

THE EASTERN CARIBBEAN SUPREME COURT  
IN THE HIGH COURT OF JUSTICE  
SAINT VINCENT AND THE GRENADINES  
HIGH COURT CIVIL CLAIM NO. 199A of 2002



BETWEEN:

James C. Johnston (Executor in the  
Estate of his father Thomas G. Johnston Deceased)

Claimant

v

Amos S. Eno  
And  
Robert Rooth  
(Parties who have entered a caveat  
In the Estate of Thomas G. Johnston Deceased)

Defendants

Appearances: Mr. S.E. Commissiong for the Claimant  
Mr. P.R. Campbell Q.C. and Ms. R. Fredericks for the  
Defendants

---

2008: December 15, 16, 17  
2009: July 29  
2010: April 21

---

**JUDGEMENT**

- [1] **THOM, J:** Thomas G. Johnston deceased (Tom Johnston) was an American artist who made the Island of Bequia his home, he died on the 19<sup>th</sup> day of September 2001. He left surviving him two sons, James Johnston the Claimant and Thomas G. Johnston Jr. The Defendants are friends of Tom Johnston who entered a caveat in the Estate of Tom Johnston.

## **BACKGROUND**

- [2] When Tom Johnston moved to Bequia he purchased a large tract of land at Moonhole (Moonhole) on the southern side of Bequia. He incorporated a company called Moonhole Company Limited (Moonhole Co.) in which the land was vested. He held the controlling interest in Moonhole Co. until his death.
- [3] Tom Johnston developed a very unique residential community at Moonhole where the emphasis was on preserving the natural beauty of the land. There are no developed roads only footpaths, no running water and no electricity. Tom Johnston built approximately fourteen houses at Moonhole. The design of each house was ideal for nature lovers. Some of these houses were sold to individuals such as the Defendants and to companies.
- [4] After Tom Johnston's death in September 2001, James Johnston on the 7<sup>th</sup> day of January 2002 applied for probate in the High Court of a Will which he alleged was executed by Tom Johnston on the 5<sup>th</sup> day of November 1998 (the November 1998 Will) in the presence of Jean Poisson and Pamela Ollivierre.
- [5] The Defendants entered a caveat to the Claimant's application for the probate and on the 5<sup>th</sup> day of April 2002 they applied for the probate of a Will which they alleged Tom Johnston executed on the 31<sup>st</sup> day of March, 1999 (the March 1999 Will).
- [6] The Claimant entered a caveat to the defendant's application for probate.

- [7] The Claimant subsequently instituted these proceedings in which he seeks inter alia:
- (a) A claim for the grant of probate of the Will of Tom Johnston dated 5<sup>th</sup> November 1998.
  - (b) A decree pronouncing against the validity of the Will of Tom Johnston dated 31<sup>st</sup> March 1999.
- [8] The Claimant in his statement of claim alleged that at the time Tom Johnston purportedly made the March 1999 Will he was 90 years old, he was not of sound mind, memory and understanding and that was unduly influenced by the Defendants and/or their agents.
- [9] The Defendants in their defence denied the allegations of the Claimant and alleged that at the time of the execution of the March 1999 Will Tom Johnston was of sound mind, memory and understanding. Tom Johnston also conducted business on that same date and also before and after 31<sup>st</sup> March 1999. The defendants also alleged that the March 1999 Will is the last Will and testament of Tom Johnston and it revoked all previous Wills. The Defendants further alleged that the November 1998 Will was not properly executed.
- [10] The Defendants by their counterclaim seek inter alia:
- (a) An order pronouncing the validity of the last Will and testament of Tom Johnston dated 31<sup>st</sup> March 1999.
  - (b) A decree pronouncing against the validity of the alleged Will dated 5<sup>th</sup> November 1998.

## **ISSUE**

[11] The issue to be determined is which of the two Wills, the November 1998 Will of the March 31, 1999 Will is the valid Will.

## **EVIDENCE**

[12] James Johnston testified and called three witnesses being his wife Sheena, Thomas Weston (Tom Weston) who managed Moonhole in the year 1992 but left in 1992 because of the disagreement with Tom Johnston, and Aubrey Harris a Canadian architect. A witness statement was filed by Jean Poisson who is named as a witness on the November 1998 Will but he died before the trial. The Defendants testified and called eleven witnesses most of whom are homeowners at Moonhole and Pamela Ollivierre who signed as witness of the November 1998 Will.

[13] I find that all of the witnesses were very forthright in their oral testimony.

## **FINIDING OF FACTS**

[14] Tom Johnston purchased approximately thirty-five acres of land in Bequia at an area called Moonhole. The land was vested in a company incorporated in St. Vincent and the Grenadines and called Moonhole Co. Tom Johnston was the Managing Director. He developed a unique nature retreat at Moonhole. He subsequently established two other entities for the further development of Moonhole being the Moonhole Homeowners Association Co. Ltd., and the Thomas and Gladys Johnston Moonhole Conservation Trust Ltd.

- [15] Moonhole is a unique development. It has no roads, just footpaths, no telephone service, no electricity and no pipe-borne water.
- [16] Tom Johnston's desire was to preserve the uniqueness of Moonhole for posterity. Homeowners such as the Defendants, Sophie and Charlene Engelhard all share his views.
- [17] The homeowners with the exception of John Corbett do not reside permanently at Moonhole but they spend holidays there.
- [18] The persons who resided permanently at Moonhole were Tom Johnston, his wife Gladys and from 1992, the Claimant and his wife Sheena.
- [19] Between 1988 and 1989 the Claimant lived at Moonhole but due to his constant drinking of alcohol his relationship with Tom Johnston deteriorated and he left Moonhole.
- [20] In 1991 he married Sheena and they returned to live at Moonhole in 1992.
- [21] In 1992 Tom Johnston's wife Gladys died.
- [22] In 1992 Tom Weston was involved in the management of Moonhole. The working relationship between Tom Weston and Tom Johnston was not a good one and Tom Weston left Moonhole in 1992.

- [23] In 1992 Tom Johnston built a bar and restaurant at Moonhole which he permitted the Claimant to operate and to conduct paid tours of Moonhole. Many of the homeowners were not in agreement with the regular tours.
- [24] Tom Johnston was approximately 92 years old when he died on September 19, 2001.
- [25] Tom Johnston's dream for Moonhole was consistent. He wanted Moonhole to be preserved as a nature retreat for posterity. He wanted his shares in Moonhole Co. to be vested in another entity.
- [26] In 1993 Tom Johnston wrote to the homeowners at Moonhole and invited them to purchase his shares in Moonhole Co. and put same into a trust. Tom Johnston also proposed that title to several properties at Moonhole be transferred to him in satisfaction of the debt of E.C. \$400,000.00 owed to him by Moonhole Co. The homeowners did not agree with either of the proposals. One homeowner Charlene Engelhard subsequently agreed to purchase the shares.
- [27] On August 3, 1993 Tom Johnston and Charlene Engelhard initialled a memorandum the terms of which included:
- (a) Tom Johnston's shares in Moonhole were to be sold to a new company to be incorporated Moonhole Private Forest and Wildlife Preserve Ltd. Charlene Engelhard and Robert Rooth were to serve as the directors.

- (b) Moonhole Co. would provide Tom Johnston with lifetime use of certain properties at Moonhole, food and housekeeping services for life and Tom Johnston would remain Chairman and Managing Director of Moonhole Co. for life.
- (c) Moonhole Co. would provide the Chairman with lifetime use of a house at Moonhole.

[28] In August 1993 Tom Johnston gave oral then written instructions to his solicitor Mr. Matadial to prepare his Will. Mr. Matadial prepared the Will and Tom Johnston executed the Will on August 28, 1993 (the August 1993 Will).

[29] In the August 1993 Will which was exhibited by Defendants, Tom Johnston bequeathed all of his shares in Moonhole Co. and all sums owing to him by Moonhole Co. to Charlene Engelhard. He bequeathed \$50,000.00 E.C. to Winifred Kydd. He devised all of his properties real and personal situated in the United States of America to the Claimant along with a life interest in one of the houses at Moonhole called "Hill House".

[30] On April 17, 1998 Tom Johnston executed a document, the Moonhole Perpetuation Trust when outlined the responsibilities of the trustees of the Moonhole Perpetuation Trust.

[31] On April 21, 1998 Tom Johnston executed a Will prepared by Mr. Matadial in which Tom Johnston's shares were bequeathed to Charlene Engelhard. Tom Johnston in his own handwriting inserted Amos Eno in place of Charlene

Engelhard. Amos Eno undertook to establish the trust and the trust was established and registered on January 28, 1999.

- [32] In the April 21, 1998 Will (the April 1998 Will) which was exhibited by the defendants the bequest to the Claimant is the same as in the August 1993 Will. The Shares in Moonhole are bequeathed to Amos Eno instead of Charlene Engelhard and EC \$50,000.00 is bequeathed to Winifred Kydd. A new paragraph 7 is included which was not present in the August 1993 Will. In paragraph 7 Amos Eno agreed to pay EC\$3,000.00 per month for the maintenance and upkeep of Tom Johnston and Tom Johnston covenants with Amos Eno not to revoke or alter paragraph 3 of the Will where he bequeathed his and Gladys' shares in Moonhole Co. to Amos Eno.
- [33] In the November 1998 Will, Tom Johnston bequeathed his entire estate to the Claimant alone. This will was witnessed by Jean Poisson and Ms. Pamela Ollivierre. It was not prepared by Mr. Matadial.
- [34] In March 1999 Tom Johnston gave instructions to his Attorney, Mr. Matadial to prepare his Will. Mr. Matadial prepared the Will and it was executed by Tom Johnston on March 31, 1999 in the presence of William Lowe, Sophie Engelhard, John Corbett and Timothy Kerr. William Lowe and Timothy Kerr signed as witnesses in the presence of Tom Johnston.
- [35] In the March 1999 Will the bequest to the Claimant is the same as in the August 1993 Will and April 1998 Will. The difference between the April 1998 Will and the March 1999 Will is that the shares in Moonhole Co. are bequeathed to the Thomas and Gladys Johnston Moonhole Conservation

Trust Ltd. Along with Tom Johnston's "Scrimshaw" sculptures and the residual interest in "Hill House".

- [36] On the same day, March 31, 1999, Tom Johnston executed a Deed of Covenant in which he promised not to revoke the bequest of the shares in Moonhole Co. to the Trust. The Trust promised to make certain payments to Tom Johnston during his lifetime.
- [37] On April 22, 1999, Tom Johnston executed an agreement with Moonhole Co. and the Trust in which he agreed not to transfer any of his Moonhole Co. shares to anyone without the trust's prior written approval. Moonhole Co. agreed not to transfer any of its assets to any person without the prior written approval of the Trust. The Directors of Moonhole Co. were not to be changed without the prior written approval of the Trust.
- [38] Tom Johnston changed his mind on occasions. This is evidenced by:
- (a) the number of Wills he executed;
  - (b) the letter dated April 25, 2000 to all homeowners in which he spoke of the steps he had taken to preserve the future of Moonhole, he marked null and void on May 5, 2000;
  - (c) the father and son agreement which is dated May 2, 2000 was made null and void on May 7, 2000;
  - (d) in December 1996 he entered into a lease agreement with Aubrey Harris in relation to "OH HO" house, after considerable renovations were made Tom Johnston changed his mind about leasing the property.

[39] The Claimant was not aware of the April 1998 Will until after the death of Tom Johnston.

[40] The Defendants became aware of the November 1998 Will after the death of Tom Johnston.

### **SUBMISSIONS**

[41] Learned Counsel for the Claimant submitted:

- (a) that the November 1998 Will is a valid Will. No evidence was led to show that the Will was not executed in accordance with the Wills Act;
- (b) that the March 1999 Will is invalid because:
  - (i) Tom Johnston was not of sound mind when he executed the Will in March 1999;
  - (ii) Tom Johnston was subjected to undue influence by the Defendants and their agents.
  - (iii) Instructions for the preparation of the Will were given by telephone.

[42] Learned Queen's Counsel for the Defendants submitted:

- (a) that the November 1998 Will is invalid since it was not executed in accordance with the provisions of the Wills Act in particular Section 12;
- (b) the November 1998 Will has been revoked by Will of March 1999;
- (c) the evidence shows that the March 1999 Will was validly executed;

- (d) the Claimant has failed to adduce any evidence to show that Tom Johnston was not of sound mind when he executed the March 1999 Will;
- (e) the Claimant failed to adduce any evidence of undue influence.

### **LAW AND ANALYSIS**

[43] The law governing the execution of Wills in Saint Vincent and the Grenadines is the Wills Act Cap. 384. The relevant provision is Section 12(1) which reads as follows:

- “(1) No Will shall be valid unless
  - (a) it is in writing and signed by the testator, or by some other person in his presence and by his directions;
  - (b) it appears that the testator intended by his signature to give effect to the Will;
  - (c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
  - (d) each witness either:
    - (i) attests and signs the Will ; or
    - (ii) acknowledges his signature in the presence of the testator (but not necessarily in the presence of any other witnesses;but no form of attestation shall be necessary.”

The burden of proving that the testator had testamentary capacity is on the propounder of the Will. The propounder of the Will must also prove that the testator knew and approved the content of the Will at the time of execution of the Will.

[44] I will deal first with the November 1998 Will.

## SECTION 12 (1)

[45] Learned Queen's Counsel for the Defendants submitted that the Claimant has led no evidence of the circumstances surrounding the execution of the November 1998 Will. The November 1998 Will was not executed in accordance with Section 12. The evidence of Pamela Ollivierre is that she signed as a witness to the Will but did not see anyone else sign the Will.

[46] Having reviewed the evidence I agree that the Claimant led no evidence as to the circumstances surrounding the execution of the November 1998 Will. The Claimant testified that he was not present when the November 1998 Will was executed. The executed Will was given to him by Jean Poisson the same day that it was executed. The Witnesses named on the November 1998 Will are Jean Poisson and Pamela Ollivierre. Jean Poisson died before the trial of this matter. In any event, his witness statement makes no mention of the November 1998 Will. Pamela Ollivierre testified on behalf of the Defendants. Pamela Ollivierre stated in her witness statement:

- “6. One day in 1998 Mr. Johnston asked me to come into his living room and sign my name as a witness on a paper. At the time Mr. Johnston's son, Jim Johnston and Mr. Jean Poisson were also present. They did not read the paper to me and they did not give me a chance to read it for myself.
7. **At the time, Tom Johnston seemed unhappy about signing the paper,** which I learned later was a Will. After the date I signed the paper, Tom Johnston never brought up the subject of that paper again to me.

8. **After Tom Johnston had signed this paper**, the regular visits by his son Jim stopped..."

[47] Under cross-examination, she testified that she recalled a particular instance in 1998 when the Claimant, Jean Poisson and Tom Johnston were together. They had a paper. Mr. Johnston gave her the paper and asked her to sign it.

[48] Under re-examination, Pamela Ollivierre stated that she did not see anyone else sign that paper.

[49] The effect of subsection 12 (1) (c) and (d) is that the testator must sign the Will in the presence of at least two witnesses, both witnesses must be present at the same time and each witness must attest and sign the Will or acknowledge his signature in the presence of the testator but not necessarily in the presence of the other witness. The provisions of Section 12 (1) are mandatory. They must be complied with. Failure to comply will result in the Will being deemed to be invalid.

[50] Having reviewed Pamela Ollivierre's testimony, the effect of her testimony is Tom Johnston signed the Will. He gave her the Will and asked her to sign it. at that time she did not know that it was a will, she did not see any other person sign the Will. The first time she stated she did not see anyone else sign the Will was under re-examination. She was asked specifically in re-examination, "And did you see anybody else sign that paper?" To this question she answered, "No, sir." I believe her testimony that she did not see anybody else other than Tom Johnston who had given her the Will to sign, sign the Will. Also the fact that Pamela Ollivierre did not know the paper

which she signed was a Will is immaterial. In view of this testimony, I do not agree with Learned Queen's Counsel for the Defendants that Pamela Ollivierre's testimony shows that the November 1998 Will was not in accordance with Section 12 (1) of the Wills Act.

## **MARCH 1999 WILL**

### **Testamentary Capacity**

[51] Learned Counsel for the Claimant referred the Court to the evidence which showed that Tom Johnston vacillated on several occasions. In addition to those referred to earlier at paragraph 38, Learned Counsel referred the Court to the evidence which showed:

- (a) While Tom Weston managed Moonhole, Tom Johnston would request him to do something and soon after he would send someone else to do it.
- (b) Tom Johnston agreed to sell Tom Weston the house at Moonhole known as "Recovery House" and without informing Tom Weston he sold the house to John Corbett.
- (c) The Homeowners Association decided that tours to Moonhole should be discontinued, but shortly thereafter he gave approval for the Claimant to continue the tours;
- (d) Moonhole Co. decided that the Claimant should pay 25% of the rental from the two houses to Moonhole Co. and Tom Johnston subsequently instructed the Claimant not to do so.
- (e) Moonhole Co. decided that Winifred Kydd and John Corbett should be made signatories on the bank account which contained the rental for the two houses and tours but Tom Johnston encouraged the Claimant not to comply.

[52] Learned Counsel also referred the Court to the evidence of Tom Weston on the way Tom Johnston treated his wife Gladys during the period of her illness preceding her death and that the Defendant, Robert Rooth had told him in 1992 that Tom Johnston was crazy, he was incapable of making rational decisions. Also, Tom Johnston's tolerance of the large number of rats, cats and dogs that lived in Tom Johnston's house defied normal human behaviour.

[53] Learned counsel submitted that the burden of proof that the testator had testamentary capacity was on the person propounding the Will and referred the Court to the text The Law Relating to Wills 3<sup>rd</sup> Edition by W.J. Williams, 1967, page 18 and to several cases including Battan Singh and Others v Amirchand and Others [1948] 1 AER p. 152; and Banks v Goodfellow (1866) AER p. 48.

[54] It is settled law that a testator must have the requisite testamentary capacity when he executed the Will. The burden is on the party propounding the Will to prove that the testator had the requisite testamentary capacity. The onus is on the Defendants to prove that Tom Johnston had the requisite testamentary capacity when he made the March 1999 Will.

[55] What amounts to the requisite testamentary capacity is outlined in Halsbury Laws 4<sup>th</sup> Edition Volume 50 paragraph 324 as follows:

"Soundness of mind, memory and understanding are vital to the issue of validity. It is necessary for the validity of a Will that the testator should be of sound mind, memory and understanding, words which have consistently been held to mean sound disposing mind and to import sufficient capacity to deal with and appreciate the various

dispositions of property to which the testator is about to fix his signature.”

[56] Also in **Hansen v Barker-Denfield** [2006] All ER (D) 253 the Court stated at paragraph 41 as follows:

“The essential requirements for testamentary capacity are well known and contained in a passage from the judgement of Cockburn CJ in **Banks v Goodfellow** (1870) L.R. 5 QB p. 549:

“It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing, shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object, that no disorder of the mind shall poison his affections; pervert his sense of right, or prevent the exercise of his natural faculties that no insane delusions shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound would not have been made.”

“The Standard of mental capacity to be shown is not required to be especially high. Even if the testator’s mental faculties have been impaired by age or physical infirmity, capacity to make a Will can still remain. See per Cockburn CJ in **Banks v Goodfellow** at p. 566.”

[57] Whether a testator has testamentary capacity to make a Will is a question of fact which the Court must decide on the evidence as a whole, see **Hoff and Others v Atherton** [2004] EWCA Civ. 1554.

[58] To discharge this burden the Defendants led evidence from several witnesses including William Lowe, who signed as a witness to the March 1999 Will, he had known Tom Johnston for over twenty years. He does not own property at Moonhole nor live at Moonhole, Sophie Engelhard, a homeowner and friend of Tom Johnston for many years and John Corbett, a friend of Tom Johnston

and whose company served as the accountants for Moonhole Co. None of these witnesses are beneficiaries under the March 1999 Will or any of the previous Wills of Tom Johnston.

[59] They all testified that they were well acquainted with Tom Johnston. They were present when he signed the March 1999 Will. They observed him, they heard him speak both before and after he signed the March 1999 Will. He appeared to be of a sound mind. That same day he also participated in a meeting of the Directors of Moonhole Co. and the Annual General meeting of Moonhole Co. This evidence was not contradicted. As stated earlier I found these witnesses to be credible witnesses.

[60] The evidence led by the Claimant does not show that Tom Johnston did not have the required testamentary capacity when he made the March 1999 Will. While I agree that Tom Johnston did vacillate on several occasions, the mere fact that a person vacillates does not mean that the person is not of a sound mind. The evidence of Tom Weston on Tom Johnston's mental capacity centered around Tom Johnston's treatment of his wife Gladys during the period of her illness in 1992. His main allegation is that Tom Johnston did not allow her to remain in the United States for medical treatment contrary to her doctor's orders and when her situation deteriorated while at Moonhole he did not allow her to return to the United States contrary to her doctor's orders. He did not allow anyone to assist her with her medication. The Defendant Robert Rooth stated that Tom Johnston was crazy he was incapable of making rational decisions. Also, there were many rats at their home which created an unhealthy environment for Gladys.

[61] Tom Weston testified of events which occurred in 1992, the year Tom Johnston's wife died. It was not disputed that neither Tom Johnston nor Gladys Johnston liked conventional medicines and hospitals. It was also not disputed that Tom Johnston loved his wife very much and he was distraught at her passing. I accept the evidence of the Defendant Robert Rooth that his remark about Tom Johnston being crazy was in relation to his love for Moonhole. I do not agree that the evidence of Tom Weston in any way shows that Tom Johnston did not have the requisite testamentary capacity to make a Will in March 1999. I agree with the submission of Learned Queen's Counsel that neither Aubrey Harris nor Tom Weston had seen or conversed with the Testator at or around the time of the making of the March 1999 Will. Neither of them had seen or conversed with Tom Johnston for some years prior to the March 1999 Will.

[62] Having reviewed all of the evidence, I am satisfied that when Tom Johnston made his March 1999 Will he was a man of sound mind memory and understanding. He had the requisite testamentary capacity to make a Will.

### **Undue Influence**

[63] Learned Queen's Counsel for the defence submitted that the Claimant led no evidence in support of the allegation of undue influence. Learned Queen's Counsel referred the Court to the evidence of the Claimant under cross examination where he admitted that he had no evidence of undue influence specific to the March 1999 Will. Learned Queen's Counsel further submitted that the Defendants did not participate in the preparation of the March 1999 Will nor did they witness the signing of the March 1999 Will. There is no

evidence to show that they were at Moonhole at the time of the execution of the March 1999 Will or the months leading up thereto.

[64] It is settled law that the burden of proving undue influence is on the party alleging undue influence. What amounts to undue influence on a testator was explained by Sir James Hannen P. in Wingrove v Wingrove (1885) 11 P.D. p. 81 in the following manner:

“To be undue influence in the eye of the law there must be ... to sum it up in a word coercion... There is only undue influence if the testator is in such a condition that if he could speak his wishes to the last, he would say, this is not my wish, but I must do it.”

[65] In Craig v Lamourex 1920 A.C. p. 349 the Court explained undue influence as follows:

“As was said in the House of Lords when Boyse v Rossborough (1856) 6 H.L.C. p. 249 was decided, in order to set aside the Will of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis. Undue influence in order to render a Will void must be an influence which can justly be described to have caused the execution of a paper pretending to express a testator's mind, but which really does not express his mind, but something else which he did not really mean.”

[66] The defendants in seeking to show that the March 1999 Will was in accordance with the wishes of Tom Johnston led the evidence of Attorney-at-Law Hansraj Matadial. Mr. Matadial was the solicitor for Tom Johnston for many years. Mr. Matadial testified that he prepared the March 1999 Will, he had also prepared the April 1999 Will and the August 1993 Will. He took instructions orally over the telephone from Tom Johnston he prepared a draft Will and faxed it to Tom Johnston he discussed it with Tom Johnston to

ensure it was correct. He then sent the final version by hand to Tom Johnston. This evidence of Mr. Matadial was not contradicted.

[67] In **Ramcomarsingh v Administrator General** [2002] U.K. P.C. 67 the Court stated that one of the simplest ways of avoiding the suggestion that there has been undue influence is to ensure that an independent legal advisor was consulted by the testator. In this case the testator Tom Johnston had independent legal advice. Indeed, the uncontradicted evidence of Mr. Matadial is that Tom Johnston telephoned him and gave him instructions to prepare his Will. The instructions were clear and lucid.

[68] Emphasis was placed by the Claimant on the fact that Tom Johnston was 90 years old when he made the March 1999 Will. In **Killick v Pountney and Another**, The Times April 30, 1999 the Court stated:

“I can readily accept that if there is evidence showing the exertion of improper pressure in relation to the execution of a Will, it will be easier and sometimes very much easier where the testator is enfeebled in body or mind and all the more so if he is enfeebled in both body and mind, to find that such influence was in all the circumstances undue and to adopt Viscount Haldane’s words, that it was by means of the exercise of that influence that the Will was obtained. This is because ... a lesser degree of pressure or inducement may suffice to produce the desired result where the testator is feeble in body or mind than would be required were he in vigorous health. But no amount of evidence of bodily or mental infirmity will of itself establish undue influence in the absence of some independent evidence tending to show the exercise of an improper influence.”

[69] The uncontradicted evidence in this case is that Tom Johnston in spite of his age in 1999 and indeed up until December 2000 was a very active man. Indeed both the Claimant and his wife agreed he still played chess. Having

reviewed the evidence I find that no evidence was led to show the exercise of improper influence on the part of the Defendants or indeed by any other person. I agree with the submissions of Learned Queen's Counsel for the Defendants that there is no evidence of undue influence in this case.

### **Instructions to Solicitor**

[70] Learned Counsel for the Claimant submitted that the instructions to Mr. Matadial were given over the telephone and no written record of the instructions was produced. The Court therefore cannot be certain that it was the testator who gave those instructions nor whether the provisions in the Will were in keeping with the oral instructions. Learned Counsel referred the Court to the case of **Battan Singh and Others v Amirchand and Others** [1948] 1 AER 152 @154E, 155A-H, in particular C:

“Their Lordships are further of opinion that the principle enunciated in **Parker v Felgate** should be applied with the greatest caution and reserve when a testator does not himself give instructions to a solicitor who draws his Will, but to a lay intermediary who repeats them to the solicitor. The opportunities for error in transmission and of misunderstanding and of deception in such a situation are obvious, and the Court ought to be strictly satisfied that there is no ground for suspicion, and the instructions given to the intermediary were unambiguous and clearly understood, faithfully reported by him and rightly apprehended by the solicitor, before making the presumption in favour of validity”

Lord Normand at p. 154 H explained the decision in **Parker v Felgate** as follows:

“That case decided that, if a testator has given instructions to a solicitor at a time when he was able to appreciate what he was doing in all its relevant bearings and if the solicitor prepares the Will in accordance with these instructions, the Will will stand good though at

the time of execution the testator is capable only of understanding that he is executing the Will which he has instructed but is no longer capable of understanding the instructions themselves or the clauses in the Will which give effect to them.”

[71] In this case, unlike **Battan Singh** the testator Tom Johnston himself gave instructions to his long-time solicitor to prepare the March 1999 Will, the same solicitor who had prepared the August 1993 Will and the April 1998 Will. No intermediary was involved.

[72] Mr. Matadial testified that while at his request he received written instructions for the first Will, that is the August 1993 Will, from Tom Johnston, he did not seek written instructions from Tom Johnston in relation to the April 1998 Will and the March 1999 Will because on each occasion Tom Johnston was only making minor changes to the previous Will.

[73] An examination of the August 1993 Will , the April 1998 Will and the March 1999 Will show that major changes were not made in relation to the bequests made by Tom Johnston. The bequest to the Claimant remained the same. The Moonhole shares were not bequeathed to him in August 1993 Will, the April 1998 Will, nor the March 1999 Will. I believe the testimony of Mr. Matadial and I find that this submission has no merit.

### **Knowledge and Approval**

[74] The propounder of the Will is required to prove that the testator knew and approved the contents of the Will at the time of execution of the Will. This burden is usually discharged by the propounder proving capacity and due

execution from which knowledge and approval are inferred. See **Hoff and Others**.

[75] In **Sherrington v Sherrington** [2005] EWCA Civ. 326, the Court in outlining the approach which should be taken in determining whether a testator had knowledge and had approved the Will stated as follows:

“The Court must consider the inherent probabilities and in so doing it must look at all the relevant evidence, including the evidence of what happened after the Will was executed.”

In view of the evidence of Mr. Matadial referred to earlier at paragraphs 67 and 73, and the testimonies of William Lowe, Sophie Engelhard and John Corbett referred to at paragraphs 59 and 60 and the testimony of the Defendant Amos Eno that he visited Moonhole between April 18 - 26 1999 and he visited with Tom Johnston at his home and Tom Johnston indicated to him that he was satisfied with the arrangement in his March 1999 Will, the March 31, 1999 Deed of covenant and the 22<sup>nd</sup> April Agreement with the Trust and also the testimony of the Defendant Robert Rooth that he visited Moonhole during December 1999 and he visited Tom Johnston and Tom Johnston told him that he was satisfied with the arrangement in the above mentioned documents, I am satisfied that Tom Johnston had knowledge of and approved the contents of the March 1999 Will when he executed it.

[76] In conclusion, I find that the Defendants have proved on a balance of probabilities that the March 1999 Will was executed in accordance with the provisions of Section 12(1) of the Wills Act. I am satisfied that Tom Johnston was of sound mind memory and understanding when he made the March

1999 Will, that he knew and approved the content of the Will at the time of execution and no undue influence was brought to bear on him.

[77] The Claimant's claim is dismissed.

[78] Judgement is entered for the Defendants on the Counterclaim.

[79] It is ordered:

- (a) That the Will and Testament of Thomas Johnston dated 31<sup>st</sup> March 1999 is valid and is deemed to be the last Will and Testament of Thomas Johnston.
- (b) The Will of Thomas Johnston dated 5<sup>th</sup> November 1998 is deemed to have been revoked by the March 31<sup>st</sup> 1999 Will.
- (c) The claimant shall within 30 days render a full account to the Registrar of the Court and the Defendants of all funds and properties of the estate of Thomas Johnston which he had in his possession at the date of the death of Thomas Johnston and those which he has taken in his possession since the death of Thomas Johnston.
- (d) The Claimant shall pay the Defendants costs in the sum of \$14,000.00, such costs shall not be taxed on the Estate of Thomas Johnston.

..........  
Gertel Thom  
HIGH COURT JUDGE