REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2008-01955

IN THE MATTER OF THE ESTATE OF
BERESFORD CRUICKSHANK, DECEASED

Between

JIM WATTS

Claimant

And

DWIGHT CRUICKSHANK
SYLVAN CRUICKSHANK

Defendants

****

Claim No. CV2009-04594

IN THE MATTER OF THE ESTATE OF
BERESFORD CRUICKSHANK, DECEASED

Between

JIM WATTS

Claimant

And

DWIGHT CRUICKSHANK
SYLVAN CRUICKSHANK

Defendants

****

Claim No. CV2009-02147

Between

JIM WATTS

SAVITRI RAGBIR

WATTS ENGINEERING LIMITED

Claimants

And

JENNIFER PATRICIA BRUCE-CAESAR

JOANNE KING also called

JOANIE KING

Defendants

GLENFORD BRUCE

Intervener

****

BEFORE THE HONOURABLE MR. JUSTICE PETER A. RAJKUMAR

APPEARANCES

Mr. Philip Lamont for the claimant

Mr. Martin George for the defendants in the first and second actions

Ms. Janet James Sebastien for the defendant in the third action

Reasons for Decision

BACKGROUND

1. This action has a complicated procedural history. It comprises 3 consolidated actions numbered CV 2009-04594, CV 2008-01955 and CV 2009-02149, which revolve around the estate of Beresford Cruikshank, deceased, who owned a property at Mt. Pelier – (The Mt. Pelier property or the said property).

2. The **first and second actions** involve the validity of purported **wills of Beresford**. Featured in the three actions are three purported wills of Beresford Cruikshank, deceased, ("**Beresford"**) with differing dispositions of the Mt. Pelier property), and 3 purported wills of Daphne Cruikshank ("Daphne**")**, his wife.

3. The **third action** is in relation to alleged **trespass** and dispossession of Jim Watts and his tenants by Daphne's daughter, Jennifer Bruce Caesar. (Jennifer)

4. On **November 28th 2007** the Claimant Jim Watts entered into agreement for sale with Daphne for the Mt Pelier property. The agreement describes Daphne as selling the said property as legal personal representative of the estate of Beresford, who died **intestate.**

5. The claimant Jim Watts claims to be entitled to complete the purchase of that property under the alleged agreement he had with Daphne Cruikshank **if** the will of Beresford dated **April 2nd 2006** is upheld, **and** the Mt. Pelier property passed to her **under that will of Beresford**.

6. These claims require a determination as to which party, if any, had, or acquired, title or interest to the Mt. Pelier property, and therefore a determination as to which will of Beresford was his last true will.

ISSUES

7. Counsel for Jim Watts succinctly summarized the issues, (which are adopted with only minor modifications), as follows:-

i. whether the will dated 13th April 2005 was in fact the last true will of Beresford, or whether the will of Beresford dated 13th April 2005 had been revoked by a later will, dated 2nd April 2006.

ii. **(**As, only by the provisions of the later 2006 will, does the house at Mt. Pelier go to Daphne, **if** the house goes to Daphne, then**)** - whether Jim Watts and Daphne entered into a binding contract with respect to that house so that Jim Watts has an equity arising out of a specifically enforceable contract.

iii. If so, then by virtue of that contract, and/or by virtue of having been put into possession, whether, when Jennifer put Jim Watts and his tenants out of the house, she committed a trespass such that Jim Watts is entitled to damages for trespass.

CONCLUSION

Will of April 2006

8. I find that there are circumstances of suspicion surrounding the purported preparation and execution of the purported will of 2nd April 2006 which cannot be ignored. In those circumstances this will cannot be admitted to probate.

Trespass

9. Accordingly I find that Jennifer had no right to the Mt Pelier property under any will of Daphne, as the 2nd April 2006 will of Beresford was invalid and cannot be admitted to probate.

10. Her actions, in taking possession of the said property and evicting the claimant Jim Watts and his tenants, were high handed and without lawful authority, and thereby rendered her liable for claims for damages in trespass.

11. I find that Jim Watts and/or his tenants were in possession of the Mt. Pelier property at the time that Jennifer sought to recover possession and evicted them. I find that she had no right or legal basis to do so.

12. The second named claimant Savitri Ragbir abandoned her claim for damages at trial.

13. The third named defendant gave conflicting evidence concerning his alleged damage and was a most unconvincing witness. His evidence was not credible, and I find that he has not supported his claim for special damages.

14. Watts Engineering and Savitri Ragbir have both failed to prove any damages, and no award is made in relation to their claims.

15. The first named claimant has not proven any specific claim for damages.

Will of April 2005

16. I find that the Beresford will of **April 13th 2005** can be admitted to probate.

DISPOSITION AND ORDERS

Second Action

17.

a. **It is declared that the will dated 2nd April 2006 cannot be admitted to probate.**

b. **It is further declared that the will dated April 13th 2005 can be admitted to probate and** that Dwight and Sylvan Cruikshank are at liberty to seek **probate** of that will dated **13th April 2005**.

c. It is ordered that the executors of the estate of Beresford be granted **possession** of the Mt. Pelier property.

d. It is ordered that rental monies being held in escrow be paid out to the estate of Beresford.

e. It is ordered that the **costs of the first and second actions** be paid to the Defendants by Jim Watts in the sum of $28,000.00

Third action

18.

f. In the **third action** nominal damages in the sum of $5,000.00 are awarded to the first named claimant to be paid by the first named defendant, Jennifer Bruce Caesar.

g. The claims of the second and third named claimants, Savitri Ragbir and Watts Engineering, are dismissed with no order as to costs.

h. The first defendant's counterclaim for damages is dismissed.

i. It is ordered that the defendant Jennifer Bruce Caesar do pay to the claimant Jim Watts costs in the sum of $14,000.00

j. It is further ordered that the costs of the injunction be paid by the first named defendant Jennifer Bruce Caesar to the claimant Jim Watts to be assessed by this court in default of agreement.

k. Liberty to apply

ANALYSIS AND REASONING

CHRONOLOGY

Purported Wills of Beresford Cruikshank

19.

(a) By the purported will of Beresford Cruikshank deceased dated **13th April 2005** he left the Mt. Pelier property to three of his children and his grandchildren by his deceased son.

(b) By the purported will of the said Beresford Cruikshank deceased dated 16th January 2006 he left the said Mt Pelier property to his widow, Daphne Cruikshank, deceased. No one now relies on this will. (The claimant Jim Watts at the trial of the consolidated actions sought instead to rely on the will dated **2nd April 2006,** which would, if authentic, have revoked any January will. Jennifer Bruce Caesar, daughter of Daphne, also sought to rely on this April 2006 will.)

(c) By the purported will of the said Beresford Cruikshank deceased dated **2nd April 2006** he left the said Mt. Pelier property to his widow Daphne Cruikshank, now deceased.

Purported Wills of the Daphne Cruikshank

20.

(a) a purported will of the said Daphne Cruikshank deceased, dated 31st March 2007.

(b) by purported will of the said Daphne Cruikshank deceased, dated 18th January 2007 she left the said Mt. Pelier property to Jennifer Patricia Bruce-Ceasar and Zena Bruce.

(c) by purported will of the said Daphne Cruikshank deceased, dated 20th June 2008, Jim Watts is named as sole executor. In it the deceased acknowledged the sale of the Mt Pelier property to Jim Watts, and she devised the proceeds of the sale of the Mt Pelier property to be divided equally among 4 persons, (said to be her grand children).

21. Attorneys for Jim Watts in written submissions make clear that the will of Daphne Cruickshank dated the 20th June 2008 has not been put forward in any form or fashion for any purpose in this matter. In fact none of the purported wills of Daphne is relevant to this action unless the Mt Pelier property formed part of Daphne's estate.

22. Jennifer Bruce Caesar disputes that any such will of Daphne dated 20th June 2008 is valid, though she also seeks to propound the will of Beresford dated **April 2nd 2006**, as under that will of Beresford the Mt. Pelier property would pass to Daphne's estate.

23. It is clear that if the **April 13th 2005** will of Beresford is upheld, then Daphne would have had no interest in the said property, and she would have had no entitlement to sell it to Watts. It is only if the **April 2nd 2006**, (or the January 2006), Beresford will is found to be valid that Daphne Cruikshank would have had such an interest.

24. The evidence in relation to the **April 2nd 2006** Beresford will must be examined, as well as that relating to the **April 13th 2005** Beresford will.

THE CLAIMS

25. In Claim No. **CV2008-01955**," **the first action**" - the Claimant Watts seeks to have the Court pronounce against the alleged last Will of Beresford Cruickshank deceased ,(the deceased) ,dated 13th April 2005 ,and pronounce for and grant probate of the alleged true last Will and Testament of Beresford Cruickshank deceased dated 16th January 2006.

26. By the first action filed herein the Claimant Watts sought to propound that will of Beresford Cruickshank dated 16th January 2006 as being his last and true final will and testament.

27. The Defendants Dwight and Sylvan Cruickshank, the son and brother of the Deceased, by way of Defence and Counterclaim contended that both the purported January 2006 will, and a purported April 2006 will, were forgeries.

28. They contended that the last and only true will and testament of the Deceased was his Last Will and Testament of April 13th 2005, which they seek to have admitted to Probate.

29. The claim of Jim Watts to propound the January 2006 will was eventually dismissed when he failed to file Witness Statements in time.

30. In that action all that was left in relation to the first action was the Defendants' claim to have the **13th April 2005 Beresford will** propounded and admitted to Probate.

31. In that action , in Reply, the claimant Watts in relation to the alleged April **2nd** 2006 will, had contended that it was not a forgery, but that the claimant had not been in a position to prove due execution thereof. He then filed Claim No**. CV2008-04594 - (the second action).**

32. In that action the Claimant seeks to have the Court pronounce against the alleged last Will of Beresford Cruickshank deceased dated 13th April 2005 and pronounce for and grant probate of the alleged true last Will and Testament of **Beresford Cruikshank** deceased dated **2nd April 2006**. That will was allegedly prepared by attorney at law Anthony Arnold and witnessed by him and one Elaine Stewart, his secretary. It was alleged to be in the possession of Jennifer Bruce Caesar ,who produced the purported original in court.

33. In **Claim CV 2009-02147 –"the third action**" the Claimants seek damages for trespass to goods and land and possession of premises situate at Mt. Pelier Scarborough. He seeks such relief against Jennifer Bruce Caesar - daughter of Daphne - and Joanne King - a bailiff.

34. In Claim **CV 2009-02147** the first named Claimant Jim Watts alleges that by an agreement for sale dated 28th November 2007 he had entered an agreement with Daphne Cruikshank to purchase from her the said Mt. Pelier property for the sum of $600,000.00, and he had advanced payment, pursuant to the said agreement, in the sum of $250,533.20.

35. In his Statement of Case Jim Watts alleges that he was put into possession of the Mt. Pelier property by Daphne Cruikshank's son Glenford Bruce, who at all material times managed it pursuant to a Power of Attorney given to him by Daphne Cruikshank.

36. Further, in his said Statement of Case Jim Watts alleges that he had acquired an equitable interest in the Mt. Pelier property contingent upon the said house falling into the estate of the said Daphne Cruikshank deceased and he at all times honestly believed that the said Daphne Cruikshank was able to dispose of that property. He relied upon the word of Anthony Arnold, attorney at law, who assured him that Beresford had made a valid will disposing of the said property to Daphne.

37. In this action Jennifer Bruce Caesar filed a defence and counterclaim. She denied that Daphne executed any will under which Jim Watts was appointed executor.

38. If she did it was not validly executed as Daphne's mental condition and state of health precluded her from understanding the nature of the act of making a will or the extent of the property of which she was disposing.

39. It was also the product of undue influence, and she would not have known or approved of the contents thereof. She claimed to have been evicted from the property by Glenford Bruce, (her brother, and son of Daphne), and Jim Watts.

40. She claimed that the property was not vested in Daphne at the time of any agreement for sale. She denied that the first named claimant acquired any equitable interest as a result of any part payments he purported to have made. In particular she claimed that Beresford died testate and by his last will and testament dated **April 2, 2006** devised the property to Daphne.

41. She claims, however, that by will dated **January 18th 2007** Daphne appointed her, Jennifer Caesar, executrix, and devised the property to her. She claims damages for trespass to goods, and requests that the court pronounce against the will of Daphne dated June 20th 2008, propounded by the first claimant – Jim Watts.

42. She asks the court to pronounce against the agreement dated November 28th 2007 between Watts and Daphne, and asks that the court decree probate of the will of Daphne dated **January 18th 2007** in solemn form, as well as possession of the property.

43. **In reply** Jim Watts claims that the will of Daphne dated June 20th 2008 was duly executed. However he makes clear in post trial written submissions that he is not seeking to propound that will of Daphne in these proceedings.

The application of Glenford Bruce to intervene

44. Glenford Bruce, a son of Daphne, sought leave to intervene and is asking the Court to pronounce in favour of a Will of Daphne Cruickshank dated **31st March 2007**.

45. The application of Glenford Bruce to intervene was made at an exceedingly late stage of this matter. It adds nothing to the proceedings except further, and in any event unnecessary, procedural confusion.

46. The validity of the purported wills of Daphne was raised only tangentially to the main issue in these proceedings, which, despite being complicated by claims and counterclaims of trespass, was actually the devolution of the Mt. Pelier property.

47. To determine this issue it was necessary to determine whether that property passed at all to Daphne. It only did so if the **April 2 2006** will of Beresford was valid and could be admitted to probate. If not, though the claimant and the defendant In Claim CV 2009-02147, both seek to rely on that will of Beresford, they would neither of them have rights over the said property, as Daphne would have acquired no rights therein.

48. It is not proposed to deal with the validity or otherwise of Daphne's wills in these proceedings. Glenford Bruce simply filed submissions in which he sought to have a will of March 31st 2007 admitted to probate. He did not seek to be joined in this action at a stage when pleadings in this regard, and evidence, could have been submitted and tested.

49. The existence of such a will, and its validity as against either the will sought to be propounded by Jennifer Bruce Caesar dated **January 18th 2007**, or the will of June 20th 2008, under which Watts was the purported executor, needs to be addressed frontally in proceedings where that is the issue. It cannot be a side issue, added by accretion, in proceedings where the issue is the validity of the wills of Beresford, and consequently, whether the Mt. Pelier property passed to Daphne under a valid will of Beresford.

Trespass

50. At issue also is whether there has been a trespass committed by Jennifer Bruce Caesar in dispossessing Jim Watts or his tenants or agents on May 6th 2009, and whether Jim Watts was responsible for her earlier dispossession on 27th May 2007.

51. Jim Watts denies that he had anything to do with taking possession of the property from Jennifer Bruce Caesar in May 2007. This is corroborated by Ms. Caesar herself as she confirmed in cross examination that she had no direct knowledge of this.

Agreement for sale

52. The Mt. Pelier property was the subject of an alleged agreement for sale between Watts and Daphne Cruikshank. Watts therefore needed to establish that Daphne was entitled to the Mt. Pelier property under a will of Beresford. The April 2005 will was not such a will. The purported April 2006 will was.

53. Jim Watts claims that he was assured by Attorney at Law, Anthony Arnold, that Daphne was entitled to the house at Mt. Pelier under a will of Beresford. The evidence of Anthony Arnold must therefore be examined, as it is alleged by him that he prepared that will and took execution thereof.

54. Much turns therefore on the evidence of Anthony Arnold.

Evidence of Anthony Arnold

55. Attorney at Law, Mr. Arnold agrees that he did produce to Jim Watts a "copy" of the alleged will of April 2nd 2006 of the Deceased Beresford Cruickshank. However, under cross-examination he had to admit to differences between what he presented as a copy of the document that he "certified as a true copy" and the wording of the actual document.

56. Attorney at Law, Mr. Arnold was described by attorney at law for the defendants in the second action as belligerent, evasive, obstructionist, rude and untruthful in his evidence. After witnessing his remarkable performance in the witness box under cross examination this court is constrained to agree.

57. He testified that he and his Secretary Elaine Stewart went up to the home of Beresford and took the instructions from him In his witness statement he claims that he observed that Beresford was in good spirits and in good health. – yet he had not himself noticed that Beresford had just recently lost a leg. (Beresford had in fact had a left above knee amputation on March 10th 2006. On March 21st 2006 he had been discharged from the Mt Hope hospital.)

Q: *On 25th March 2006 you did not realise he had amputated leg?*

A*:* ***I am not too sure****. In my estimation he was mentally alert.*

Q: *Did you not think it a course of prudence to get some form of medical certificate as to fitness to give instructions?*

A*: As I told you before* ***only*** *thing I notice was he wasn't moving properly.*

58. It is hardly conceivable that he would not have observed this. He visited twice. He would reasonably have been expected to observe the testator and to note his physical and mental condition. Any aspects of that condition which would have impacted his ability to give instructions to make a will or to execute one would be relevant.

59. Coupled with the above, the delivery of the evidence of Mr. Arnold under cross examination made it perfectly clear that bluff and bluster formed a significant part of his testimony.

Anthony Arnold, claims to have written material on file that would confirm his testimony that Beresford gave him instructions, was able to make corrections to the will, and that the April 2nd 2006 will represented his alleged instructions.

Arnold was prepared to certify a copy of that will as a true copy, regardless of the fact that the original purported will, when produced, was not identical to the copy that he "certified". In fact Anthony could not say with any certainty whether any will allegedly dated April 2nd 2006 was in fact the will that he claims he prepared and witnessed.

His evidence did not inspire any confidence that the matters that he claimed to have witnessed or been party to, either occurred, or occurred in the manner he described. I find that his evidence was completely discredited and did not survive cross examination. This is a disappointing and unusual finding for a court to have to make in relation to an attorney at law, and it is not made lightly.

60. With respect to the April 2nd 2006 will which Mr Arnold claimed to be instrumental in preparing, and about which he gave evidence of its execution, I am constrained to find that there are too many circumstances which excite suspicion to permit this document to be admitted to probate as the last will and testament of the deceased.

61. These include the following:-

Daphne's actions

a. if the April 2nd 2006 will was the last will of Beresford, and Daphne was present when it was made, why would Daphne have instituted proceedings to prove an earlier **will of January 16th** 2006, knowing that it would have been revoked by the purported later will?

b. further, why would Daphne make an application for **letters of administration** and enter into an agreement for sale of the Mt Pelier property based upon an alleged **intestacy** of Beresford, if she were in fact present at the execution of a will of Beresford 2nd April 2006?

How could it not be suspicious that a will of **April** 2nd **2006** is then produced after she entered into that agreement for sale? If, at the time of giving instructions and at the time of its execution Daphne was allegedly there, according to Arnold, why would Daphne not rely upon that will? Why would she apply instead for letters of administration on the ground that she knew of no will of Beresford in existence?
Any suggestion that she could do so as she had no will "in hand" is simply not acceptable. She swore on November 28th 2007 that she had **made searches for a will** among his papers and effects and had found none. Mr Mungalsingh testified that she appeared to be fully capable of understanding what she was doing and of giving instructions.
How could it not therefore be suspicious in those circumstances that a purported January 16th 2006 will is " **found**" by Glenford Bruce in clearing out the Mt Pelier house in February 2008- shortly thereafter-, and a copy given to Jim Watts?

Although that application was later withdrawn, she proceeds to court to enforce, not the April 2nd 2006 will that she was allegedly present for, but that will of January 16th 2006. Clearly she would not have done so if she were in fact aware of the later will of April 2nd 2006.

If Arnold's testimony is to be accepted, she was present at the time of execution of the April 2nd 2006 will, and aware that instructions had been given for a will and that one was being executed.

Her actions in seeking to prove the January 2006 will confirm that Arnold's evidence,
i. that he took execution of a will in April 2006 and
ii. that Daphne was present and

iii. that she was aware that a will was being executed,
cannot be accepted.

Arnold' s testimony

c. unusual as it may be for this court to have to make such a pronouncement, the evidence of Anthony Arnold did not inspire any confidence whatsoever. His evidence was contradictory from minute to minute. He appeared to be more interested in scoring imaginary points than in assisting the case with his evidence.

A sample of his evidence, set out hereunder, demonstrates, after extensive, and painful cross examination occasioned by the lack of cooperation of this witness – an officer of the court-, that this witness did have written material available to him which he made no effort to produce to the court.

The extremely defensive demeanour of this witness created substantial suspicion that he was not speaking the truth, either deliberately, or simply recklessly. It does not matter which. This court cannot comfortably rely on any evidence emanating from such a witness, especially when it involves a property of significant value, and when the validity of this will is so critical, a fact which was known to this witness.

Q: *With all of that information that would have been in your file you didn't check?*
*So most current version of your evidence is -**on file you have (in boxes))***
a. original instructions
b. print copy of will
c. version with changes

Q: *So this is the first time you are saying that?*

A: *Yes.*

Q: *You know all this evidence is critical?*

A: **Yes**.

d. why would Anthony Arnold not have noted on March 25th 2006 that the testator Beresford, who gave him instructions, and whom he again visited thereafter to arrange execution of the April 2nd 2006 will, had one leg, having had an amputation on March 10th 2006.

It at least calls into question his evidence about visiting Beresford and ensuring that he was even in a fit condition to give instructions for a will, far less execute one, if his powers of observation, or recollection, were not sufficient to draw his attention to this striking fact.
It also brings into question whether Arnold ever even visited Beresford as he claims, for this or any purpose, at the times that he claims.

e. the fact that Arnold produced a copy of a will as a printout from his computer, and certified to Jim Watts "that this was a true copy of the will he made for Beresford Cruikshank. This "certified true copy" turned out on examination and comparison with the original, which was produced in court eventually, to contain differences from the alleged original. Arnold's evidence when tested, revealed that he could not say whether what he certified for Jim Watts was the final draft, or an earlier draft. His haste to certify it as a true copy, and certainty that it was, calls into question the degree of care that this witness was concerned to exhibit. In fact his cavalier and careless approach was also demonstrated in his evidence in cross examination, to such a degree that this court can place no reliance on his testimony.

f. In fact it is unusual that Arnold would be supplying such information to someone like Watts, who had no connection with Beresford, and who simply sought to purchase from Daphne the Mt. Pelier property before she had obtained probate or letters of administration.

g. Beresford was an elderly person who had recently been hospitalized. Arnold did not follow best practice and ensure that he was examined by a medical professional so as to confirm that he had the testamentary capacity to give instructions for the preparation of a will, to know and approve of its contents, and to execute a will.

Combined with all the other matters above, the purported will of April 2 2006 must lie under a cloud of suspicion.

Whether the rule in Browne v Dunn affects the evidence of Anthony Arnold

62. It was submitted that although Mr. Arnold was cross examined at length **it was never put to him**

i. that the signature of the deceased was a forgery, or
ii. that the deceased did not sign the will, or
iii. that the will was not properly executed, or
iv. that the deceased did not have the mental capacity to make a will.

63. It was submitted that,
i. as Arnold has sworn that he did sign his name, and has sworn that the will was duly executed,
ii. as it was never put to Arnold that he was lying or that he was wrong about either his own signature, or the signature of the deceased ,or indeed about the due execution of the will,
that the rule in Browne v Dunn applies to this situation, in that Counsel must put his case to the witness to be contradicted, and if he fails to do so then he is taken to accept that witness's evidence.

64. In **Markem Corpn v Buckley [2005] EWCA Civ 26** it was stated at paragraphs 58-60:-
Browne v Dunne is only reported in a very obscure set of reports. Probably for that reason it is not as well-known to practitioners here as it should be although it is cited in Halsbury's Laws of England para 1024 for the following proposition:
*"Where the court is to be asked to disbelieve a witness, the witness should be cross-examined; and failure to cross-examine a witness on some material part of his evidence or at all, **may be treated** as an acceptance of the truth of that part or the whole of his evidence."*

Because the decision is so difficult to lay hands on we take the opportunity here of citing all the material passages. We do so via the decision of Hunt J in Allied Pastoral Holdings case because his judgment also contains his own valuable comments. He said (p.623):
*"It has in my experience always been **a rule of professional practice that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matters, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence,** particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a rule of practice is necessary both to give the witness the*

opportunity to deal with that other evidence, or the inferences to be drawn from it, and to allow the other party the opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn. That rule of practice follows from what I have always believed to be rules of conduct which are essential ***to fair play at the trial and which are generally regarded as being established by the decision of the House of Lords in Browne v Dunn (1894) 6 R 67.***

No doubt because that decision is to be found only in an obscure series of law reports (called simply "The Reports" and published briefly between 1893 and 1895), reliance upon the rules said to be enshrined in that decision seems often to be attended more with ignorance than with understanding. The appeal was from a defamation action brought against a solicitor and based upon a document which the defendant had drawn whereby he was to be retained by a number of local residents to have the plaintiff bound over to keep the peace because of a serious annoyance which it was alleged he had caused to those residents. Six of the nine signatories to the document gave evidence on behalf of the defendant that they had genuinely retained him as their solicitor and that the document was really intended to be what it appeared on its face to be. No suggestion was made to any of these witnesses in cross-examination that this was not the case and, so far as the conduct of the defendant's case was concerned, the genuineness of the document appeared to have been accepted. However, the defence of qualified privilege relied upon by the defendant depended in part upon whether the retainer was in truth genuine or whether it was a sham, drawn up without any honest or legitimate object but rather for the purpose of annoyance and injury to the plaintiff. This issue was left to the jury. The plaintiff submitted to the jury that the retainer was not genuine and was successful in obtaining a verdict in his favour. In support of that submission, the plaintiff asked the jury to disbelieve the evidence of the six signatories who had said that the retainer was a genuine one.

Lord Herschell LC said (at 70-71): "Now my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, ***where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his***

attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, *and* ***not to take his evidence and pass it by as a matter altogether unchallenged,*** *and then,* ***when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him,*** *the circumstances which it is suggested indicate that the story he tells ought not to be believed****, to argue that he is a witness unworthy of credit.*** *My Lords, I have always understood that* ***if you intended to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him****; and, as it seems to me, that* ***is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses****."*

His Lordship conceded that ***there was no obligation to raise such a matter in cross-examination in circumstances where it is "perfectly clear that (the witness) has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling****". His speech continued (at 72): "All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been* ***no suggestion whatever in the course of the case that his story is not accepted."***

Lord Halsbury said (at pp 76-77): "My Lords, with regard to the manner in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. To my mind ***nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said****,* ***although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to."***

Lord Morris (at pp77, 79) said that he entirely concurred with the two speeches which preceded his, although he wished (at p 79) to guard himself with respect to laying down

any hard-and-fast rules as regards cross-examining a witness as a necessary preliminary to impeaching his credit. The fourth member of the House of Lords, Lord Bowen, is reported (at pp79, 80) to have said that, on the evidence of the six signatories, it was impossible to deny that there had been a real and genuine employment of the defendant. But his Lordship made no statement of general principle.

These statements by the House of Lords led to the formulation of a number of so-called "rules". They have been stated in various ways in the cases and by text-book writers, and it is fair to say that there is some room for debate as to their correct formulation. For example, in ***Cross*** *on Evidence (2nd Australian ed, 1979) the authors state (at para 10.50 at p245): "****Any matter upon which it is proposed to contradict the evidence in chief given by the witness must normally be put to him so that he may have an opportunity of explaining the contradiction, and failure to do this may be held to imply acceptance of the evidence in chief.****"*

In Phipson (12th ed, 1976) the authors state the rule somewhat more discursively (at para 1593, at pp657, 658): "As a rule a party should put to each of his opponent's witnesses in turn so much of his own case as concerns that particular witness, or in which he had a share ... If he asks no questions he will in England, though not perhaps in Ireland, generally be taken to accept the witness's account and he will not be allowed to attack it in his closing speech, nor will he be allowed in that speech to put forward explanations where he has failed to cross-examine relevant witnesses on the point ... ***Where it is intended to suggest that the witness is not speaking the truth upon a particular point his attention must first be directed to the fact by cross-examination, so that he may have an opportunity of explanation; and this probably applies to all cases in which it is proposed to impeach the witness's credit …*** *Failure to cross-examine, however, will not always amount to an acceptance of the witness's testimony, e.g. if the witness has had notice to the contrary beforehand, or the story is itself of an incredible or romancing character."*

Hunt J concluded (p.634):

*"I remain of the opinion that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matters**, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence**, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings."*

65. Based upon the preceding, it was submitted that in the whole of the cross examination of Arnold it appeared to have been accepted that the deceased and Arnold and his secretary, actually signed the will and that there was due execution of the will, as no challenge was made as to these matters.

66. It was submitted that the Cruickshanks cannot now, in law, claim that the signature on the will of 2nd April 2006 is not that of the deceased, nor can they now claim that there was not due execution. It was claimed therefore, that the onus of proving these elements has been satisfied.

67. This cannot be accepted, and the case cited does not serve to rehabilitate the evidence of Arnold.

68. First, it is clear from the above extract, cited by counsel for Watts ,that "there was no obligation to raise such a matter in cross-examination in circumstances where it is '*perfectly clear that (the witness) has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling*'"

69. There was no doubt from the cross examination, both its tenor, and from specific questions directed to Arnold, that his credibility was very much being called into question. It was clear that the account that he gave of going to the home of Beresford, taking instructions from him, and returning to take execution of the alleged will, without noticing that Beresford was missing a leg, was being treated with grave sceptism.

70. The witness himself appeared to appreciate this, as evidenced by his quarrelsome and unresponsive demeanour.

71**.** **Second,** it must have been appreciated by the witness that he was not in a position, on his own evidence, to testify truthfully that the document that he produced from his computer was the last version of that alleged will.

72. Further, while he may have witnessed the execution of a document that was intended to be a will, he retained no copy. He was forced to concede that the document, produced in court as the alleged original of the will that he says he executed, differed from the **copy** that he "certified" for Jim Watts.

73. It must therefore have been obvious to him that any evidence that he purported to give, as to the legitimacy and accuracy of the will that he says he prepared and witnessed, would be unable to link that document (the copy he purported to certify), or in fact any document, with the document subsequently produced, which purported to be the original.

74. Third, it was obvious to him that the existence of written instructions and copies of drafts with changes suggested by Beresford, if they existed, (and he eventually accepted they did), was being investigated, as well as the reason for their non production.

75. Accordingly I do not accept that there was a failure to adhere to the rule in **Browne v Dunn (1894) 6 R 67**, as properly understood. Fairness to this witness was not compromised in cross examination. This witness could have responded, or those reexamining him could have clarified, all the above maters, to establish, if it could be established, that the apparent circumstances of extreme suspicion surrounding the purported execution of the document of April 2nd 2006, could be readily and credibly explained.

76. Further, that rule cannot produce the result that all the other suspicious circumstances must be ignored, and that the will of April 2nd 2006 cannot be considered to be defective.

77. While the case was not put to this witness that it was a forgery, or suffered from lack of knowledge or approval, or testamentary capacity of Beresford, it was sufficiently put to this witness

a. that his whole account was replete with suspicious circumstances, and further

b. that the nexus could not be established between the alleged will, if any, that he claimed to witness, and the purported original of the April 2006 will .

78. Parties had agreed to seek a forensic examination of the April 2006 will. That report was referred to in the submissions as apparently being inconclusive. Accordingly the contents of such report are no substitute for the necessity for this court's analysis of the evidence.

The contents of the will of 2nd April 2006- rationality

79. The will of 2nd April 2006 is not irrational on its face. It makes provision for wife Daphne, and for children Hasley, Dave, Dwight, Pearl and Janet. It deals with other property of the deceased.

80. Dwight admitted in cross examination that in the 2005 will, the deceased left shares in BWIA to Daphne, RBTT accounts to Daphne, $30,000.00 to Daphne, and shares at the Unit Trust Corporation to Daphne.

81. It is accepted that, up to a point, the April 2nd 2006 will appears rational on its face. However, a significant bequest is made in this will to Daphne. It confers upon her the most significant asset of the deceased – the Mt. Pelier property.

82. It does so in circumstances that are rife with suspicion. This occurs towards the end of Beresford's life, when he has had a leg amputated, and his then medical condition has not been verified by a doctor.

83. He has already made a will. Yet he allegedly considers it a priority to change the disposition of the Mt Pelier property and confer it upon Daphne, who was 69 years old in 1995,at the time of her marriage to Beresford, and ,11 years later in 2006, **80 years old**.

84. It must have dawned upon Beresford that after Daphne's death, the property would in all likelihood go to Daphne's children, and not to his own children. While the will is therefore not completely irrational on its face, it raises within itself its own issues.

85. It was entirely up to Beresford to divest himself of his property in any manner that he considered appropriate. However any such disposition must be in circumstances devoid of the grave suspicions that are attendant upon this April 2nd 2006 document , a will that Daphne herself did not see fit to propound.

LAW

AROUSING THE VIGILANCE AND SUSPICIONS OF THE COURT

86. In **Marilyn Lucky v. Maureen Elizabeth Thomas - Vaillo H.C.A. No. CV 1396 of 1996** the Honourable Justice Stollmeyer, as he then was, at page 15 stressed the need for the presence of a medical practitioner when an elderly or infirm testator makes a will.

"Where a testator is elderly and infirm his will should be witnessed and approved by a medical practitioner who satisfies himself as to the capacity and understanding of the testator and who records his examination and findings – Re Simpson, Schaniel v Simpson 1977 121 Sol Jo 224" relied on in Lookhoor v. Lookrwah at p. 19.

87. *At page 16 of the judgment of the Honourable Stollmeyer J, (as he then was), he set out relevant principles as follows:-*

> *1. The **onus of proving** a will as having been executed as required by law is on **the party propounding it;** (See also Civ. App. No. 102 of 2003 Lalla v Lalla per the Honourable Mendonca JA at para 53)*
>
> *2. There is presumption of due execution if the will is, ex facie, duly executed;*
>
> *3. The force of the presumption varies depending upon the circumstances,*
>
> *The presumption might be very strong if the document is entirely regular in form, but where it is irregular or unusual in form, the maxim omnia praesemuntur rite esse acta cannot apply with the same force, as for example, would be the case where the attestation clause is incomplete;*

*4. **The party seeking to propound a will must establish a prima facie case by proving due execution**;*

5. If a will is not irregular or irrational, or not drawn by a person propounding the will and benefitting under it, then this onus will have been discharged.

*6. If by either by the cross examination of witnesses, or the **pleadings** and the evidence, the issues of either testamentary capacity or want of knowledge and approval are raised, then the onus on these issues shifts again to the party propounding the will;*

*7. Even if the party propounding the will leads evidence as to due execution, **there is still the question of whether the vigilance and suspicions of the court are aroused. If so, then the burden once again reverts to the party seeking to propound.***

88. The burden of proof is on the claimant Jim Watts to establish due execution of the will dated April 2006.

89. In **Visham Lalla v. Suruj John Lalla Civ App No. 102 of 2003** the Honourable Mendonca JA held (at paragraph 59) that:
*"…Where there are **circumstances which excite the suspicion of the Court, the Court ought not to pronounce in favour of the Will unless the suspicion is removed** so that the Court is satisfied that the Will propounded does express the true Will of the deceased (see Barry v Butlin 2 Moo P. C. 480)."*

90. In **Lalla v. Lalla** it was further explained that the circumstances, which have been held to excite suspicion, include the intrinsic terms and the **circumstances of the preparation and execution of the Will** and regard must be had to the circumstances primarily existing at the time when the Will was executed, although subsequent events could be relevant. *(At paragraph 60)*

91. Even assuming the formal validity of the will, the question therefore remains whether there was anything surrounding the preparation and execution of the will which would **excite the**

suspicion of the court. If that is the case, there would be a **burden placed on the claimant to remove that suspicion** and satisfy the court.

92. I am constrained to find that there are too many circumstances which excite suspicion relating to the purported April 2nd 2006 will. That suspicion has, far from being removed by the evidence on behalf of the propounders of that will, in fact been augmented by their testimony.
In the circumstances, this document cannot and should not be admitted to probate as the last will and testament of the deceased.

Contract for the sale of the house between Daphne and Jim Watts

93. The evidence of Jim Watts in his witness statement is that he expended considerable sums, more than a quarter of a million dollars, on the purchase of the Mt. Pelier property. A significant amount of this was expended before he ever saw a purported copy of a will of Beresford under which he allegedly left the said property to Daphne.

94. Watts took possession of the said property after executing agreement for sale on November 28th 2007, and a supplemental agreement for sale on December 20th 2007.

95. He continued to pay medical, and finally funeral, expenses for Daphne, advancing these sums against the final purchase price of the house, sums all paid toward the purchase price of a property that was not vested in Daphne.

96. Daphne instituted an application for letters of administration of the estate of Beresford in November 2007 which would have been on the basis that Beresford in fact left no will.

97. On his own evidence Jim Watts was aware of a purported January 2006 will of Beresford – which, fortuitously turned up when he went to the property sometime after 20th December 2007 and Glenford Bruce allegedly came across it and gave it to him.

98. Apart from the will of January 2006, he was assured by Mr Anthony Arnold that there was a will of April 2nd 2006 by which the Mt. Pelier property was left to Daphne. On January 7th 2008 Anthony Arnold eventually produced for him a will of April 2nd 2006.

99. Daphne then executed a will in which she named Watts executor. The evidence of alleged substantial expenditure without evidence that Daphne even had title to the property is curious, and the cross examination of Jim Watts did not serve to enhance its credibility or dispel the concerns that must be raised by the plethora of wills that relate to Beresford, and to Daphne.

100. In any event his dealings in relation to this property are suspicious, involving as they do
a. allegedly entering into agreements for sale with an elderly and impoverished person.

b. entering such agreement on the basis that that Daphne was applying for letters of administration of the estate of Beresford ,on the further basis, which he believed at that time to be untrue, that Beresford had died **without leaving a will**.

c. allegedly expending large sums of money pursuant to the said agreements on the basis simply that she would have been entitled to the property under an alleged will of Beresford, without ensuring that that will was in fact uncontested, and valid.
d. conveniently being handed a copy of a will of Beresford dated January 2006 allegedly by Glenford Bruce, under which Daphne is also coincidentally the beneficiary and entitled to the Mt. Pelier property.

e. allegedly becoming the executor of the will of Daphne, placing himself in a position as such Executor of the will of the deceased Daphne Cruickshank, to enforce an agreement allegedly made by her with himself, for the sale to himself of the property.

100. This must be considered in the context in which the property is alleged to be due to come into the Estate of the said Daphne Cruickshank – from the Estate of the deceased Beresford Cruickshank via the alleged will of April 2nd 2006.

101. There are too many circumstances of suspicion surrounding this will to permit it to be admitted to probate.

102. I note that he collected rent from the tenants to the property from the date of his entry to the date of his eviction, in respect of a property that he in fact had no right to.

Alleged Trespass by Jim Watts

103. From Jennifer's own evidence it is not clear that Jim Watts was ever involved in her eviction. I find that there is no evidence that Jim Watts committed any act of trespass against Jennifer Bruce, and there is evidence that at the time of that eviction, he was not yet concerned with the Mt. Pelier property. The case in trespass against him is dismissed with costs.

104. On the other hand, Jim Watts having gone onto the property with the blessing of Daphne Cruickshank, and being in possession, ought not to have been dispossessed by Jennifer Bruce. That was an act of trespass.

GLENFORD BRUCE

105. Glenford Bruce has made an application to be joined in this action as a party, and has asked the Court to pronounce against a will of Daphne made the 20th June 2008. Counsel for Jim Watts contends that the will of Daphne Cruickshank dated the 20th June 2008 has not been put forward in any form or fashion for any purpose in this matter.

106. In the counterclaim the defendants to the trespass action ask the Court to pronounce against the will of 20th June 2008, where no one had asked the contrary, and ask that probate in solemn form be granted of a will dated 18th January 2007. The application of Glenford Bruce is to join as a party on the basis that someone is seeking probate of the will of 20th June 2008 in this matter.

107. The joinder of Glenford Bruce at this stage, just before judgment, would be a waste of judicial resources, as he seeks to address issues relating to wills of Daphne. What is actually in contention is wills of Beresford and the disposition of the Mt. Pelier Property.

108. I have found that that property did not pass to Daphne, or her estate, in view of the extremely suspicious circumstances attendant upon the purported will of April 2nd 2006, (and in passing, the purported January 2006 will).

Will of April 13th 2005

109. I find, on a balance of probabilities, that the deceased, having testamentary capacity, and with knowledge and approval of its contents, did sign the will of April 13th 2005.

110. I accept the evidence of the defendants Dwight and Sylvan Cruickshank in this regard.

111. No real contest was raised as to the validity of this will or its due execution, save that it was contended, in effect, that it was not the last will and testament, having been revoked by subsequent wills.

112. I find that the only will of Beresford which can, and should be admitted to probate, is the will of Beresford dated April 13th 2005.

CONCLUSION

Will of April 2nd 2006

113. I find that there are circumstances of suspicion surrounding the will of April 2nd 2006 which cannot be ignored. This will cannot in those circumstances be admitted to probate.

Trespass

114. Accordingly I find that Jennifer had no right to the Mt. Pelier property under any will of Daphne, as the April 2nd 2006 will of Beresford was invalid and cannot be admitted to probate. Her actions in taking possession of the said property and evicting the claimant Jim Watts and his tenants were high handed and without lawful authority, and thereby rendered her liable for claims for damages in trespass.

115. I find that Jim Watts and/or his tenants were in possession of the Mt. Pelier property at the time that Jennifer sought to recover possession and evicted them. I find that she had no right or basis to do so.

116. The second named claimant Savitri Ragbir abandoned her claim for damages at trial.

117. The third named defendant gave conflicting evidence concerning his alleged damage and was a most unconvincing witness. His evidence was not credible, and I find that he has not supported his claim for special damages.

118. Watts Engineering and Savitri Ragbir have both failed to prove any damages, and no award is made in relation to their claims.

119. The first named claimant has not proven any specific claim for damages.

Will of April 2005

120. I find that the Beresford will of April 13th 2005 can be admitted to probate.

DISPOSITION AND ORDERS

121. **Second Action**

a. . **It is declared that the will dated 2nd April 2006 cannot be admitted to probate.**

b. **It is further declared that the will dated April 13th 2005 can be admitted to probate and** that Dwight and Sylvan Cruikshank are at liberty to seek **probate** of the will dated **13th April 2005**.

c. It is ordered that the executors of the estate of Beresford be granted **possession** of the Mt. Pelier property.

d It is ordered that rental monies being held in escrow be paid out to the estate of Beresford.

e. It is ordered that the **costs of the first and second actions** be paid to the Defendants by Jim Watts in the sum of $28,000.00.

Third action

122.

f. In the **third action** nominal damages in the sum of $5000.00 are awarded to the first named claimant to be paid by the first named defendant Jennifer Bruce Caesar.

g. The claims of the second and third named claimants, Savitri Ragbir and Watts Engineering, are dismissed with no order as to costs.

h. The first defendant's counterclaim for damages is dismissed.

i. It is ordered that the defendant Jennifer Bruce Caesar do pay to the claimant Jim Watts costs in the sum of $14,000.00

j. It is further ordered that the costs of the injunction be paid by the first named defendant Jennifer Bruce Caesar to the claimant Jim Watts to be assessed by this court in default of agreement.

k. Liberty to apply.

Dated this 23rd day of May, 2013

Peter A. Rajkumar

Judge.

The court wishes to record its appreciation to counsel for all parties, who all provided comprehensive and thorough submissions from which much assistance was derived.