affidavits were vigorously cross-examined. I will not burden this summary with a recounting of the details of the cross-examination of each of them. I think it is sufficient to say that, under cross-examination, none of the witnesses was substantially diverted from the account given on affidavit. At the end of the day, therefore, the essential shape of the case on both sides remained as I have summarised it above.

What the judge found

[36] In his judgment given on 19 July 2013, after a careful review of the evidence, the judge concluded as follows[19]:

> "[41] Suffice it to say that I find that the evidence supports the fact that [the deceased] had in his lifetime acknowledged the [respondent] as his child. There is a plethora of documentary evidence to support this as well as oral evidence from several persons to whom he spoke. I accept that some of these documents were found at the

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[17] At para. 13
[18] Para. 17
[19] Judgment, para. [41]

> premises being the last residence of [the deceased]. The presence at his home of these photographs and greeting cards can only be explained by the fact that [the deceased] was [the respondent's] father. I accept also that the tape recorded conversation accurately reflects what was stated in the telephone conversation. I accept as authentic the handwritten letter dated 30th May 2000 and, find that it was written by [the deceased] to [the respondent]. I find as a fact that [the deceased] was [the respondent's] biological father and that he acknowledged her as such in his lifetime."

[37] The judge expressly rejected[20] the submission made on behalf of the appellants that "a court should be very reluctant to issue declarations of paternity for succession purposes, unless the court is absolutely sure, by virtue of almost undisputable evidence of paternity, such as those set out in Section 8 of the Act or DNA evidence". After considering the provisions of sections 7, 8, 9 and 10 of the Act, the judge stated the position as follows[21]:

> "Where persons claiming or interested in an estate have within their possession the proof specified in Section 8 paternity may be recognized for succession purposes and the relevant authorities may treat with such persons. That is prima facie and in the absence of any challenge or allegation to the contrary. (See Section 7). A Declaration by a court pursuant to Section 10 is one of the 'proofs' specified in Section 8 but is conclusive proof.
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> The phrase 'subject to Section 7 (1)' which appears in Section 8 (4) is alerting the reader that any such Declaratory Judgment must bear in mind the stipulation in Section 7 that for succession purposes the court ought to be satisfied that either (a) the father and mother were married or (b)

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[20] At paras. [42]-[43]
[21] At para. [44]

> paternity was either admitted or established doing [sic] the lifetime of the father. It is for this reason also that Section 10 (2) authorizes the Court to state whether the requirements of Section 7 (1) (b) have been satisfied."

[38] As regards the standard of proof required for a declaration under section 7(1)(b), after referring to the decision of the Court of Appeal of Saint Vincent and the Grenadines in **David Adolphus McKenzie v David Sampson (Intended Administrator of the Estate of Elisha Sampson, deceased)**[22] ('**McKenzie v Sampson**'), the judge said this[23]:

> "[46] The Court therefore recognizes that there can be other types of evidence which might attain the requisite standard albeit not formally witnessed in the manner prescribed in section 8. These include as in the present case, letters, greeting cards, and the words of the deceased as reported by witnesses of quality and truth. I agree that the standard could be described as on a high balance of probabilities."

[39] Then, after referring to the later decision, also of the Court of Appeal of Saint Vincent and the Grenadines in **David Sampson (Intended Administrator of the Estate of Elisha Sampson, deceased) v David Adolphus McKenzie**[24] ('**Sampson**

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[22] (Unreported), Court of Appeal of Saint Vincent and the Grenadines, Civil Appeal No 12/2003, judgment delivered 29 March 2004
[23] At para. [46]
[24] (Unreported), Court of Appeal of Saint Vincent and the Grenadines, Civil Appeal No 6/2005, judgment delivered 5 December 2005

v McKenzie'), the judge added[25] that, "[i]t is not the type of evidence that is limited but it is its cogency".

[40] And, finally, in respect of the words, "or otherwise", the judge held[26] that "there is no reason to apply the *ejusdem generis* rule".

The grounds of appeal

[41] The appellants filed 16 grounds of appeal, many of which are overlapping. I will nevertheless set them all out below:

> "i. The learned Judge erred in law and/or wrongly exercised his discretion by finding that the Respondent is the biological daughter of Charles Leopold Leiba.
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> ii. The learned Judge erred in law and/or wrongly exercised his discretion by finding that the evidence supports the fact that Charles Leopold Leiba had in his lifetime acknowledged the Respondent as his biological child.
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> iii. The learned Judge erred in law and/or wrongly exercised his discretion by finding that Charles Leopold Leiba admitted his paternity of Beverly Valleta Warren during his lifetime by one or more of the types of evidence specified in section 8 or otherwise of the Status of Children Act.
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> iv. The learned Judge erred in law and/or wrongly exercised his discretion by finding the proof and evidence lead [sic] by the Respondent in support of her Application was of the strength and character required by Section 8 of the Status of Children Act.
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> v. The learned Judge erred in law and/or wrongly exercised his discretion by finding that the phrase 'or otherwise' as appears in section 7(1)(b) is not to be read *ejusdem generis*

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[25] At para. [48]
[26] At para. [49]

with the types of evidence specified in section 8 of the Status of Children Act in determining the strength of the evidence required for proof of paternity.

vi. The learned Judge erred in law and/or wrongly exercised his discretion by finding that the principle of *ejusdem generis* is not applicable to an examination of the strength of the evidence before the Court in determining the paternity of the Respondent for the purposes of section 7 of the Status of Children Act.

vii. The learned Judge erred in law and/or wrongly exercised his discretion by finding that paragraphs 3 – 9 and 10 of the Affidavit of Yvonne Tillica Carty dated 16th September 2012 was not hearsay evidence and therefore admissible into evidence.

viii. The learned Judge erred in law and/or wrongly exercised his discretion by dispensing with and/or curtailing the requirement of notice under section 31E of the Evidence Act in respect of the hearsay evidence which was placed before the Court and set out in the various Affidavits relied on by the Respondent.

ix. The learned Judge erred in law and/or wrongly exercised his discretion by finding that the evidence required for proof of paternity for succession purposes is not limited by section 7(1)(b) of the Status of Children Act.

x. The learned Judge erred in law and/or wrongly exercised his discretion by admitting into evidence documents attached to the Affidavit of Jean Forde filed November 21, 2011.

xi. The learned Judge erred in law and/or wrongly exercised his discretion by taking into consideration the documents attached to the Affidavit of Jean Elizabeth Forde filed November 21, 2011 and finding that same were evidence of an admission of paternity by Charles Leopold Leiba during his lifetime.

xii. The learned Judge erred in law and/or wrongly exercised his discretion by finding that there was enough evidence before him to demonstrate the authenticity of an alleged handwritten letter dated 30th May 2000 sent by Charles

Leopold Leiba to the Respondent (Exhibit BVW17) and admitting same into evidence.

xiii. The learned Judge erred in law and/or wrongly exercised his discretion by admitting into evidence exhibit BVW 19.

xiv. The learned Judge erred in law and/or wrongly exercised his discretion by failing to strike out the Affidavit of Gary Williams filed on the 19th February 2013 or parts thereof on the grounds that it did not comply with the Evidence Act, contained statements of opinion and was self-serving.

xv. The learned Judge erred in law and/or wrongly exercised his discretion by finding that the tape recording presented to the Court is a true reflection of one conversation between Winston Leiba and Gary Williams on the 11th October 2011.

xvi. The learned Judge erred in law and/or wrongly exercised his discretion by finding that the Respondent is the biological daughter of Charles Leopold Leiba, with there being no evidence of a relationship having existed between the Respondents mother and Charles Leopold Leiba and the Respondent's surname being Wong on her birth certificate and/or there being no explanation as to why the Respondent's surname was Wong."

[42] I hope that I do no disservice to these detailed grounds of appeal by subsuming them under the following three questions:

1. What is the proper construction of sections 7, 8 and 10? In particular, (i) are the words "or otherwise" in section 7(1)(b) to be interpreted *ejusdem generis* with the words immediately preceding them; and (ii) what is the standard of proof required in proceedings under the Act, especially with regard to claims under section 7(1)(b)? ('The statutory construction issue') (Grounds v, vi and ix)

2. Did the judge err in (i) dispensing with the requirements of section 31E of the Evidence Act and in admitting hearsay evidence contained in the various affidavits filed in the support of the claim; and (ii) exercising his discretion to admit various documents in evidence, despite the objections made to their admissibility by the appellants? ('The admissibility issue') (Grounds vii, viii, x, xi, xii, xiii, xiv and xv)

3. Did the judge err in finding that the evidence adduced by the respondent was sufficient to ground a declaration of paternity under section 7(1)(b)? ('The sufficiency of evidence issue') (Grounds i-iv and xvi)

The statutory construction issue

[43] This issue lies at the heart of the case. Both counsel referred us to four principal authorities on the proper construction of the Act. Among them are **McKenzie v Sampson** and **Sampson v McKenzie**, the two decisions of the Court of Appeal of Saint Vincent and the Grenadines to which the judge had referred, and **Re Cato**[27], a decision of the High Court of the same jurisdiction. All three decisions are concerned with the equivalent provisions of the Status of Children Act of Saint Vincent and the Grenadines ('the Vincentian Act'), which are in all material respects identical to sections

[27] (Unreported), High Court of Saint Vincent and the Grenadines, Civil Suit No 43/2000, judgment delivered 3 November 2000

7, 8 and 10 of the Act. The fourth authority is the decision of this court in **Madge Young-Lee v Zailia Young**[28] (**Young-Lee v Young**).

[44] I have found all of these authorities to be of value and I will therefore start the discussion on this issue by considering them.

[45] The first in time is the decision at first instance of Mitchell J in **Re Cato**. In that case, after rehearsing in some detail the categories of evidence referred to in section 8 of the Vincentian Act, Mitchell J considered[29] that "[t]he forms of evidence envisaged by section 8 as acceptable as prima facie evidence of proof of paternity are not light: the standard is heavy and weighty". After observing that applications under the Vincentian Act "are invariably made when the father is dead", Mitchell J concluded that the only answer to the question of how the words "or otherwise" should be interpreted that was consistent with the general scheme of the legislation was that the *ejusdem generis* rule should apply. This is how the learned judge put it:

> "Can the Legislature have meant by the words 'or otherwise' that the type of evidence that will be acceptable to the court under section 8 is to be lesser when the father is not around to explain himself? Especially when the application will have serious consequences for the family of the deceased left behind? What rule of interpretation should the court apply to understand what the legislature meant by the words 'or otherwise?' It seems that the proper and appropriate rule to apply to the words 'or otherwise' in cases of disputed paternity is the *eiusdemi generis* [sic] rule of interpretation. That is, the words 'or otherwise' in section 7(1)(b) only

[28] [2012] JMCA Civ 9
[29] At para. [13]

> make sense if they mean 'of a similar type' to those itemized in section 8. Section 8 would not have been limited, as it was by the Legislature, to forms of documentary admission by the alleged father and findings by a court if the applicant need only produce any lesser type of self-serving evidence. In disputed cases, the intention of the legislature appears to have been that only evidence of the type provided for by section 8 or similar types of evidence is to suffice to satisfy the court that the relationship of father and child was recognized by the alleged father. Although the standard of proof in the High Court in applications for paternity declarations is the civil standard of proof on a balance of probabilities, the Legislature has provided that the High Court must look for a higher level of evidence than is acceptable in the Magistrate's Court in affiliation proceedings. Mere corroboration is not sufficient in applications under the Act as it is when applications are made under the **Maintenance Act**. The High Court is not seeking to determine whether or not the mother has proved that the child is the child of the alleged father, it is seeking to determine whether or not it is satisfied on a balance of probabilities that the father either admitted paternity during his lifetime, or that paternity was established during the lifetime of the father. It is within this context that corroboration becomes relevant. The more evidence of the type prescribed by the Legislature there is that supports the allegation of the mother and/or of the child of the admission of paternity or the establishment of the paternity, particularly in a disputed case, the better."

[46] **Re Cato** was approved by the Court of Appeal in **McKenzie v Sampson**. In that case, the appellant, Mr David McKenzie, applied for a declaration that the late Elisha Sampson was his father. The application was opposed by the respondent, Mr David Sampson, who was a nephew of the late Elisha Sampson. The trial judge declined to make a declaration of paternity under section 10(2)), on the ground that "the claimant's statement of case and affidavits in support do not meet the requirements of

section 8 or otherwise so as to enable the Court to make a declaration under section 10(2) determining that the requirements of section 7(1)(b) of the Act have been satisfied". However, the trial judge considered that it would be in order for him to make what he described as "the declaration of paternity simpliciter": that is, a declaration of paternity under section 10(1). This declaration did not entitle Mr McKenzie to succeed to any property of the late Elisha Sampson.

[47] Mr McKenzie appealed against the refusal of the declaration under section 10(2). In a judgment written by Saunders JA, as he then was, the Court of Appeal[30] concluded, after a full review of the provisions of sections 7, 8 and 10, that the Vincentian Act "does indeed permit the making of two separate declarations in circumstances where an alleged father is deceased and an applicant wishes to succeed to the estate of the deceased"[31]. Saunders JA explained the interplay between sections 7, 8 and 10 in this way[32]:

> "When read together, sections 7, 8 and 10 provide for two different standards of proof. If the alleged father is alive, and/or if he is dead but the applicant is uninterested in succeeding to property, then a court merely has to be satisfied that the relationship of father and child exists in order to make a declaration of paternity. This is what has been referred to as a declaration of paternity simpliciter. Mitchell, J. in **Re Cato**, observed that the standard of proof for a declaration of paternity simpliciter is much lower than would be acceptable in affiliation proceedings. On the other hand, where the alleged father is dead and the applicant

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[30] Saunders JA, Redhead JA (Ag) and Gordon JA (Ag)
[31] At para. [17]
[32] At para. [15]

> wishes to go further and succeed to property of his/her deceased father, then the applicant can only obtain the further declaration, referred to in section 7(2), if evidence of the kind outlined in section 8 is forthcoming."

[48] Saunders JA then went on[33] to endorse Mitchell J's interpretation of the words "or otherwise" in section 7(2) as meaning "evidence of a type that is similar to the kind of evidence itemized in section 8". However, at the end of the day, the appeal was allowed on the basis that the trial judge ought not to have disposed of Mr McKenzie's application purely on the strength (or lack of it) of his statement of case and the affidavits filed in support of it. Rather, the trial judge ought to have permitted a trial to be held so that the serious factual disputes which emerged on the affidavits could be fully explored.

[49] So Mr McKenzie's application for a declaration that the requirements of section 7(1)(b) had been satisfied had to be tried again. He succeeded this time around. The trial judge accordingly made the declaration that "paternity of the said Elisha Sampson had been admitted by him and/or established during his lifetime, and that the requirements of section 7(1)(b) of the Status of Children Act ... have been satisfied". And now, it was Mr David Sampson's turn to be dissatisfied, thus giving rise to the

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[33] At para. [16]

second outing before the Court of Appeal[34] between the same parties in relation to the same dispute.

[50] The appeal in **Sampson v McKenzie** proceeded on the basis that Saunders JA's analysis of the true meaning and import of sections 7, 8 and 10 of the Vincentian Act in the previous case was an accurate reflection of the law of Saint Vincent and the Grenadines. As Rawlins JA (as he then was) observed[35], the single issue in the appeal was "whether, after the trial, the learned Judge was correct when he found that the evidence adduced was sufficient 'other' evidence under section 7(1)(b) of the Act to establish that the deceased either admitted paternity of David McKenzie during his lifetime, or that paternity was established during the lifetime of the deceased, on a balance of probabilities". It was therefore an appeal against the trial judge's findings of fact.

[51] Apart from his own evidence that the late Elisha Sampson treated him as his son, Mr McKenzie placed particular reliance on two letters which Mr David Sampson wrote to Elisha Sampson from England several years before[36]. In both letters, Mr David Sampson enquired after various family members, including someone called "Peter". It was common ground that this was a reference to Mr McKenzie.

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[34] Alleyne CJ (Ag), Barrow and Rawlins JJA
[35] At para. [16]
[36] The letters were dated 13 September 1980 and 22 February 1981 respectively.

[52] Rawlins JA considered[37] that, despite the appellate court's traditional disinclination to disturb a trial judge's findings of fact, it was open to the court to "interfere in a case in which it determines that the trial Judge erred in finding that the evidence that was provided was sufficient to meet the requirements laid down by the Act for a declaration of paternity for the purpose of sharing in property". In the result, it was held that the evidence which Mr McKenzie adduced in support of the claim was insufficient to meet the required threshold. This is how Rawlins JA explained the decision[38]:

> "I do not doubt that the evidence that was adduced on behalf of Mr. McKenzie was cogent and credible. However, a declaration of paternity for the purpose of succession to property must not only be cogent and credible, it must also be of the quality that would satisfy the requirement under section 7(1)(b) of the Act. Although it is a question of fact, it is also a question of sufficiency of the evidence to meet the statutory requirement, which is within the purview of this Court. On the authority of **David Adolphus McKenzie**, what section 7(1)(b) of the Act requires is some evidence that is other than the types of evidence specified in section 8 of the Act, though not less convincing, which shows that the deceased admitted paternity of Mr. McKenzie, or that paternity was established, during the lifetime of the deceased. Unfortunately, it is a particularly onerous requirement given the oral tradition that there is in the Caribbean. So that although there are members of the family who are of the view that the relationship between the deceased and Mr. McKenzie was similar to the relationship of father and son, this was not sufficient for the purposes of section 7(1)(b) of the Act."

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[37] At para. [21]
[38] At para. [26]

[53] The principal issue in **Young-Lee v Young** was whether the procedure adopted by the trial judge, who granted a declaration of paternity under section 10(2) of the Act after an *ex parte* hearing, was correct. The appellant submitted that the respondent's application, being concerned with succession to property, should not have been heard *ex parte*, as all parties with an interest in the outcome of the application should have been given notice of it. The respondent maintained that this was a matter for the discretion of the judge hearing the application and that her decision in this case should not be disturbed.

[54] In a judgment written by N McIntosh JA, the court accepted the appellant's submission and allowed the appeal in part[39]. It was ordered that the declaration of paternity granted by the trial judge under section 10 of the Act was "not recognizable for the purposes of section 7(1)(b) of the Act". The matter was therefore remitted to the Supreme Court for a determination, after an *inter partes* hearing, of whether the second declaration under section 10(2) of the Act should be granted.

[55] **Young-Lee v Young** is therefore authority for saying that an application for a declaration of paternity for any purpose related to succession to property pursuant to section 7(1)(b), or for a declaration of paternity under section 10(2) of the Act, must be made after an *inter partes* hearing, at which all persons whose rights stand to be affected by the grant of the declaration can be heard.

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[39] At para. [21]

[56] But, for present purposes, the case is of greater importance for N McIntosh JA's helpful analysis of sections 7, 8 and 10 of the Act, in particular her acceptance of the conclusions reached in the trio of Vincentian cases which I have been discussing. Thus, she concluded[40] that "a distinction is to be made between two categories of paternity declarations, namely declarations where the applicant seeks only to establish that the relationship of father and child exists (see section 10(1)(b)) and those contemplated by section 7(1)(b) …" And further[41], that "each category of paternity declaration requires a different standard of proof with the declaration contemplated by section 7(1)(b) attracting a higher standard, as is evident from the provisions of section 8 ..."

[57] The Vincentian cases are, of course, not binding on this court. But, as the judge rightly observed[42], they are "to be accorded the highest respect". In this instance, they also possess the great advantage of the explicit approval of this court in **Young-Lee v Young**.

[58] These cases clearly support the view that a distinction must be drawn between declarations of paternity under section 10(1) (declarations of paternity '*simpliciter*') and declarations of paternity for the purposes of section 7(1)(b). They also confirm that, in a proper case, it is open to the court to make an order under section 10(1), while at the same time declining to make one under section 7(1)(b).

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[40] At para. [11]
[41] At para. [12]
[42] Judgment, para. [49]

[59] But, despite various statements which obviously have a bearing on the issues, it seems to me that they do not really provide definitive answers to the questions relating to the *ejusdem generis* principle and the standard of proof to be applied in proceedings under the section. I will deal with each of these questions in turn.

(i) Does the *ejusdem generis* principle apply?

[60] In **Re Cato**, Mitchell J held that the principle applied, but neither Saunders JA nor Rawlins JA mentioned it at all in either **McKenzie v Sampson** or **Sampson v McKenzie**. Nor did N McIntosh JA in **Young-Lee v Young**. And in this case, as has been seen[43], the judge found that there was no reason to apply the principle.

[61] Mr Leiba submitted that the words "or otherwise" in section 7(1)(b) must be read conjunctively with the words which precede it, with the consequence that purely oral admissions of paternity are not sufficient for the purposes of a declaration under section 7(1)(b). The *ejusdem generis* principle applies, so the words "or otherwise" are to be restricted to the same genus as "one or more of the types of evidence specified by section 8".

[62] Mr Small submitted that the words "or otherwise" should be treated as disjunctive, since the words "or otherwise" do not normally attract the *ejusdem generis* rule.

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[43] Para. [28] above

[63] The *ejusdem generis* principle is well known. This is how Bennion explains it[44]:

> "The Latin words *ejusdem generis* (of the same kind or nature) have been attached to a principle of construction whereby wide words associated in the text with more limited words are taken to be restricted by implication to matters of the same limited character. The principle may apply whatever the form of the association, but the most usual form is a list or string of genus-describing terms followed by wider residuary or sweeping-up words."

[64] As an example of the principle in action, Mr Leiba referred us to **Eton Rural District Council v River Thames Conservators**[45]. In that case, it was held that the words "or otherwise", following the words, "tenure, custom, prescription", did not include purely contractual obligations: the genus was obligations imposed by law on land and *ejusdem generis* therefore applied. So the case is a clear example of the words "or otherwise" attracting the principle.

[65] But Bennion goes on to make it clear[46] that, for the principle to apply, "there must be a sufficient indication of a category that can properly be described as a class or genus, even though not specified as such in the enactment". Thus, as Farwell LJ observed in the older case of **Tillmanns v SS Knutsford Ltd**[47], "[u]nless you can find a category there is no room for the application of the *ejusdem generis* doctrine".

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[44] Bennion on Statutory Interpretation, 6th edn, by Oliver Jones, Section 379, page 1105
[45] [1950] Ch 540
[46] In Section 380(1), page 1108
[47] [1908] 2 KB 385, 403,

[66] In order for the principle to apply in this case, therefore, it is first necessary to identify a genus or category in the language of section 8.

[67] The section lists four types of evidence. First, if, pursuant to section 19 of the Registration (Births and Deaths) Act ('the R (B & D) Act'), or to the corresponding provisions of any former enactment, the name of the father of the child in question has been entered in the register of births, a copy of that entry, certified or sealed in accordance with the relevant provisions of the R (B & D) Act, will be *prima facie* evidence that the person named as the father is the father of the child. But, in the case of a child whose parents were not married to each other, the father's name cannot be entered in the register of births unless one of the requirements of section 19A of the R (B & D) Act have been satisfied. These are, first, (i) a declaration of paternity in respect of the child has been made; or (ii) the father has been made guardian of the child by virtue of the Children (Guardianship and Custody) Act; or (iii) both the mother and the person acknowledging himself to be the father of the child consent to the entry (section 8(1)).

[68] Second, an instrument signed by the mother of a child and by any person acknowledging that he is the father of the child shall, if executed in the presence of one of the persons listed in the Act, be *prima facie* evidence that the person named as the father is the father of the child (section 8(2)).

[69] Third, a declaration made under section 10 shall, for all purposes, be conclusive proof of the matters contained in it (section 8(4)).

[70] And fourth, an order made in any country outside Jamaica declaring a person to be the father or putative father of a child, being an order to which this subsection applies pursuant to subsection 6, shall be *prima facie* evidence that the person declared the father or putative father, as the case may be, is the father of the child (section 8(5)).

[71] As it seems to me, these provisions contemplate two distinct categories of evidence. The first derives from some form of acknowledgment in writing of paternity (section 8(1) and (2)); and the second is based on an order of a court, whether in Jamaica or in any other country to which the Act applies for this purpose, declaring a person to be the father of the child. While evidence in the first category will obviously constitute an admission of paternity, evidence in the second, which is often the product of contested court proceedings (as in this case), most certainly will not.

[72] Taken together, therefore, it is in my view impossible to characterise the kinds of evidence set out in section 8 as a genus. Accordingly, as Lord Browne-Wilkinson put it in **Re C (a minor) (interim care order: residential assessment)**[48], a case in which it was submitted that the principle applied, "I can find no genus to which the principle can apply". For that reason, I would conclude that the *ejusdem generis* principle does not operate to limit the scope of the words "or otherwise" in section 8. I therefore think that the judge's conclusion on this point was correct.

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[48] [1996] 3 WLR 1098, 1104

[73] But this does not mean that, in seeking to give effect to the words "or otherwise" in section 7(1)(b), the court is at large. For, it is another commonplace of statutory interpretation that, to quote Bennion again[49], "a word or phrase is not to be construed as if it stood alone but in the light of its surroundings". This principle is captured in yet another Latin maxim, *noscitur a sociis*, by virtue of which words or phrases in a statute "must always be construed in the light of the surrounding text"[50].

[74] I therefore accept that, in considering the types of evidence that might appropriately be relied on to satisfy the requirement of section 7(1)(b), it is entirely in order to have regard to the fact that the kinds of evidence referred to in section 8 are, by their very nature, likely to be especially cogent and highly persuasive. The words "or otherwise" may therefore be taken to connote evidence that is, if I may respectfully adopt Rawlins JA's finely nuanced formulation in **Sampson v McKenzie**[51], "other than the types of evidence specified in section 8 of the Act, though not less convincing". Or, as the judge put it in his judgment in this case[52], in my view correctly, "[i]t is not the type of evidence that is limited but it is its cogency".

(ii) <u>What is the standard of proof?</u>

[75] Mr Leiba's overarching submission was that the language of the Act and the authorities called for a very high standard of proof for an order under section 7(1)(b) and that the judge therefore erred in holding that the evidence adduced on behalf of

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[49] Bennion, op. cit., section 378
[50] Op. cit., page 1190
[51] See para. [52] above
[52] At para. [48]

the respondent's claim was sufficient for the purpose. In this regard, he posited a distinction between a declaration of paternity, '*simpliciter*', under section 10(1), and a declaration of paternity for the purposes of succession under section 7(1)(b). While proof on a balance of probabilities will suffice for the former, in relation to the latter evidence of the type set out in section 8 is required: that is, clear and unequivocal evidence.

[76] Mr Small took issue with the contention that the Act stipulated for different standards of proof for a declaration of paternity under section 10(1), and for a declaration of paternity for the purposes of section 7(1)(b). He drew attention to section 6(3) of the Act, which provides that, in the context of establishing the paternity of a child born within 10 months after the dissolution of the marriage of his or her mother by death or otherwise, and after her remarriage, the question "shall be determined on the balance of probabilities in each case". On this basis, Mr Small submitted that that same balance of probabilities, which is the normal standard of proof in all civil proceedings, applies to all applications for declarations of paternity under the Act, whether under section 10(1) or for the purposes of section 7(1)(b). Had the legislature intended differently, it would have said so in so many words.

[77] In a brief reply, Mr Leiba submitted that the fact that the legislature felt it necessary to state specifically the standard of proof applicable to matters to which section 6(3) applies suggests no more than a need to carve out a standard of proof for that particular section. It therefore does not follow that it was intended to apply

throughout the Act as a whole. Mr Leiba accepted that these were civil proceedings, to which proof on the balance of probabilities normally applies, but he submitted that, even within the civil standard, the law recognises that there may be differences in the quality of evidence required to meet the standard in particular kinds of matter.

[78] All of the cases which we have been shown have thrown up different formulations of the standard of proof applicable to proceedings under section 7(1)(b). Thus, in **Re Cato**, Mitchell J said[53] that, "[a]lthough the standard of proof in the High Court in applications for paternity declarations is the civil standard of proof on a balance of probabilities, the Legislature has provided that the High Court must look for a higher level of evidence than is acceptable in the Magistrate's Court in affiliation proceedings". In **McKenzie v Sampson**, Saunders JA observed[54] that "sections 7, 8 and 10 provide for two different standards of proof", referring approvingly to Mitchell J's view that the standard of proof for a declaration of paternity simpliciter is "much lower" than would be acceptable in affiliation proceedings". In **Sampson v McKenzie**, Rawlins JA did not in terms mention the standard of proof, but he stated instead that "a declaration of paternity for the purpose of succession to property must not only be cogent and credible, it must also be of the quality that would satisfy the requirement under section 7(1)(b) of the Act"[55]. In **Young-Lee v Young**, McIntosh JA stated unequivocally[56] that "each category of paternity declaration requires a different standard of proof". And,

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[53] At para. [13]
[54] At para. [15]
[55] At para. [26]
[56] At para. [12]

finally, in this case, the judge said[57] that "the standard could be described as on a high balance of probabilities".

[79] The problem with these formulations, as it seems to me, is that while they reflect some kind of consensus that the standard of proof required in proceedings under section 7(1)(b) is "higher" and "different", they give no indication of precisely what that might entail.

[80] As Lord Carswell reiterated in **Re Doherty**[58], "[i]t is indisputable that only two standards are recognised by the common law, proof on the balance of probabilities and proof beyond reasonable doubt". Generally speaking, the latter standard is that required by the criminal law and in analogous proceedings[59], while the former is the general standard applicable to all other civil proceedings. It is unnecessary for present purposes to explore this very well-known distinction any further, save to say that, in a civil case, a court will be satisfied that an event occurred, "if the court considers that, on the evidence, the occurrence of the event was more likely than not"[60].

[81] It is equally indisputable that proceedings under the Act are civil proceedings. For this reason, I think that Mr Small's submission that the standard of proof applicable to proceedings under the Act is proof on a balance of probabilities is plainly right. In

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[57] At para. [46]
[58] [2008] UKHL 33, para. [23]
[59] Lord Carswell gives as an example of these disciplinary proceedings brought against members of a profession.
[60] Per Lord Nicholls of Birkenhead in **In re H (Minors) (Sexual Abuse: Standard of Proof)** [1996] AC 563, 586

this regard, I consider the specific provision to this effect in section 6(3) of the Act to be no more than a reaffirmation of the general rule in that particular context.

[82] The difficulty with distinct – lesser or greater - standards of proof under the general rubric of proof on the balance of probabilities lies, in my view, in its clear potential for uncertainty and confusion. It seems to me that it certainly must make life difficult for triers of fact in this area of the law, who are told that, on the one hand, the standard of proof is on the balance of probabilities; but, on the other hand, depending on the issues involved in the particular case, it can also be on a higher balance of probabilities.

[83] The problem is neither new nor peculiar to this region. The difficulties were highlighted by Lord Nicholls of Birkenhead in **In re H (Minors) (Sexual Abuse: Standard of Proof)** as follows[61]:

> "If the balance of probability standard were departed from, and a third standard were substituted in some civil cases, it would be necessary to identify what the standard is and when it applies. Herein lies a difficulty. If the standard were to be higher than the balance of probability but lower than the criminal standard of proof beyond reasonable doubt, what would it be?"

[61] At page 587

[84] Lord Nicholls suggested[62] that the answer to the problem was to be found in the manner of the court's approach to the consideration of whether a particular case has been proved on the balance of probabilities:

> "When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A step-father is usually less likely to have repeatedly raped and had non-consensual oral sex with his under age stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation."

[85] In **Secretary of State for the Home Department v Rehman**[63], a case in which, in an immigration appeal, the Special Immigration Appeals Commission had explicitly applied "a high civil balance of probabilities", Lord Hoffmann put the matter even more directly:

> "… I feel bound to say that I think that a 'high civil balance of probabilities' is an unfortunate mixed metaphor. The civil standard of proof always means more likely than not. The only higher degree of probability required by the law is the criminal standard. But, as Lord Nicholls of Birkenhead explained in *Re H (minors) (sexual abuse: standard of proof)* … some things are inherently more likely than others.

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[62] At page 586
[63] [2002] 1 All ER 122, para. 55

> It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. In this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not."[64]

[86] And, finally on this point, I will mention **R (N) v Mental Health Review Tribunal (Northern Region) and others**[65], in which Richards LJ said that:

> "Although there is a single civil *standard* of proof on the balance of probabilities, it is flexible in its *application*. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."

(This statement was cited with specific approval by the Privy Council, albeit in a slightly different context, in **Sharma v Browne-Antoine and others**[66].)

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[64] See also **In re B (Children) [**2008] UKHL 35, in which Lord Hoffmann restated and reaffirmed the views which he had expressed in this case.
[65] [2005] EWCA Civ 1605, para. [62]. This statement was cited with approval by Lord Carswell in **Re Doherty**, at para. [27]
[66] [2006] UKPC 57, para. 14(4)

[87] On the basis of these authoritative statements, I therefore venture to suggest that the true position is that (i) the standard of proof in proceedings under the Act, as in civil proceedings generally, is always proof on the balance of probabilities; (ii) the standard, although fixed, is flexible in its application, depending on the issues involved in particular cases; (iii) the more serious the consequences if the allegation is proved, or the less probable the allegation may on the face of it appear to be, the stronger must be the evidence required to prove it; and (iv) the important thing in every case will therefore be the strength or quality of the evidence that is proffered in proof of the allegation.

[88] In this case, in considering the case put forward by the respondent, the standard of proof applied by the judge was, as has been seen, proof "on a high balance of probabilities". Although, as I have been attempting to suggest, there may be an element of contradiction in that formulation, it is certainly not anything that, in my view, can possibly enure to the benefit of the appellants. It is quite clear from his judgment as a whole that the judge's entire focus was, as the authorities suggest that it must ultimately be, on the quality and inherent strength of the evidence.

The admissibility issue

[89] Mr Leiba submitted that the judge erred in admitting various items of evidence in breach of the rule against hearsay, notwithstanding the respondent's non-compliance with the provisions of 31E of the Evidence Act. The judge also erred in dis-applying section 31E. And the judge erred as a matter of discretion in admitting various other

documents in evidence despite the fact that no sufficient foundation had been laid for the purpose.

[90] The principal complaints in the first category relate to significant aspects of the evidence of Ms Yvonne Tillica Carty, and the several documents exhibited to the second affidavit of Miss Jean Forde. Those in the second category relate to the handwritten letter dated 30 May 2000, purportedly written by the deceased to the respondent and signed "Daddy", with regard to a bank account of which the respondent appeared to be the beneficiary (exhibit 'BVW17'); the letter from Bank of Nova Scotia dated 7 October 2011 (exhibit 'BVW19'); the judge's failure to strike out the whole or parts of the second affidavit of Gary Williams for non-compliance with 31E of the Evidence Act; and the judge's finding that the purported tape-recording of Winston's telephone conversation with Mr Williams was genuine. I will consider each of them briefly.

(i) Ms Carty's evidence

[91] Paragraphs 3-10 of Miss Carty's affidavit read as follows:

> "3. The late CHARLES LEOPOLD LEIBA was by landlord and the owner of Apartments 11, 33, 43, 57 and 70 Camp View Apartments, 3-5 Anderson Road, Kingston 5 (the 'Camp View Apartments').
>
> 4. I first met Mr. Leiba in December 1980 when I was looking for a place to live.
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> 5. I became a tenant of Mr. Leiba's in January 1981 occupying at Apartment 70, Camp View Apartments. I still reside here today paying rent less maintenance as per Mr. Leiba's instructions into a bank account.

> 6. Mr. Leiba and I had a very good and trustworthy relationship as landlord and tenant.
>
> 7. I interacted with him frequently over the years and would often act as liaison between himself and his other tenants at the Camp View Apartments. This included, arranging appointments for Mr. Leiba with his other tenants or relaying messages to them on his behalf.
>
> 8. At Mr. Leiba's request, I used and still use my rent to pay the maintenance for all his Camp View Apartment [sic], the balance of which is deposited monthly to a bank account pursuant to Mr. Leiba's instructions. I also collect Mr Leiba's rent for Apartment 33 which is also deposited into a bank account pursuant to his instructions.
>
> 9. My relationship with Mr. Leiba was such that I would bake him potato pudding, which he loved, from time to time and I have on occasion taken potato pudding to him at his townhouse on Liguanea Avenue.
>
> 10. During our many interactions Mr. Leiba told me that he goes to Canada every summer as he has a daughter who lives there."

[92] At the beginning of the trial, the appellants applied to strike out these paragraphs. As the judge recorded it[67], the ground of their objection was that the paragraphs "were inadmissible as being irrelevant and/or in breach of the hearsay rule". The judge ruled that the evidence was admissible. He dispensed with the requirement of section 31E(2) of the Evidence Act, which provides that, in order for reliance to be placed on a hearsay statement in a document, the person wishing to do so must give 21 days' notice to all other parties in the litigation. The judge did so pursuant to section 31E(6), which gives the court a discretion to dispense with the notice requirement,

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[67] Para. [2]

"where it thinks appropriate having regard to the circumstances of any particular case". He did this on the ground that Miss Carty's affidavit had been served on the appellants several months before the trial and so they were aware of the respondent's intention to rely on the evidence from then. The judge further considered that, in any event, the evidence was admissible as evidence of an admission of paternity by the deceased during his lifetime[68].

[93] Mr Leiba submitted that the legal requirements for the admission of hearsay evidence were not met and the judge therefore erred in admitting this evidence. Mr Small submitted that paragraphs 3-9 of the affidavit contained information which Ms Carty was able to state from her own knowledge and therefore did not constitute hearsay; and that, in any event, paragraph 10 was admissible as proof of the fact that the deceased had admitted paternity of the respondent.

[94] In agreement with Mr Small, I am strongly inclined to doubt whether any part of paragraphs 3-9 of Ms Carty's affidavit can properly be characterised as hearsay evidence at all. As the Privy Council explained in **Subramaniam v Public Prosecutor**[69], to which Mr Small referred us, the question whether evidence of a statement made to a witness by a person who is not called as a witness is hearsay, will depend on the purpose for which the evidence is being led. In the words of the Board -

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[68] Judgment, para, [2]
[69] [1956] 1 WLR 965

> "Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made."

[95] In this case, Ms Carty's evidence of the instructions given by the deceased as to the collection of rent from his other tenants and payment of maintenance was obviously not being put forward as proof of the truth of anything the deceased said, since there was absolutely no issue as to any of that in the case. So the only function which that evidence performed was to establish the wider context of Ms Carty's evidence in paragraph 10 that, during one of their "many interactions ", the deceased told her "that he goes to Canada every summer as he has a daughter who lives there". If believed, that evidence was plainly relevant and admissible in support of the respondent's case that the deceased had admitted that she was his child.

[96] (I would observe in passing that, although the point was not argued on this basis, it may also be arguable that Ms Carty's evidence of what the deceased said to her might also have been admissible as a declaration against his interest made by the deceased during his lifetime. As Professor Peter Murphy explained[70], the principle at common law was, that "a declaration made by a person since deceased is admissible to prove the facts is states if its contents were, at the time when the statement was made,

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[70] Peter Murphy, A Practical Approach to Evidence, 4th edn, para. 6.12.2

against the interests of the maker". Despite the fact that far-reaching amendments to the Evidence Act in 1995 placed the admissibility of statements in breach of the rule against hearsay on a statutory footing, the former common law exceptions to the rule were expressly preserved by section 31A of that Act.)

[97] In light of my conclusion on the hearsay point, it is not strictly speaking necessary for me to consider the further question of whether the judge was right to admit the evidence as an exception to the rule against hearsay in the exercise of his discretion under section 31E(6) of the Evidence Act. But, for completeness, I will add that, even if I am wrong on the hearsay point, there is, in my view, no basis upon which this court can interfere with the judge's exercise of his discretion to admit the evidence. The appellants had been aware for several months before the trial of the respondent's intention to rely on Ms Carty's affidavit and had done nothing about it.

(ii) The documents exhibited to Miss Forde's second affidavit

[98] As will be recalled, the judge allowed into evidence a number of items of a personal nature which Miss Forde and Mr Williams found at the deceased's Liguanea Avenue home on 12 December 2011. Among other things[71], these included a Christmas card addressed to "Dad", apparently from the respondent and her husband; birthday and Father's Day cards, addressed to "Great Grandpa" from the respondent's grandchildren; photographs of the deceased with the respondent and members of her family; and a folder with stationery headed "Chambers, 66a Duke Street, Kingston".

[71] See para. [26] above

[99] Mr Leiba submitted that the judge, having apparently admitted these documents, not for the truth of their contents, but on the basis that they were found among the deceased's personal possessions[72], erred in taking these documents into consideration as evidence of an admission of paternity by the deceased during his lifetime.

[100] The basis of the submission appears to be the judge's statement in his judgment[73] that "[t]he presence at [the deceased's] home of these photographs and greeting cards can only be explained by the fact that [he] was [the respondent's] father".

[101] There is nothing at all, in my view, in this submission. I do not understand the judge to be saying anything more than that these documents, taken together, were an important item of circumstantial evidence pointing to the conclusion, on the balance of probabilities, that during his lifetime, the deceased had acknowledged the respondent as his daughter.

(iii) The handwritten letter dated 30 May 2000 (exhibit BVW17)

(iv) The letter from Bank of Nova Scotia dated 7 October 2011 (exhibit BVW19)

(v) The judge's failure to strike out the whole or parts of the second affidavit of Gary Williams for non-compliance with the Evidence Act

(vi) The judge's finding that the purported tape-recording of Winston's telephone conversation with Mr Williams was genuine

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[72] See para. [27] above
[73] At para. [41]; see para. [35] above

[102] Mr Leiba advanced no fresh argument in support of the complaints as to the admissibility of these documents, save to say that the judge erred in exercising his discretion to admit them and to invite reference to the submissions made at the trial. In submitting that the exercise of a discretion by a judge at first instance should not lightly be interfered with, save for good cause shown, Mr Small referred us to the decision of this court in **The Attorney General of Jamaica v John Mackay**[74], in which it was said that:

> "This court will … only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

[103] Although this statement of the position deals specifically with the exercise of a judicial discretion on an interlocutory application, there can be no doubt that the principle is of more general application[75]. With this in mind, it seems to me, again, that Mr Leiba's complaints on these additional matters cannot possibly succeed. They all seek to impugn the manner in which the judge exercised his undoubted discretion in

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[74] [2012] JMCA App 1, para. [20]

[75] See, for instance, **Phonographic Performance Ltd v AEI Rediffusion Music Ltd** [1999] 2 All ER 299, 314, in which Lord Woolf MR described the appellate court's reluctance to interfere with a decision at first instance based on the exercise of a discretion as the "conventional approach".

the areas identified and nothing has been put forward to show that he acted on the basis of any erroneous principle in arriving at his decisions in respect of them.

The sufficiency of evidence issue

[104] Mr Leiba submitted that the evidence relied on by the respondent contained several inherent weaknesses which made the judge's conclusions based on it unsafe and unreliable. Among other things, Mr Leiba highlighted the absence of any explanation of the fact that the respondent's birth certificate recorded her surname as Wong; the fact that there was no allegation that there was a relationship between the deceased and the respondent's mother; the fact that there was no express or unambiguous admission of paternity by the deceased; the fact that the first written acknowledgment of paternity relied on by the respondent was a letter written in the year 2000; and the absence of DNA or any other such evidence in support of the claim.

[105] Mr Small submitted that an appellate court should be slow to disturb a trial judge's findings of fact and referred us to a number of authorities on the point in his skeleton submissions[76]. But the principle is so well established that it is, I think, only necessary to refer to the decision of this court in **Eurtis Morrison v Erald Wiggan et al**[77], in which Harrison JA summarised the relevant principle as follows:

> "(a) Where the sole question is one of credibility of the witnesses, an appellate court will only interfere with the judge's finding of fact where the judge has misdirected

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[76] At para. 11

[77] (Unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 56/2000, judgment delivered 3 November 2005 at page 15

> himself or herself or if the conclusion arrived at by the learned judge is plainly wrong. (b) On the other hand, where the question does not concern one of credibility but rather the proper inferences that ought to have been drawn from the evidence, the appellate court may review the evidence and make the necessary inferences which the trial judge failed to make."

[106] I unhesitatingly accept Mr Small's submission on this point. The judge considered that the oral and the documentary evidence was overwhelming, and so do I. As regards the issue of credibility, the judge preferred the respondent's and her witnesses' evidence over Winston's. There was no suggestion – either at the trial or on appeal - that any of the witnesses who testified that the deceased had on several occasions spoken freely about his daughter in Canada was anything other than completely independent. Indeed, despite Winston's assertion of a close filial relationship with the deceased, it is quite clear from the evidence of the respondent, Miss Forde, Mr Miller, Mr Williams and the deceased's former tenants, much of it unchallenged, that there was a large area of the deceased's life of which he was completely unaware.

[107] There is equally nothing, in my view, in Mr Leiba's complaint about the absence of any evidence of a relationship between the deceased and the respondent's mother, or any explanation of how it was that the respondent came to be given the surname Wong. The respondent was almost 67 years of age by the time of the trial. Her mother had by then been dead for close to 20 years. There was no indication by that time that there was anyone else available or in a position to speak to the relationship between the deceased and the respondent's mother. While the fact that the respondent's

surname was stated to be Wong was certainly a somewhat curious feature of the case, there is nothing in it to detract from the clear evidence and the judge's finding that the deceased had on more than one occasion during his lifetime acknowledged and accepted the respondent as his child. While DNA evidence would certainly have been helpful, it was clearly the judge's duty to decide the case on the basis of the evidence before him.

[108] The essential question on this point is, of course, whether the evidence which the judge accepted was of the quality and cogency required to ground a declaration of paternity under section 7(1)(b) on the balance of probabilities. In my view, the evidence, both oral and documentary, amply satisfied that criterion and there is absolutely no reason to disturb the judge's findings.

Conclusion and disposal of the appeal

[109] The *ejusdem generis* principle does not apply to the words "or otherwise" as they appear in section 7(1)(b) of the Act. There is therefore no requirement for the evidence proffered in support of a claim for a declaration of paternity under that section to be of the same "type" as the kinds of evidence specifically referred to in section 8. However, although the standard of proof in proceedings under the Act is, as in civil proceedings generally, proof on the balance of probabilities, the evidence required for such a declaration must be of such a nature and quality as to make it no less convincing than the kinds of evidence specified in section 8. The judge, having seen and heard the majority of the witnesses testify in person, concluded that the oral and documentary evidence tendered in the case plainly satisfied this test. In this appeal, nothing has

been advanced to suggest that the judge either misdirected himself or came to a conclusion that was plainly wrong. In these circumstances, the judge's finding that the deceased had in his lifetime admitted paternity of the respondent and his declaration that she is the daughter of the deceased should be affirmed.

[110] I would therefore dismiss this appeal. On the question of costs, I would also order that unless a contrary submission is received from the appellants in writing within 14 days of the judgment on the appeal, the appellants are to pay the respondent's costs, as taxed or agreed.

Apology for delay

[111] This judgment has been long outstanding, for which I apologise profusely.

BROOKS JA

[112] I have had the privilege of reading, in draft, the closely reasoned judgment of the President. I agree completely with that reasoning and the conclusions to which he has arrived.

P WILLIAMS JA

[113] I too have read the draft judgment of the President and agree with his reasoning and conclusion. There is nothing that I wish to add.

MORRISON P

ORDER

1. Appeal dismissed.
2. Unless a contrary submission is received from the appellants in writing within 14 days of the judgment on the appeal, the appellants are to pay the respondent's costs, as taxed or agreed.