In The Supreme Court of Bermuda

CIVIL JURISDICTION

2020: No. 321

BETWEEN:

LAURETTA LORNA STONEHAM

Plaintiff

- and -

BERTRAM NATHANIEL FRASER

Defendant

JUDGMENT

Testamentary capacity, Dementia, Montreal Cognitive Assessment, Undue influence, Proprietary Estoppel

Date of Hearing: **17, 18, 19, 20, 21 April, 17 May, 6 June 2023**

Date of Judgment: **29 November 2023**

Appearances: **Kyle Masters, Emma Duffy Carey Olsen Bermuda Limited, for Plaintiff**

Marc Daniels, Marc Geoffrey Ltd, for Defendant

JUDGMENT of Mussenden J

Introduction

1. The sapphire and azure waters of the North Shore gently lap up against the edges of the shoreline properties along with the fresh sea breeze. Sometimes those waters become a tempestuous sea which along with hurricane force winds rage up onto the land and the people.

2. The Plaintiff, Lauretta Stoneham, ("**Lauretta**"), is the sister of the Defendant, Bertram Fraser ("**Bertram**").

3. Cedelle Albina Prudence Fraser ("**Mrs. Fraser**"), who died on 21 December 2019 at the age of 87 years, was the mother of 5 children (the "**Siblings**" or the "**Children**"). They are in order of birth, Gary Dublin ("**Gary**"), Kenneth Dublin ("**Kenneth**"), Beverly Tavares ("**Beverly**"), Lauretta and Bertram.

4. Mrs. Fraser's father, Jonathan Edness ("**Mr. Edness**") died in 1975 and gifted her 2 real properties (together the "**Two Properties**") which are located next door to each other on the North Shore waters' edge, as follows:
    a. Wisdom Manor at 121 North Shore Road, Pembroke ("**Wisdom Manor**"); and
    b. Aurora House at 123 North Shore Road, Pembroke Parish ("**Aurora House**").

5. The core of the case is that Mrs. Fraser executed 6 known wills during the course of her lifetime as set out below disposing of her estate including the Properties. The last two Wills, which are the subject of this case, were executed in 2018 (together the "**2018 Wills**") when she gifted both Properties to Bertram. In each of the earlier 4 Wills, she had gifted Bertram with one property solely. The other property was gifted in the first Will to Lauretta solely and in the other 3 Wills it was gifted to all 5 children.

6. Thus, Lauretta seeks to set aside the 2018 Wills on the that: (i) Mrs. Fraser did not have requisite mental capacity to make them when she did and (ii) Bertram exercised undue influence over Mrs. Fraser at the time when she executed those two wills. Further, Lauretta seeks to have title to Wisdom Manor, on the basis of promissory estoppel, in that Mrs. Fraser promised Wisdom Manor to her and that she relied on such promise to make financial investments into Wisdom Manor to her detriment.

Other Properties and Accommodations

7. Mr. Edness gifted 5 other properties (the "**Sibling's Properties**"), located across the street from the Properties, to the Siblings as follows:
    a. 118 North Shore Road to Gary;
    b. 120 North Shore Road to Kenneth;
    c. 122 North Shore Road to Beverly;
    d. 124 North Shore Road to Lauretta; and
    e. 126 North Shore Road to Bertram.

8. Various family members lived at the Properties as follows:
    a. Mrs. Fraser lived in the lower apartment of Wisdom Manor;
    b. Lauretta lived in the upper apartment of Wisdom Manor, together with her family from January 2004 through to late 2015;
    c. Bertram lived at Aurora House;
    d. Mrs. Fraser's sister, Dorothy Smith ("**Dorothy**") lived in the lower south apartment of Aurora House along with her daughter Ruthann Pitter ("**Ruthann**") who was Mrs. Fraser's niece and goddaughter. In November 2016 Dorothy and Ruthann lived with Mrs. Fraser on a temporary basis whilst their apartment at Aurora House was being renovated.

The Wills, Powers of Attorney, Cognitive Assessments

9. Mrs. Fraser executed 6 known wills in her lifetime, executed several Powers of Attorney and underwent several cognitive assessments as set out below.

10. The "**2006 Will**" – executed on 20 July 2006. It provided the following gifts, generally:
    a. The sum of $100,000 absolutely to Beverly;
    b. The sum of $100,000 absolutely to Kenneth;
    c. The sum of $200,000 absolutely to Gary. It also declared that the cedar furniture "of and in" Wisdom Manor (the "**Cedar Furniture**") was the property of Gary.
    d. Wisdom Manor to Lauretta absolutely; and
    e. Aurora House to Bertram absolutely.

11. The "**2012 Will**" – executed on 4 April 2012. It appointed Lauretta and Bertram as joint executors and trustees of Mrs. Fraser's estate and provided the following gifts generally:
    a. Aurora House to Bertram, subject to a life interest, in the lower north apartment to Dorothy;
    b. In the event Bertram should predecease her, Aurora House to her other 4 remaining children in equal shares as tenants in common;
    c. Wisdom Manor to all 5 Children in equal shares as tenants in common;
    d. The sum of $10,000 to Ruthann; and
    e. The residuary of the estate to her 5 children in equal shares.

12. The "**2015 Will**" – executed on 23 February 2015. It appointed Lauretta and Bertram as joint executors and trustees of Mrs. Fraser's estate and provided the following gifts generally:
    a. Wisdom Manor to Bertram absolutely;
    b. In the event Bertram should predecease her, Wisdom Manor to her other 4 remaining children in equal shares as tenants in common;
    c. Aurora House to all 5 Children in equal shares as tenants in common, subject to a life use of the lower apartment to Dorothy;
    d. The sum of $10,000 to Ruthann; and

e. The residuary of the estate to her 5 children in equal shares.

13. The 2017 Power of Attorney (the "**2017 POA**") - In 2017 Dr. Griffith wrote to Wakefield Quin law firm that Mrs. Fraser had successfully completed a competency assessment (the "**March 2017 CA**"). On 28 April 2017 at Wakefield Quin, Mrs. Fraser executed the 2017 POA appointing Lauretta and Bertram as her attorneys.
14. The "**2017 Will**" – executed on 28 April 2017 at Wakefield Quin. It appointed Lauretta and Bertram as joint executors and trustees of Mrs. Fraser's estate and provided the following gifts generally:
    a. Wisdom Manor all 5 Children in equal shares as tenants in common;
    b. Aurora House to Bertram absolutely;
    c. In the event Bertram should predecease her, Aurora House to her other 4 remaining children in equal shares as tenants in common; and
    d. The residuary of the estate to her 5 children in equal shares.

15. On 11 May 2018 Dr. Saba conducted a Montreal Cognitive Assessment (the "**May 2018 MoCA**") and prescribes Mrs. Fraser a dementia treating drug, Donepezil. He wrote a letter of the same date to Mrs. Fraser's doctor, Dr. Williams, of the May 2018 CA.

16. On 15 May 2018 Mrs. Fraser appointed Bertram as her Power of Attorney (the "**May 2018 POA**") at Trott & Duncan.

17. The "**May 2018 Will**" – executed on 22 May 2018 as drafted by Ms. Martin of the law firm of Trott & Duncan ("**T&D**"). It appointed only Bertram as executor and trustee of Mrs. Fraser's estate and Lauretta was named as the alternative appointee. It provided the following gifts generally:
    a. Wisdom Manor to Bertram absolutely;
    b. In the event Bertram should predecease her, Wisdom Manor to her other 4 remaining children in equal shares as tenants in common;
    c. Aurora House to Bertram absolutely;

d. In the event Bertram should predecease her, Aurora House to her grandchildren (Bertram's children): Cherie Allen, Kaleo Place and Isaiah Fraser in equal shares absolutely; and
e. The residuary of the estate to her 5 children in equal shares.

18. The May 2018 Will also provided that it was Mrs. Fraser's "*WISH and DESIRE that Bertram will maintain Wisdom Manor as a guest house for as long as possible*." It went on to provide that it was her "*WISH and DESIRE that the net proceeds derived from the operation of Wisdom Manor as a guest house be paid out annually in equal shares amongst her remaining children for the duration of their lives or for as long as Wisdom Manor remains in operation as a guest house.*"

19. The "**October 2018 CA**" - On 15 October 2018, Mrs. Fraser once again underwent a cognitive assessment by Dr. Griffith who asserted that she exhibited "*good cognitive ability in sound judgment and is capable of making decisions about her health and well-being. Mental status has not changed since her previous visit to see the neurologist Dr. Saba earlier this year in May*."

20. The "**October 2018 POA"** - On 19 October 2018, at Terra Law Limited ("**TLL**"), Mrs. Fraser revoked the May 2018 POA and on the same day executed an Enduring Power of Attorney dated 19 October 2018 appointing Bertram as her attorney with Anthony Evans as an alternate.

21. The "**November 2018 CA**" – On 2 November 2018 Mrs. Fraser underwent a cognitive assessment by Dr. Saba. He prepared a written report.

22. The "**November 2018 Will**" – executed on 8 November 2018 as drafted by Ms. Francis of TLL. It appointed only Bertram as executor of Mrs. Fraser's estate and Anthony Evans as an alternative executor. It provided the following gifts generally:
    a. Wisdom Manor and Aurora House to Bertram absolutely; and
    b. The residuary of the estate to her 5 children in equal shares.

23. The November 2018 Will records Mrs. Fraser's "WISH and DESIRE" that Bertram maintain Wisdom Manor as a guest house but makes no provision for the distribution of the profits.

Background and Pleadings

Generally Endorsed Writ of Summons (the "**Writ**") and the Statement of Claim (the "**SOC**")

24. By a Generally Endorsed Writ issued on 13 October 2020, subsequently amended on 26 November 2020, and the SOC dated 26 November 2020 Lauretta commenced the present action. She claimed that her mother, Mrs. Fraser, was not of sound mind, memory or understanding and lacked the requisite mental capacity to execute the May 2018 Will and the November 2018 Will at the date upon which each of them were executed.

25. The SOC set out the particulars of the claims.

26. Lack of Mental Capacity – The SOC set out a number of particulars including that:
    a. In 2015, medical professionals recommended that Mrs. Fraser undergo a cognitive assessment because she was exhibiting short-term memory loss.
    b. She had serious medical conditions and by 2017 was unable to care for herself.
    c. In June 2017, she was forgetful and easily confused, not recognizing relatives, close friends and her hairdresser.
    d. Medical professionals opined that she had cognitive impairment in 2018.

27. Undue Influence – The SOC set out a number of particulars including that:
    a. The lack of mental capacity was included;
    b. At the date of the execution of the May 2018 Will and the November 2018 Will, Mrs. Fraser was already in her eighties.
    c. Mrs. Fraser was physically frail having undergone a number of surgeries since 2003 including a major surgery in 2015. Also, she suffered from chronic vascular disease

which impacted her brain function, caused visual impairment and a stroke where she needed assistance in walking.

d. She was dependent on medications and assistance for her general care.

e. Dorothy temporarily lived with Mrs. Fraser in 2016 at Wisdom Manor but died in January 2017 at their home after a tragic fall when Mrs. Fraser was present in the house.

f. Two months later, Ruthann moved out of Wisdom Manor on Bertram's demand leaving Mrs. Fraser isolated from her family and living alone.

g. Bertram was appointed Power of Attorney by Mrs. Fraser jointly with Lauretta in April 2017. Lauretta was living overseas at the time, resulting in Bertram having primary control over Mrs. Fraser's affairs entrenching a relationship of dependency between Mrs. Fraser and him.

h. From around 2017, Bertram started to conduct Mrs. Fraser's affairs in an unsatisfactory manner including preventing relatives from seeing her, hiding her legal documents, interfered with medical appointments, refused to share information about her care, accompanied her to all legal appointments including when the May 2018 Will and November 2018 Will were prepared. Thus, Bertram exercised undue influence over Mrs. Fraser by orchestrating the circumstances set out above by convincing Mrs. Fraser that she had been abandoned by her family, that he was the only child willing to assist with her care and that Lauretta was not interested in her care and wellbeing.

28. Proprietary Estoppel - The SOC set out a number of particulars including that:

a. Mrs. Fraser told Lauretta on many occasions that Wisdom Manor would be gifted to her on her Mother's death.

b. Lauretta contributed to the renovation of Wisdom Manor between 1990 and 1994 on the basis that Wisdom Manor would be gifted to her upon Mrs. Fraser's death and in reliance upon the promise made by Mrs. Fraser to her.

c. In January 2004, as a result of a dinner at Lobster Pot in 2003 (attended by Mrs. Fraser, Gary, Lauretta and Bertram), Lauretta and her immediate family moved into

Wisdom Manor to assist Mrs. Fraser with her care, to maintain Wisdom Manor and to supplement Mrs. Fraser's income by paying a market rent to her.

d. In reliance upon Mrs. Fraser's assurances and encouragement, Lauretta, with the knowledge of Mrs. Fraser and Bertram: (i) financed significant portions of the design and renovation of Wisdom Manor between 1990 and 1994; (ii) for the period of 2004 to 2015, Lauretta moved her family from their own property in Southampton, into the upper apartment of Wisdom Manor initially paying a rent of $3,000 per month, later reduced to $2,000 per month taking into account ongoing maintenance of Wisdom Manor; (iii) between January and April 2004, renovated the upper apartment of Wisdom Manor using her own funds; and (v) paid for all maintenance and upkeep costs at Wisdom Manor (upper and lower apartments) for the period when she lived there.
e. After Wisdom Manor suffered damage from two hurricanes in 2014, Lauretta refurbished it, whilst living in another property at 163A North Shore Road, Pembroke, but continued to pay rent to Mrs. Fraser.
f. In 2015, Mrs. Fraser, on the encouragement of Bertram and his partner, requested Lauretta and her family vacate Wisdom Manor to enable the upper apartment to be marketed for a higher rent to a third party. Lauretta complied.
g. In the circumstances, it would be unconscionable for Lauretta not to have ownership of Wisdom Manor.

Relief Sought

29. Thus, Lauretta sought the following:

a. A declaration that Mrs. Fraser was not of sound mind, memory or understanding and lacked the requisite mental capacity to execute the May 2018 Will and the November 2018 Will as at the date upon which each of them were executed.
b. An Order that the May 2018 Will and the November 2018 Will be set aside on the basis that Mrs. Fraser lacked the requisite testamentary capacity to execute them.
c. Further or alternatively, a declaration that the May 2018 Will and the November 2018 Will be set aside as having been procured by the undue influence of Bertram over his mother Mrs. Fraser.

d. A grant of probate of the 2017 Will in true and solemn form.
e. A declaration that Wisdom Manor is vested in fee simple in equity in Lauretta and an Order that Wisdom Manor be conveyed in fee simple to Lauretta.
f. An account of the dealings by Bertram with the property bequeathed under the November 2018 Will from 21 December 2019 or such other date as the Court may order.
g. An Order for the payment into Mrs. Fraser's estate of all sums found due to the estate as a result of the account undertaken, plus interest pursuant to the Interest and Credit Charges (Regulations) Act of 1975.
h. Further or other relief as the Court may see fit;

The Defence

30. The Defendant's case is as follows:
    a. Bertram denied that Mrs. Fraser was not of sound mind or lacked mental capacity as asserted.
    b. Bertram denied exercising undue influence over Mrs. Fraser.
    c. Bertram generally denied the particulars of the claim of proprietary estoppel. He admitted that there was a dinner at the Lobster Pot attended by the parties mentioned, but denied the content of the discussions asserted. He maintained that renovations to Wisdom Manor, performed by Lauretta's husband Wayne Stoneham, were billed to Mrs. Fraser and paid by her. He asserted that Lauretta's sense of entitlement did not accord with their mother's wishes and she was free to choose to whom she would dispose the Properties.

The Trial - Evidence

31. The trial took place with evidence given by witnesses for the parties. There was also extensive documentary evidence.

32. For Lauretta's case, Lauretta gave evidence along with her husband Wayne Stoneham, Linda Augustus, Ruthann Pitter, Janet Dublin, Dameka Dublin and Antoinette Bean. She called an expert witness psychiatrist Dr. Kenneth Shulman.

33. For the Defendant's case, Bertram gave evidence along with attorney Nadine Francis, Lovitta Foggo and Yvonne Dujan. He called an expert witness psychiatrist Dr. Stephen Attard.

Evidence not in dispute

34. There was evidence that generally was not in dispute although finer points are in dispute. I have already set out details of the parties, the Children, the properties and ownership, the accommodations and the Wills. The Court has been conveniently assisted by the Chronology of Events filed by Mr. Masters and from which I take some relevant events.

35. In 1976, Mrs. Fraser moved into Aurora House with some family members. At that time Wisdom Manor was an uninhabitable two-storey dwelling that was used as a junkyard. During or around 1990 to 1994, Wisdom Manor underwent renovations and construction works to convert it from a junkyard into a home divided into a lower apartment and an upper apartment. Wayne carried out the majority of the work. It is in hot dispute whether Wayne and Lauretta paid for these works as well as whether at this time Mrs. Fraser promised Lauretta that she would inherit Wisdom Manor, issues to which I will return.

36. In 2003, Mrs. Fraser held a family dinner at the Lobster Pot restaurant. There is a dispute about what was discussed at the meeting. Also in 2003, Lauretta and Wayne renovated the upper apartment and then moved in and lived there until late 2015. Mrs. Fraser travelled to Boston with Lauretta and Beverly for eye surgery.

37. In 2004, Mrs. Fraser suffered a diabetic coma and was treated at KEMH VII Hospital and Lahey Clinic in Boston where she was accompanied by Lauretta and Beverly.

38. In 2005, Wayne renovated the upper apartment of Aurora House.

39. In 2014, Hurricanes Faye and Gonzalo hit Bermuda causing extensive damage to the upper apartment of Wisdom Manor. A renovation was carried out and the funding for it is disputed although there was $35,000 funds from an insurance claim.

40. In September 2015, Mrs. Fraser had treatment for a lower spine injury at Lahey Clinic, where she was accompanied by Lauretta for 1 month. In October 2015, Lauretta returned to Bermuda and Beverly and granddaughter Dameka Dublin took over attendance. Bertram and his then partner Lovita visited Mrs. Fraser. A doctor, concerned about Mrs. Fraser cognitive functioning, recommended to Lauretta and Bertram that she be screened for dementia. Bertram refused the screening. In December, Mrs. Fraser returned to Bermuda accompanied by Bertram.

41. In March 2016, Lauretta emigrated to Singapore to reside and work for 2 years.

42. The 2017 Will was executed. Also in 2017, Lauretta returned to Bermuda for a visit spending time with Mrs. Fraser. Lauretta states that she noticed a decline in Mrs. Fraser's health and short-term memory. I should note here that there are disputes about events in late 2017 about Mrs. Fraser's bank accounts, medication mix-ups and Bertram's conduct.

43. In February 2018, Lauretta returned to Bermuda from Singapore. Thereafter there are a chain of events throughout the year. Notable events include that: (a) Bertram and Lauretta had meetings and discussion about the condition and care of Mrs. Fraser, arranging live-in assistance and disability renovations for her home; (b) Lauretta planned a trip to Foxwood casino, USA for Mrs. Fraser and several female family members. Later the women went on the trip but Mrs. Fraser did not go. (c) Bertram informed Lauretta that Mrs. Fraser had revoked the 2017 POA in April 2018 and later on 5 May 2018 Mrs. Fraser executed a revocation of the same at Trott & Duncan; (d) Mrs. Fraser attended doctors for various kinds of tests and care including, eyes, glasses, dialysis, carotid artery, medication updates; (e) the 2018 MoCA was conducted, and the May 2018 POA and May 2018 Will were executed at Trott & Duncan. (f) family and friends visited Mrs. Fraser and/or took her out of the home for events (hair, bingo, lunches); (g) Lauretta and Bertram's relationship deteriorated resulting in mediation, lawyer's letters and attendance and police intervention

for access to Mrs. Fraser; (h) Lauretta commenced a Supreme Court action involving an injunction that was later set aside and Ruthann was evicted by Magistrates Court on Bertram's application; (i) the May 2018 POA was revoked, the October POA was executed, the November 2018 CA was conducted, and the November 2018 Will executed at TLL; and (j) Mrs. Fraser had some live-in caregivers.

44. In 2019, more events took place amidst a poor relationship between Lauretta and Bertram including: (a) In August 2019 Mrs. Fraser was placed in Westmeath Residential Home where she had visits from Lauretta whose name was not on the list of authorized visitors; (b) By September 2019 Mrs. Fraser was back living at her home where Lauretta and Beverly attempted to visit her; (c) On 19 December 2019, Mrs. Fraser was found unconscious at home by her caregiver and taken by ambulance to KEMH VIII Hospital where she was visited by family; (d) Mrs. Fraser passed away on 21 December 2019; (e) On 3 January 2020, Mrs. Fraser's funeral was held without any input on arrangements from Lauretta or Beverly.

Evidence in dispute

45. There were various main areas of evidence that were in dispute as set out below which I will deal with in turn.

46. Upon my observations of Lauretta giving evidence, I found that she was generally a credible witness who gave her evidence in a forthright and honest manner. Her evidence about caring for and visiting her mother, attempting to arrange live-in caregivers and property ownership had sound reasoning and a resounding ring of truth to it. I found her to be straightforward in her evidence about the material matters even though I accepted some parts of her evidence and rejected other parts. I took the same view of other witnesses for Lauretta who described their knowledge of Mrs. Fraser and their involvement in the care of Mrs. Fraser.

47. I have considered the evidence of Bertram and my observations of him are that whilst he cared for his mother passionately, he was secretive, defensive if not evasive, unreasonable and unhelpful in some of his explanations and thus I found him generally to not be a credible or trustworthy witness. I found that Bertram had such a contempt and/or disdain for Lauretta and her claims such that it clouded his evidence on cross-examination.

Expert Evidence

48. I have given significant consideration to the evidence of the Experts, both to their joint report and to the issues where they did not agree.

49. Dr Shulman is a Professor of Psychiatry at the University of Toronto. He has given expert evidence in estate matters in Ontario, Alberta, Texas and Bermuda. For several years he co-chaired the task force on Testamentary Capacity for the International Psychogeriatric Association. He has published several papers on testamentary capacity and other capacities in international journals and he is a frequent presenter on the subject matter.

50. Dr. Attard is a consultant forensic psychiatrist employed by the National Health Service at HMP Woodhill. He is a Member of the Royal College of Psychiatrists. He is a recognized specialist in forensic psychiatry and has been providing psychiatric reports to the criminal and civil courts in the UK since 2009. On cross-examination he stated that his daily work is not focused on dementia - although he has experience in working in settings involving dementia - but rather on capacity assessment.

51. The Experts filed a joint report dated 30 September 2022 (the "**JER**"). They understood their duty as expert witnesses is to the Court. I have accepted the conclusions in the JER and where necessary I have made further findings about their joint conclusions. The Experts agreed on the following:
    a. Dr. Attard accepted that he did not receive the Wills file of TLL. Also, he was not provided with Mrs. Fraser's prior Wills demonstrating the testamentary

dispositions and the various changes. Dr. Shulman did not receive audio recordings involving Mrs. Fraser.

b. They agreed that capacities are task/decision, situation and time specific. Thus, it was not meaningful to consider general statements with regard to capacity. They agreed that the specific issue with respect to Mrs. Fraser's testamentary capacity is the change in bequest of Wisdom Manor, which in 2017 was bequeathed to all 5 of her children and in her 2018 Wills was bequeathed only to Bertram.

c. They agreed on the definition of dementia as set out in paragraph 88 of Dr. Attard's Report. There he stated that "*Dementia is an umbrella terminology representing a number of different pathological conditions, such as Alzheimer's disease, vascular dementia or Pick's disease, which can themselves present in an idiosyncratic manner in different individuals. … <u>However, the key diagnostic feature of dementia is the combination of cognitive impairment and the inability to function in relation to normal activities of living.</u>*" [emphasis added]

d. The experts agreed that the Montreal Cognitive Assessment ("MoCA") score calculated by Dr. Saba was incorrect as he calculated 17 out of a total score of 30 [for convenience, I shall use the format of "score/30", eg 17/30] but the actual calculation was 14/30. They agreed that the clock drawing test should have been scored as 1/3 rather than 2/3 thus it was possible that the overall score would be 13/30. As to whether the MoCA Score should have been 13/30 or 14/30, I find that as the clock drawing test should have been scored as 1/3 then the corrected score should be 13/30. There is no logical reason why that error should be left uncorrected in the total score. In any event, they agreed that the corrected score casts some doubt on Dr. Saba's original opinion about the level of Mrs. Fraser's cognitive impairment. At paragraph 6 it stated:

> *"The score of 13 or 14/30 on the MoCA does suggest a more significant level of cognitive impairment than only mild impairment as described by Dr. Saba. It may very well be that Dr. Saba was not aware of the actual score on the MoCA and came to the conclusion that her cognition was impaired only mildly, whereas it may have been more severely impaired on closer examination. The impairment involved executive brain functions as well as significantly impaired short-term memory. The report by Dr. Saba on 11 May 2018 does indicate that the referral on 19 April 2018 from her GP, Dr. Griffith, was because of concerns from her family about impaired short-term memory as well as*

impaired function of daily activities. This together with the MoCA score suggests that dementia is a more likely diagnosis than mild cognitive impairment in 2018. However, we note that a diagnosis of dementia, in and of itself, is not a substitute for capacity assessment."

e. The Experts agreed that, because of the family's concerns about Mrs. Fraser's impaired short-term memory as well as impaired function of daily activities together with the MoCA score, it suggested that dementia was a more likely diagnosis than mild cognitive impairment in 2018. To that point, on cross-examination, Dr. Attard suggested that it was actually mild dementia although he explained that the Experts did not discuss the levels of dementia. In my view, based on this joint conclusion, I find that Mrs. Fraser was suffering from dementia in 2018 rather than mild dementia as lately suggested by Dr. Attard in cross-examination, because he did add that the Experts did not discuss levels of dementia.

f. The experts agreed that Mrs. Fraser suffered from a vascular or mixed dementia in 2019.

g. Both experts agreed, and which the Court accepts, that the competency/capacity assessments by Dr. Griffith and Dr. Saba were not appropriate assessments of capacity in accordance with accepted standards for assessing testamentary capacity. At paragraph 8 it stated:

"The "competency assessments" by Dr. Griffith and Dr. Saba were not as comprehensive as would normally be required, as per the criteria for testamentary capacity and the general principles described above with regard to capacity assessment."

52. The Experts made various observations and drew various conclusions in their respective reports.

53. Dr. Shulman considered aspects of Mrs. Fraser's life including her prior Wills and will-making patterns, her medical history, her cognitive and capacity assessments for the period 2017 – 2019, a complaint memorandum by Bertram, health directives and the drafting solicitor's notes. Based on medical records and the MoCA test, Dr. Shulman concluded that Mrs. Fraser's cognitive impairment that reached the level of dementia without adequate documentation of probing her rationale strongly suggests that Mrs. Fraser was not capable of executing the 2018 Wills, in particular, executing the significant changes in

her 2018 Wills from the earlier Wills. On cross-examination, Dr. Shulman maintained that he was of the view that Mrs. Fraser had a cognitive impairment of some significance in 2018.

March 2017 CA

54. Dr. Attard noted that in the March 2017 CA, Dr. Griffith had referred to Mrs. Fraser's competency pertaining to her Will thus, he could infer that there was an assessment of her testamentary capacity.

May 2018 CA and the 2018 MoCA

55. On cross-examination, Dr. Attard agreed that in the May 2018 CA, Mrs. Fraser was described by Dr. Saba as having suffered at least one stroke, had significant chronic microvascular disease according to an MRI report, had significant gait impairment that was likely multifactorial, including spine disease, orthopedic issues and her vision was very poor. He agreed that similar language was used by Dr. Saba in the November 2018 CA.

56. In reference to the May 2018 CA by Dr. Saba, Dr. Shulman's view was that the assessment was not specific enough, as a fundamental principle of any cognitive assessment was that it should be task/decision, situation and time specific. To that point, Dr. Attard explained on cross-examination that task specific referred to Mrs. Fraser's Wills, time specific referred to May 2018 and November 2018, and situation specific referred to the circumstances and facts leading to her decisions.

57. Dr. Shulman opined that he was concerned about the usage in the report of terms such as "*decision-making in a medical or socio-legal context*" which were too broad and unhelpful as there was a big difference in various legal tasks, and thus there should be screening specifically for testamentary capacity. He also considered that with reports of issues with daily activity, the assessment was consistent with dementia. Further, he disagreed with Dr. Saba's belief that because she was coherent in her speech and thought processes that she

should not be considered incompetent in terms of decision making. He explained that that would mean that her coherency would have overcome her cognitive impairment in a few domains, which he considered to be a major leap, for example she had scored 0/5 in delayed recall and she had developed dementia very soon afterwards in 2019. Also, although vision has an impact on the MoCA score, Dr. Saba did not indicate whether the MoCO was inhibited by poor vision.

58. On cross-examination, Dr. Shulman explained that in respect of MoCA scores, the lower the score, the more severe the cognitive impairment although it was not determinative of testamentary capacity and other factors needed to be considered. A score of 18 – 25 was consistent with mild cognitive impairment, 10 – 17 was moderate impairment, and under 10 was severe impairment. He maintained that it was difficult to determine the line between moderate and severe but in this case, the joint view was that with the score of 13, Mrs. Fraser was suffering from moderate to severe cognitive impairment. To that point, on cross-examination, Dr. Attard was of the view that Dr. Shulman had miscalculated the score as 13/30 when the correct score was 14/30. Dr. Shulman's view was that Mrs. Fraser was suffering from significant cognitive impairment as supported by Dr. Saba's conclusion (in the May 2018 CA) that there was some cognitive impairment in multiple domains including abstraction, executive and memory. Dr. Shulman noted that Dr. Saba treated Mrs. Fraser for a time with Donepezil which he explained was a drug used for patients with dementia, not for cognitive impairment.

59. Dr Attard considered various aspects of Mrs. Fraser's life including her personal history, her past medical history and her past psychiatric history. He was aware that Mrs. Fraser had executed the May 2018 Will on 18 May 2018. He concluded that, based on the detailed assessment conducted by Dr. Saba on the 11 May 2018 and the report of Dr. Griffith of 15 October 2018 that Mrs. Fraser had no discernible deterioration in functioning between 11 May 2018 and 15 October 2018, he was of the opinion that, it is likely that Mrs. Fraser had the testamentary capacity on 18 May 2018. On cross-examination he agreed that the May 2018 CA did not say it was an assessment of her capacity to change her Will but for a retrospective assessment it helped to infer the thoughts of Dr. Saba, which, if he gave evidence would be very useful. Further, he conceded that Dr. Saba had based his report on

an incorrect MoCA score but Dr. Attard maintained that the MoCA does not tell you everything as a screening tool; but that Dr. Saba had conducted a clinical assessment for a duration of 80 minutes, conceding that more than 50% was focused on counselling and coordination of care. He added that his own conclusions were based on the clinical letters and notes and that he had not made any assumptions.

60. In my view, based on the JER conclusion as already set out, the May 2018 CA did not satisfy the requirements of the specifics of time, task and situation. Further, I am not satisfied with Dr. Attard's evidence about Dr. Saba's assessment such that he could conclude that Mrs. Fraser had testamentary capacity in May 2018. To my mind, it is a huge and weak leap for Dr. Attard to seek to provide a retrospective assessment of Dr. Saba's notes to determine capacity, especially in light of a lack of evidence from Dr. Saba himself. Additionally, Dr. Saba had based his assessment on the incorrect MoCA score concluding that Mrs. Fraser was suffering from a mild cognitive impairment when she was actually suffering from dementia. I prefer the evidence of Dr. Shulman that the terms used by Dr. Saba were too broad for the requirement for the necessary specifics. Further, I prefer Dr. Shulman's evidence that Mrs. Fraser's coherency with speech was in essence unlikely to overcome the impairment in several domains. I also find little weight in Dr. Attard's reference to the assessment being of 80 minutes when half of it was dealing with counselling and care.

<u>October 2018 CA and accompanying report of same date</u>

61. On cross-examination in relation to Dr. Griffith's October 2018 CA, Dr. Shulman opined that it was contradictory for Dr. Griffith to state that Mrs. Fraser had some cognitive impairment with some domains of short-term memory and abstract thinking as compared with his statement that she was responding to questions without any impairment. He noted that Mrs. Fraser was an elderly lady over 80 years old with vascular disease who may have been socially ok but she was not examined further for testamentary capacity or probed specifically about her Wills. This would be critical to support the significant changes that she was making in her Wills. I agree with this evidence.

62. Dr. Attard agreed that the October 2018 CA made no statement about Mrs. Fraser's capacity to make a Will or made any statement about a Will. I agree with this evidence.

63. In my view, based on the JER conclusion as already set out, the October 2018 CA did not satisfy the requirements of the specifics of time, task and situation.

November 2018 CA

64. In respect of the November 2018 CA by Dr. Saba, Dr. Shulman noted that Donepezil was not listed in her medications although she had been taking it previously. Also, although the term 'dementia' was not present the report did indicate the "impression" of "mild cognitive impairment due to degenerative disease" which he opined was a subjective report of improvement rather than based on objective assessment. On cross-examination, Dr. Attard opined that the "impression" section was not about capacity, but it was about a diagnosis of cognitive impairment. Thus, it was relevant information on cognitive ability and it showed cognitive improvement.

65. Dr. Attard was aware that Mrs. Fraser had executed the November 2018 Will on 8 November 2018. Also, he noted that a few days earlier, Mrs. Fraser was reassessed by Dr. Saba on 2 November 2018 at which time it was noted that there had been improvements in Mrs. Fraser's health and cognition and that she had "mild cognitive impairment" ("**MCI**"). That condition is a recognized neurocognitive disorder that represents the earliest symptomatic stages of a variety of cognitive disorders. It is considered a prodromal phase of dementia where some degree of impairment is present, but the individual is still able to function in their day to day activities. He noted that Dr. Saba did not make a diagnosis of dementia. In light of the review of the relevant material, Dr. Attard was of the opinion that it is likely that Mrs. Fraser retained testamentary capacity in November 2018. On cross-examination Dr. Attard agreed that Dr. Saba had made no mention that Mrs. Fraser was about to prepare a Will. Also, he clarified that although he was of the view that she had mild dementia, she still had testamentary capacity, noting they were not inconsistent. Dr. Attard maintained that, notwithstanding the joint conclusions that the assessments did not

qualify as assessments for testamentary capacity, Mrs. Fraser still had testamentary capacity to make a Will, relying on Ms. Francis' affidavit which spoke to Mrs. Fraser's statements about her properties and children in their one-on-one discussion. When taken to Ms. Francis' affidavit, on cross-examination he conceded that it did not go into detail but he felt he had sufficient information.

66. In my view, based on the JER conclusion as already set out, the November 2018 CA did not satisfy the requirements of the specifics of time, task and situation. Also, I am not satisfied that I should accept Dr. Attard's evidence that Mrs. Fraser had testamentary capacity in November 2018 to make her Will as he was of the view that she had mild cognitive impairment when she actually was suffering from dementia. Further, I find little weight in his reliance on Ms. Francis notes of her meeting with Mrs. Fraser, which he did concede lacked detail, but he still thought they were sufficient for his conclusions.

2019 BEAM CA

67. Dr. Shulman agreed on cross-examination that Mrs. Fraser was likely suffering vascular dementia in 2019, which was related to previous strokes she had suffered, and was a condition that progressed over time. Further, his view was that Mrs. Fraser had not suffered a 'sudden deterioration' between 2018 and 2019 as Dr. Attard had explained, but that Mrs. Fraser's clinical picture in 2019 was an extension of her condition in 2018.

68. Dr. Attard then considered the reports of: (a) Bermuda Alzheimer's & Memory Services ("**2019 BEAM CA**") dated 28 May 2019 which diagnosed Mrs. Fraser as having dementia and no longer having the ability to make independent legal, medical and financial decisions; and (b) Dr. Griffiths report dated 15 August 2019 where it was noted that Mrs. Fraser suffers from dementia. Dr. Attard concluded that there is a strong likelihood that between 8 November 2018 and 28 May 2019 Mrs. Fraser lost testamentary capacity as a result of a further decline in her cognitive functioning and the development of dementia. Also, he stated that Mrs. Fraser's cognitive impairment was secondary to vascular changes in her brain, and it was likely she suffered from a vascular dementia, given her longstanding

cardiovascular disease and history of diabetes, the evidence of vascular changes and a stroke. He noted that vascular dementia is a degenerative condition where the symptoms worsen over time with the pace of decline unique to the individual, in this case his view was that it was a very sudden decline. Thus, her diagnosis of dementia in 2019 was most typical of a vascular dementia. On cross-examination, Dr. Attard maintained that although he did not have any medical reports of Mrs. Fraser's condition between November 2018 and May 2019, in his opinion there was the evidence of a decline in her mental and physical health.

69. In my view, I am not satisfied with the evidence of Dr. Attard that Mrs. Fraser lost testamentary capacity between November 2018 and May 2019 due to a further decline in her cognitive functioning and development of dementia. As found earlier, Mrs. Fraser was suffering from dementia in 2018. Both experts agreed that in 2019 she was most likely suffering from vascular dementia. Also, her family has made reports of her loss of short-term memory and loss of ability to care for herself prior to November 2018. In my view, the more likely view is that, despite some improvement in some functions described in the November 2019 CA, Mrs. Fraser was suffering from the degenerative disease that was progressing along the spectrum over a period of time as she was also suffering from a number of other ailments including having had a stroke previously. Thus, I am satisfied that her diagnosis in 2019 was an extension of the diagnosis of 2018 which unfortunately was causing a continuous decline over time.

The Issues

70. There are several main issues in this case as set out below which I will deal with in turn:
    a. Did Mrs. Fraser have the testamentary capacity to execute the 2018 Wills;
    b. Did Bertram exercise undue influence over Mrs. Fraser when she executed the 2018 Wills; and
    c. Does the principle of proprietary estoppel apply to the circumstances of the case such that it would be unconscionable for Lauretta not to have ownership of Wisdom Manor.

Issue 1 – Did Mrs. Fraser have the testamentary capacity to execute the 2018 Wills

The Law on Wills and Testamentary Capacity

71. Section 1 of the Trustee Act 1975 states as follows:

> *"property" includes real and personal property, and any estate, share and interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest, whether in possession or not; "trustee" includes an estate representative.*

72. The Wills Act 1988 states as follows:

> *"Property disposable by a Will*
>
> *5(1) Property disposable by will Subject to this Act, every person may dispose, by will executed in accordance with this Act, of all real estate and all personal estate owned by him at the time of his death.*
>
> *Capacity to make a will*
>
> *6 To be valid, a will shall be made by a person who—*
> *(a) is aged eighteen years or over; and*
> *(b) is of sound disposing mind."*

73. The test for whether a testator has sufficient testamentary capacity to execute a will remains that set out in *Banks v Goodfellow* [1861–1873] ALL ER Rep. 74. The test has been endorsed in various judgments in Bermuda including in *Creary and de la Chevotiere v de la Chevotiere* [2014] Bda LR 70 and earlier this year by me in *Doleta Bean v Anthony Caisey and Keith Caisey* [2023] SC (Bda) 12 Civ at paragraph 48. Mr. Banks had at times been of unsound mind and had been confined previously in a county lunatic asylum. He had been discharged from the asylum but he remained subject to certain fixed delusions. Cockburn CJ stated as follows [at page 56]:

> *"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 delusion shall influence his will on disposing of his property, and bring about a disposal of it which would not have been made otherwise*."

74. In determining the issues as cited in the above passage, the Court is required to consider both factual and medical evidence. The nature of the Court's inquiry is defined by *Tristam and Coote's Probate Practice, 32nd Edition* at paragraph 34.38 as follows:

> *"The issue of testamentary capacity may be determined by medical evidence as to the medical condition of the testator or testatrix but in many cases will not be, and requires the court to apply a commonsense judicial judgment based on the whole of the evidence."*

75. The burden of proof in cases where testamentary capacity is alleged is a shifting one. It initially rests with the propounder of the will, in this case Bertram. The legal principle applicable to the shifting burden of proof was summarised in *Ledger v Wooton* [2007] EWHC 90 (Ch) as follows:

> *"(a) the burden is on the propounder of the will to establish capacity; (b) this remains the case even if the propounder has already obtained a grant in common form; (c) where a will is duly executed and appears rational on its face, then the court will presume capacity; (d) an evidential burden then lies on the objector to raise a real doubt about capacity; (e) once a real doubt arises there is a positive burden on the propounder to establish capacity."*

76. Where a will is duty executed, drafted by a competent lawyer who affirms that the client had testamentary capacity, it will carry weight in support of stage (c) above. The "Golden Rule" for wills and probate practitioners when dealing with an elderly and or ill testator is to obtain the evidence of a suitably qualified medical practitioner on the test status capacity. The rule and its limitations were summarized in the English case of *Key v Key* [2010] 1 WLR 2020 Ch at paragraph 7 and was cited in *Creary v de la Chevotiere* and by me in the case of *Bean v Caisey*:

> *"7 The substance of the golden rule is that when a solicitor is instructed to prepare a will for an aged testator, or for one who has been seriously ill, he should arrange for a medical practitioner first to satisfy himself as to the capacity and understanding of the testator, and to make a contemporaneous record of his examination and findings: see Kenward v Adams, The Times, 28 November 1975; In re Simpson, deed (1977) 121 SJ 224, in both cases per Templeman J, and subsequently approved in Buckenham v Dickinson [2000] WTLR 1083, Hqff v Atherton [2005] WTLR 99, Cattermole v Prisk [2006] 1 FLR 693 and in Scammell v Farmer [2008] WTLR 1261, paras 117–123.*
>
> *8 Compliance with the golden rule does not, of course, operate as a touchstone of the validity of a will, nor does non-compliance demonstrate its invalidity. Its purpose, as has repeatedly been emphasised, is to assist in the avoidance of disputes, or at least in*

the minimisation of their scope. As the expert evidence in the present case confirms, persons with failing or impaired mental faculties may, for perfectly understandable reasons, seek to conceal what they regard as their embarrassing shortcomings from persons with whom they deal, so that a friend or professional person such as a solicitor may fail to detect defects in mental capacity which would be or become apparent to a trained and experienced medical examiner, to whom a proper description of the legal test for testamentary capacity had first been provided."

77. Capacity can fluctuate and it is open to the court to accept that at various times the testator may have been of sound disposing mind at various times prior to and after the making of the 2018 Wills. However, the Court must answer the following questions in the affirmative to be satisfied that the testator had the requisite mental capacity at the time the wills were executed;

    a. Did the testator understand the effect of her wishes being carried out on her death?
    b. Did the testator understand the extent of the property she was disposing?
    c. Did the testator understand the nature of the claims upon her estate? and
    d. Did the testator have a rational basis for making provision for only one of her children (Bertram) whilst excluding her other four children?

78. A plaintiff does not have to establish that the testator lacked capacity in relation to all of the above, it is enough if any one of them is missing. I rely on *Re Taylor (deceased)* [2010] Bda L.R. 1 at paragraph 7. The degree of extent of understanding for execution of a will is a high one, see *Re Beany deceased* [1978] 1 WLR 770, cited in *Pedro v Pedro & HSBC Bank Bermuda Limited* [2019] Bda LR72 at paragraph 180.

79. In respect of understanding the nature of the claim of others, in *Creary and de la Chevotiere* and cited by me in *Bean v Caisey* at paragraph 50 it stated:

    "8. As to the nature of the claims of others upon the testator, it has been said that the court must be satisfied that no insane delusion is influencing him to dispose of his property in a way that he would not have done had his mind been sound. See the leading case of Banks v Goodfellow (1870) LR 5 QB 549, *per Cockburn CJ at 565*.

    9. Thus, where a testator suffers from delusions, the court must be satisfied that they did not or were not likely to have an influence on the disposal of his property. This is because the rationale for denying testamentary capacity to persons of unsound mind is the inability to take into account and give due effect to the considerations which ought

to be present to the mind of a testator in making his will. See Banks v Goodfellow, per Cockburn CJ at 561 and 566.

11. However a testator is free to dispose of his property as he sees fit, even if the terms of the will are hurtful, ungrateful, or unfair to those whose legitimate expectations of testamentary capacity are disappointed. See Hawes v Burgess [2013] EWCA Civ 74, *per Mummery LJ at para 14.*

12.Provided that the testator has the requisite understanding, he need not possess the faculties of mind and memory in as great a degree as he may have formally done. See Den v Vancleve 2 Southard at 660, to which I was referred in argument, cited with approval by Cockburn CJ in Banks v Goodfellow at 567.

13.The burden is on the propounder of the will to establish capacity.See Ledger v Wootton [2007] EWHC 2599 (Ch), *per HH Judge Norris (as he then was) at para 5. Thus, where the testator suffers from delusions, the burden is on the propounder to show that they could not reasonably be supposed to affect the disposition of his property. See Smee v Smee* (1879) 5 PD 84 *at 91, per Sir James Hannen at 91.*"

Plaintiff's Submissions

80. Mr. Masters made a number of submissions in support of the Plaintiff's case including that:
    a. None of the three capacity letters is actually a capacity letter about Mrs. Fraser's Will as none of the letters refer to her Will. Thus, the Plaintiff cannot seek to rely on vague sweeping comments about Mrs. Fraser's mental state as proof of capacity because that is not enough.
    b. The diagnosis in May 2018 was one of dementia.
    c. Bertram, as propounder of the 2018 Wills, has failed to discharge his burden of establishing the capacity of Mrs. Fraser to execute the 2018 Wills.

Defendants' Submissions

81. Mr. Daniels made a number of submissions in support of the Defendant's case including that:
    a. The evidence of Ms. Francis in respect of the November 2018 Will, showed that Mrs. Fraser had testamentary capacity at the time when she executed the same. If such evidence is accepted, then it extends back to the execution of the May 2018

Will. Additionally, 3 other lawyers had accepted that Mrs. Fraser had the capacity to instruct them on various matters.

b. Mrs. Fraser was fiercely independent, had executed several Wills throughout her lifetime and she had reasons for making the changes in the November 2018 Will.
c. In 2018, Dr. Griffith and Dr. Saba did not diagnose Mrs. Fraser as suffering from dementia. Their assessments were a clear indication to the attorneys that she had the capacity to make legal decisions.
d. Out of a professional list of 4 attorneys and 2 doctors, Dr. Shulman was the only professional who had cast doubt on Mrs. Fraser's capacity after a retrospective assessment three years after her death, having never assessed or interacted with her.

Analysis

82. I am not satisfied that Mrs. Fraser had testamentary capacity to execute the 2018 Wills for several reasons. In respect of the test in *Banks v Goodfellow* I am satisfied that some aspects of the test were satisfied although not all of them, in particular that: (i) Mrs. Fraser did not understand the nature of the claims upon her estate in that she was suffering from an insane delusion; and (ii) that she did not have a rational basis for making provision for only Bertram.

Whether there is a presumption of capacity

83. I have already found that Mrs. Fraser was suffering from dementia in 2018 which was when she made the 2018 Wills. Further, I have not accepted the evidence of Dr. Attard that Mrs. Fraser had testamentary capacity in 2018 to execute the 2018 Wills.

Capacity Assessments

84. I earlier accepted the evidence of the Experts that the capacity letters competency/capacity assessments by Dr. Saba and Dr. Griffith were not appropriate assessments of capacity in accordance with accepted standards for assessing testamentary capacity. In my view, I find that the Golden Rule was not followed in this case in that the medical doctors did not satisfy

themselves as to the capacity and understanding of Mrs. Fraser. I refer to *Key v Key* where Briggs J stated that compliance with the Golden Rule did not operate as a touchstone of the validity of a will and non-compliance did not demonstrate its invalidity. However, in this case, the medical doctors did not satisfy the task, time and situation requirements for a proper assessment to be later relied on by the attorneys.

Trott & Duncan

85. Second, I have considered the evidence about the execution of the May 2018 Will and the role of the attorney at T&D who has not given evidence in this case about any interactions with Mrs. Fraser in taking instructions in respect of drafting the May 2018 Will. Thus, I am not satisfied that T&D did anything to overcome the problems connected to the failure to provide proper capacity assessments. On that basis, I am inclined to find that the Golden Rule in relation to elderly or ill testators was not properly complied with. In the case of *Creary and De la Chevotiere v De la Chevotiere*, Hellman J cited *Hawes v Burgess* for the principle that it would be difficult to challenge the validity of a will on the ground of lack of mental capacity when an attorney had taken instructions and prepared a will. However, I refer to *Hawes v Burgess* where Sir Scott Baker stated that this could be rebutted by evidence to the contrary. In this case, Mrs. Fraser was an elderly lady who was suffering from dementia and a number of other serious illnesses who was about to make considerable changes to her Will. Thus, I am of the view that the faulty capacity letters were a significant breach of the Golden Rule so as to invalidate the May 2018 Will.

Terra Law Limited

86. Third, I have considered the evidence of attorney Ms. Francis of TLL. Mr. Daniels relies heavily on her evidence to support Bertram's case and that the test in *Banks v Goodfellow* has been satisfied. Mrs. Francis stated that she first met with Mrs. Fraser in her office on 14 September 2018 when she took instructions about revoking a power of attorney and executing a new one and understood that Mrs. Fraser was considering her estate planning. She was provided with the May 2018 CA Letter from Dr. Saba but she requested an updated one, stating on cross-examination that at that point she did not act on the May 2018 CA Letter as it was too old. She later received an updated assessment from Dr. Griffith dated 15 October 2018.

87. On 19 October 2018, when meeting with Mrs. Fraser at her home, Ms. Francis was satisfied that Mrs. Fraser could execute the legal documents. After doing so, having asked Bertram to excuse himself, she took further instructions from Mrs. Fraser about drafting a new Will. On cross-examination, Ms. Francis stated that she had not discussed any instructions for a new Will with Mrs. Fraser prior to 19 October 2018 as there was a court case about her capacity and thus she wanted to wait for that case to be resolved. They had an in-depth discussion and Ms. Francis' evidence is that Mrs. Fraser understood and was carefully considering the future of her estate. On cross-examination, Ms. Francis stated that she was aware that Mrs. Fraser had executed the May 2018 Will and was aware of its dispositions. She advised Mrs. Fraser to take some time to digest her choices.

88. Ms. Francis' evidence is that on 2 November 2018, she met with Mrs. Fraser when Bertram brought her to TLL, but he did not sit in on their meeting. She was provided with the November 2018 CA authored by Dr. Saba. On cross-examination, Ms. Francis stated that she relied on the May 2018 CA Letter as follows: (a) she considered that the reference to Mrs. Fraser's competency in "decision-making in a medical or socio-legal context" was broad enough to include executing a will; and (b) the reference to competency being determined on a case by case basis, she took to mean that Mrs. Fraser was medically competent but that she still needed to use her judgment for the particular task.

89. Ms. Francis stated that she also relied on the outcome of the Supreme Court case in respect of Mrs. Fraser's capacity, having been briefed by Mrs. Fraser, Bertram and the counsel who had conduct of that case for Mrs. Fraser.

90. Ms. Francis stated that she relied on the Nov 2018 CA, and on cross-examination agreed that she would not have drafted a new Will without having an updated report. She did not know if Dr. Saba was told that an assessment was needed for a new Will. She agreed that there was no statement of capacity in the document and that it was not about capacity. However, she maintained that she read the May 2018 CA Letter together with the

November 2018 CA which stated that there were improvements in Mrs. Fraser's memory, eyesight and walking strength.

91. In respect of the October 2018 CA, Ms. Francis agreed that it was requested by her and prepared for the Healthcare Directive but that it did not say anything about competency.

92. Mrs. Francis stated that Mrs. Fraser gave clear coherent instructions on how she wished to dispose of her estate, discussing her 5 children in general and providing rational reasons detailing why she had decided on her final instructions, explaining that: (a) as she had fallen out with Lauretta, she no longer wanted her to manage her estate or benefit from it; and (b) she was very offended by the court case about her competency; (c) she did not want the Two Properties to be the subject of disagreement; (d) she had done right by all her children and thus she wanted Bertram's children to have houses. In respect of naming Anthony as Executor, on cross-examination, Ms. Francis stated that although she did not record the explanation in her notes, Mrs. Fraser stated that she knew him and had confidence in him. In light of those reasons, Ms. Francis states that she drafted the November 2018 Will in accordance with Ms. Fraser's specific instructions taking into account the court case and her family issues. Their next meeting was at TLL on 8 November 2018 when Mrs. Francis executed both a Healthcare Directive and the November 2018 Will. She stated that at all material times, she believed Mrs. Fraser possessed the required *compos mentis* to properly instruct her and being aware of the exact nature of their discussion and legal effect.

93. Mr. Daniels argued that it was clear on the evidence that Mrs. Fraser understood the effects of her wishes; the extent of the property that she was disposing and the nature of the claims against her estate. Further, Mrs. Fraser had a rational basis for making the changes to her Will that provided for Bertram above her other children.

94. In my view, Ms. Francis properly requested an updated assessment report which she received and on which she later relied. Unfortunately, the assessment letter did not satisfy the requirements of the specifics of time, task and situation. On that basis, I am inclined to find that the Golden Rule was not properly complied with. I have also given careful

consideration to the other evidence such as the other meetings, notes, the update provided to Ms. Francis about the outcome of the Supreme Court case and evidence of Ms. Francis where she detailed her efforts to satisfy herself that Mrs. Fraser had the capacity to execute the November 2018 Will. I again refer to *Hawes v Burgess* for the principle that it would be difficult to challenge the validity of a will on the ground of lack of mental capacity when an attorney had taken instructions and prepared a will. However, I again refer to *Hawes v Burgess* about evidence to the contrary and that Mrs. Fraser was an elderly lady who was suffering from dementia and a number of other serious illnesses who was about to make considerable changes to her Will.

95. Initially, on the evidence of Ms. Francis, I was prepared to accept that Mrs. Fraser had demonstrated that she understood the effects of her wishes being carried out and that she understood the extent of the property that she was disposing. These are the first two of four elements of the test in *Banks v Goodfellow*. To that point, I do accept the evidence of Ms. Francis that Mrs. Fraser in essence knew what properties she owned and knew about the details of her children. In making these findings, I rely on the fact that Mrs. Fraser's knowledge of her children and properties were well known to her for as long as she owned the properties and had her children.

96. However, understanding the nature of the claims upon her estate and having a rational basis are more intangible concepts in the test of *Banks v Goodfellow*. Thus, I am confronted by the faulty capacity letters which to my mind present legitimate concerns in this case. I considered the case of *Cowderoy v Cranfield* [2011] EWHC 1616 where the judge expressed concern about expert psychiatrists who had never examined the deceased testator in that case and thus could not give a direct psychiatric appraisal at any point in time let alone on the day of execution of the disputed will. I also considered the case of *Zorbas v Sidiropoulous (No. 2)* [2009] NSWCA 197 where the Court of Appeal of New South Wales opined on the criteria in *Banks v Goodfellow*, stating that although medical evidence may be highly relevant, however, evidence of understanding may come from non-expert witnesses, with most compelling evidence would be reliable evidence, for example, a tape recording, of a detailed conversation with the deceased at the time of the will displaying

understanding of assets, family and effect of the will. It also stated that it is "*extremely unlikely that medical evidence that the deceased did not understand these things would overcome the effect of evidence of such a conversation*". Thus, Mr. Daniels relied heavily on the evidence, contemporaneous notes and records of Ms. Francis. To my mind, I cannot agree with Mr. Daniels on this point as it relates to understanding the nature of the claims upon the estate and the need to have a rational basis for the disposition. Despite all the evidence of Ms. Francis including her records and notes, I am of the view that such evidence is not so compelling as to overcome the expert evidence, in particular about the faulty capacity letters coupled with my finding that Mrs. Fraser was suffering from dementia in 2018. Such evidence rendered Mr. Francis' efforts to be in vain for establishing capacity which I consider to be a significant breach of the Golden Rule.

97. In light of these reasons, I am of the view that Bertram, as propounder of the 2018 Wills, has failed to discharge his burden to satisfy the Court that capacity can be presumed.

Whether there is a real doubt about capacity

98. Fourth, although I have found that Bertram has failed to establish the presumption of capacity, I will go on to address the subsequent issues in respect of testatmentary capacity. If I had presumed capacity, then I am satisfied that Lauretta has raised a real doubt about capacity. As a starting point, in various medical reports, family members reported to the doctors that Mrs. Fraser was forgetting things as a result of loss of short-term memory. Also real doubt arises from the evidence, which I accept, of a number of witnesses as set out below:
    a. Antoinette Bean – She was a friend of Beverly and became a friend of Mrs. Fraser after meeting her in 2008. Ms. Bean's evidence is that she would spend time with Mrs. Fraser on a weekly basis. From around 2017, Mrs. Bean noticed that Mrs. Fraser was becoming forgetful and when they played bingo, she would not recognize people who she had played bingo with for years and she would forget to play her bingo cards properly. On cross-examination she explained that Mrs. Fraser could see who the people were, but she was not sure who they were.

b. Ruthann Pitter – She was the niece of Mrs. Fraser and had a close relationship with her from childhood through adulthood. She rented an apartment at Aurora House from 2002 to 2018 and when renovations started at Aurora House in 2016, she and her mother moved into Wisdom Manor. She recalled that in 2016 Mrs. Fraser had forgotten that her granddaughter had gotten married in 2013, having attended the wedding. Also she was telling stories about things that did not happen and she was not aware that she was sitting in her own kitchen.
c. Wayne Stoneham – he recalled that in 2017 Mrs. Fraser had left her stove on and had forgotten that she had turned it on in the first place.
d. Beverly Tavares – As eldest daughter, she was Mrs. Fraser's right hand woman before 2018 and took her everywhere including bingo, cared for her, prepared meals for her and gave her medication to her. She recalled that in 2017 Mrs. Fraser was mixing up days of the week, was accidentally taking her pills on the wrong day and time, had difficulty playing her bingo cards and was forgetting regular acquaintances.
e. Janet Dublin – She is Gary's wife. She recalled that Mrs. Fraser's sister Dorothy passed away in January 2017 but that Mrs. Fraser would ask about her siblings, all of whom had passed, and was distressed when told they had all passed. On drives, she was confused as to where she was and failed to recognize Wisdom Manor as her home.
f. Dameka Dublin – She was Mrs. Fraser's granddaughter. She recalled that by 2017 Mrs. Fraser had started to forget when she had taken her medication and her meals.

99. I also find that real doubt exists as Bertram himself expressed concerns to the medical doctors that Mrs. Fraser was suffering from dementia and that it was getting worse.

Whether Bertram has failed to establish capacity

100. Once a real doubt has been raised about capacity, then there is a positive burden for Bertram to establish capacity. In my view, I am satisfied that Bertram has failed to establish capacity. I rely on *Tristan and Coote's Probate Practice, 32nd Edition* where I am

obliged to take into account the medical evidence and to apply a commonsense judicial judgment based on the whole of the evidence.

The Medical Evidence

101. I have already found that the capacity letters were not time, task and situation specific. Thus, I attach little to no weight to them in the effort to establish capacity. I have considered the other medical evidence much of which was generated as a result of the concerns of Mrs. Fraser's family as follows:

a. By April 2018 Mrs. Fraser was taken to Dr. Griffith for a referral;
b. On 1 May 2018 Bertram took Mrs. Fraser to her doctor expressing concerns that she was hallucinating and saw her dead sister;
c. In May 2018, Mrs. Fraser was seen by Dr. Saba who administered the MoCA and scored it incorrectly resulting in a diagnosis of mild cognitive impairment when she was suffering from dementia;
d. In May 2018, Mrs. Fraser was prescribed Donepezil which is used to treat dementia; and
e. In May 2019, Mrs. Fraser was formally diagnosed with dementia.

The Expert Evidence

102. I have already given the expert evidence significant consideration and accepted the conclusions of the JER. I also accepted that Mrs. Fraser was suffering from dementia in 2018 when she executed the 2018 Wills.

103. Further, I have already found that I was not satisfied by Dr. Attard's evidence to establish capacity for the 2018 Wills even though the capacity assessments were not task, time and situation specific.

The Witness Evidence

104. I have referred to the witness evidence as set out above in respect of there being a real doubt about Mrs. Fraser's capacity. I rely on that evidence here also. Further, I have

considered that there has been no evidence from Dr. Saba and Dr. Griffith. They were crucially positioned to assist the Court in the details of the capacity assessments, but they were not called. Mr. Daniels argued in essence that their medical reports and assessments gave a contemporaneous picture of Mrs. Fraser's capacity. Thus, the Court was left with the evidence of Dr. Attard's sincere efforts to infer what Dr. Saba was taking into account. In my view, they could have assisted the Court with answers to certain questions including: (a) did they know that Mrs. Fraser was going to disinherit 4 out of her 5 children in respect of one of her properties; (b) did they know that Bertram stood to inherit the Two Properties; and (c) did they know that their letters were going to be relied on by attorneys in support for drafting and executing the Wills.

105. I do not accept Mr. Daniels argument that in the Supreme Court action, the comments by the Chief Justice could be relied on to support the capacity of Mrs. Fraser in this case. In the case before the Chief Justice, he was not dealing with testamentary capacity and its specific requirements.

The rationality of disinheriting 4 of the Children in favour of Bertram and delusions

106. I have considered the case of *Creary and De la Chevotiere v De la Chevotiere* where it cited *Ledger v Wooton*. I have considered Mrs. Fraser's capacity in light of whether it was rational for her to disinherit 4 of her 5 children in favour of only Bertram. I have balanced this task with the principle per LJ Mummery in *Hawes v Burgess* that a testator is free to dispose of her property as she sees fit, even if the terms of the will are hurtful, ungrateful, or unfair to those whose legitimate expectations of testamentary capacity are disappointed.

107. I have given serious consideration to the submissions of Mr. Daniels that the explanations by Mrs. Fraser as to her disposition when taken alone or together provide a rational basis for doing so. In essence, that Mrs. Fraser had provided for her children during the course of her lifetime, was deeply upset by the actions of Lauretta and Beverly, entrusted Bertram to be a custodian of her legacy and that her intended disposition would not cause further disagreements between her children.

108. In my view, the starting point is that I am satisfied that in the 3 Wills executed between 2012 and 2017, Mrs. Fraser intended for: (a) Bertram to inherit one of the Two Properties and if he predeceased her, then that property would be left to the remaining Children; and the other property was to be inherited by all 5 Children. This was rational in the sense that it was not unusual for Mrs. Fraser to ensure that all her children were to inherit her properties in some share.

109. To my judgment, Mrs. Fraser's actions in respect of the 2018 Wills are irrational in light of the historical background as follows: (a) the Children were each provided for with a house by their grandfather Mr. Edness; (b) the evidence which I accept that Mrs. Fraser loved all her Children and she was fair; (c) there is no evidence that Mrs. Fraser's relationship with Gary and Kenneth had changed negatively; (d) there appears to be no rational reason for excluding Beverly, who was her right-hand woman; (e) Lauretta's efforts since her return from Singapore, including the Supreme Court case, was about the care for Mrs. Fraser; (f) Mrs. Fraser had allowed various members to reside in units of the Two Properties at various times; and (g) there is no evidence at all that previously Mrs. Fraser had any interest in Wisdom Manor being a guest house. To that point, I accept Lauretta's evidence that it was a farcical idea that was contrary to Mrs. Fraser's wishes for the property to stand as the homestead honouring the legacy of Mrs. Fraser and her parents.

110. I have considered the duty upon Bertram to satisfy the Court of Mrs. Fraser's capacity. One aspect of his case is that Mrs. Fraser trusted only him to take care of the Two Properties. However, the evidence has shown that Lauretta and her husband Wayne had undertaken extensive renovations and repairs to parts of the Two Properties over many years, thus the notion that only Bertram could care for the Two Properties is without merit.

111. Another aspect of Bertram's case is that Mrs. Fraser did not trust Lauretta after her return from Singapore when she wanted care to be provided to Mrs. Fraser and the associated Supreme Court case. To that point, Mrs. Fraser was most likely suffering from some delusions about Lauretta's efforts to provide care for her. She may very well have

favoured Bertram's decisions on care, subject to her dementia, but to take the drastic step of disinheriting 4 of her Children in favour of Bertram because of Lauretta's efforts seems clearly delusionary. Thus, I am satisfied that Mrs. Fraser had insane delusions that were influencing her to dispose of the Two Properties in a way that she would not have had her mind been sound or she was not suffering from dementia. In my view, per this aspect of the test in *Banks and Goodfellow*, had Mrs. Fraser not been suffering from the insane delusion or the dementia, she may likely would have disposed of her Two Properties in some other way. In such a case of delusion, I refer to Hellman J in *Creary and De la Chevotiere* where he cited *Smee v Smee* where the principle was set out that where the testator suffers from delusions, the burden is on the propounder, in this case Bertram, to show that they could not reasonably be supposed to affect the disposition of the Two Properties. In my view, Bertram has failed to show that the delusions would not have affected Mrs. Fraser's disposition because, on the evidence, there is no explanation for disinheriting the other 4 Children in 2018.

112. In light of these reasons of irrationality and delusions, I am not satisfied that Bertram has raised sufficient evidence to show capacity in light of the real doubt that I have found. On that basis, in my view, the test in *Banks and Goodfellow* has not been satisfied. Thus, I find that Mrs. Fraser did not have the testamentary capacity to execute the May 2018 Will and the November 2018 Will.

Issue 2 – Did Bertram exercise undue influence over Mrs. Fraser when she executed the 2018 Wills

The Law

113. The modern application of the equitable principle of undue influence is found in *Royal Bank of Scotland Plc v Etridge (No. 2)* [2002] 2 A.C. 773 HL**.** *Etridge* has been cited with approval by this Court in several judgments (*Lawrence v HSBC* 2020 BDA LR 36 and *Wong ,Wen- Young v Grand View Private Trust Company Limited et al* [2022] SC (Bda)

44 Com (22 June 2022) and more recently by me in *Rita Furbert v Williston Furbert and Dawn Furbert* [2023] SC (Bda) 76 Civ.

114. In *Etridge*, Lord Clyde distilled the primary question for the Court in any undue influence claim at paragraph 93 as follows:

> *"[at] the end of the day, after trial, there will either be proof of undue influence or that proof will fail and it will be found that there was no undue influence. In the former case, whatever the relationship of the parties and however the influence was exerted, there will be found to have been an actual case of undue influence."*

115. In the recent Privy Council case of *Nature Resorts Ltd v First Citizens Bank Ltd* [2022] 1 W.L.R. 2788 it stated that the equitable doctrine of undue influence is a single concept despite the common understanding of the doctrine being divided into two categories: actual and presumed undue influence. At paragraph 11 it stated:

> *"But in Etridge the House of Lords made clear that undue influence is a single concept. It does not have two different forms. The correct analysis of the two categories is that they refer to different ways of proving undue influence. Presumed undue influence refers to where the person alleging undue influence relies on an evidential presumption. Actual undue influence refers to where the person alleging undue influence relies on direct proof (of A's conduct, within a relationship with B, which led to B not exercising a free and independent judgment)." [emphasis added]*

116. In *Snell's Equity 34th Edition* at 8-021 it confirmed that the requirement to provide direct proof of conduct does not extend to proof of specific acts but instead can include a vast penumbra of facts. The court must take into account all the circumstances of the case and can infer undue influence.

117. *Snell's* comments, also at 8-021, state that the doctrine of actual undue influence is often split into two further strands: (i) improper threats or improper inducement; and or (ii) where the nature of the relationship between the parties is such as to impose on a "*duty to behave to the vulnerable party with candor and fairness. If the stronger party then acts in breach of their duty, the transaction can be set aside for undue influence*". (See *Libyan Investment Authority v Goldman Sachs International* [2016] EWHC 2530 (Ch), [137] per Rose J.

118. Undue influence in the context of dispositions made by will means coercion to make a will in particular terms (See *Williams on Wills 11th Edition* at 5.9). In *Bean v Caisey* I cited the case of *John Edwards v Terence James Edwards, Elizabeth Maude Coombes & The Partner of KTP Solicitors* [2007] EWHC 119 (Ch) where Lewinson J stated as follows:

> *"There is no serious doubt about the law. The approach that I should adopt may be summarised as follows:*
>
> *i) In a case of testamentary disposition of assets, unlike a lifetime disposition, there is no presumption of undue influence;*
>
> *ii) Whether undue influence has procured the execution of a will is therefore a question of fact;*
>
> *iii) The burden of proving it lies on the person who asserts it. It is enough to prove that the facts are consistent with the hypothesis of undue influence. What must be shown is that the facts are inconsistent with any other hypothesis. In the modern law this is, perhaps no more than a reminder of the high burden, even on the civil standard, that a claimant bears in proving undue influence as vitiating a testamentary deposition;*
>
> *iv) In this context undue influence means influence exercised either by coercion, in the sense that the testator's will must be overborne, or by fraud;*
>
> *v) Coercions is pressure that overpowers the volition without convincing the testator's judgment. It is to be distinguished from mere persuasion, appeals to ties of affection or pity for future destitution, all of which are legitimate. Pressure which causes a testator to succumb for the sake of a quiet life, if carried to an extent that overbears the testator's free judgment direction or wishes, is enough to amount to coercion in this sense;*
>
> *vi) The physical and mental strength of the testator are relevant factors in determining how much pressure is necessary in order to overbear the will. The will of a weak and ill person may be more easily overborne than that of a hale and hearty one. As was said in one case simply to talk to a weak and feeble testator may so fatigue the brain that a sick person may be induced for quietness' sake to do anything. A "drip drip" approach may be highly effective in sapping the will;*
>
> *vii) There is a separate ground for avoiding a testamentary disposition on the ground of fraud. The shorthand used to refer to this species of fraud is "fraudulent calumny" The basic idea is that if A poisons the testator's mind against B, who would otherwise be a natural beneficiary of the testator's bounty, by casting dishonest aspersions on his character then the will is liable to be set aside;*

viii) The essence of fraudulent calumny is that the person alleged to have been poisoning the testator's mind must either know that the aspersions are false or not care whether they are true or false. In my judgment, if a person believes that he is telling the truth about a potential beneficiary then even if what he tells the testator is objectively untrue, the will is not liable to be set aside on that ground alone;

ix) The question is not whether the court considers that the testator's testamentary disposition is fair because, subject to statutory powers of intervention, a testator may dispose of his estate as he wishes. The question, in the end, is whether in making his disposition, the testator has acted as a free agent."

The Legal Burden

119. In *Thompson v Foy* [2009] EWHC 1076 Ch at [101] (cited with approval by this Court in *Pedro et al v Pedro and HSBC Bank Bermuda Limited* [2019] Bda LR 66), the discussion shows that legal burden to prove undue influence falls on Lauretta, where the Court stated:

"*The evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship, and all the circumstances of the case*".

Plaintiff's Submissions

120. Mr. Masters submitted that the ultimate question is from the leading case on actual undue influence in testamentary cases (*John Edwards*) whether in making her disposition, Mrs. Fraser acted as a free agent. He submitted a number of grounds to be considered as to why she did not so act including as follows:

a. The state of Mrs. Fraser's mental and physical strength, which is a relevant factor in determining how much pressure is necessary to overbear her will.
b. The state of her vision.
c. The relationship between Lauretta and Bertram.
d. Mrs. Fraser's reliance on Bertram by 2018.
e. The appointment of Mr. Evans in legal documents.
f. The drip-drip approach

Defendants Submissions

121. Mr. Daniels made a number of submissions that there was no undue influence including the following:

a. There is no evidence that Bertram coerced Mrs. Fraser to change her Will.
b. None of Lauretta's witnesses have alleged that Bertram acted in any way that would scare or concern Mrs. Fraser or could form the basis for him to exert undue pressure upon her.
c. Lauretta's case on undue influence is based on speculation and conjecture to create a false and misleading narrative.

Analysis

122. In my view, I am satisfied that Bertram exercised undue influence over Mrs. Fraser to procure the execution of her Wills as claimed for several reasons as set out below. I should note here that in a case of testamentary disposition of assets, unlike a lifetime disposition, there is no presumption of undue influence.

The state of Mrs. Fraser's mental and physical strength

123. First, I have taken into consideration the mental and physical strength of Mrs. Fraser in the context of determining how much pressure is necessary to overbear her will. I refer to the extract in the appendices of Dr. Shulman's report which cites a text *The Wills of Older People: Risk Factors for Undue Influence. International Psychogeriatrics, (2009)* authored by Dr Shulman and others, which states as follows:

> *"The lower the capacity, cognitive status or emotional stability of an individual, the less influence would be required to determine that the individual was unduly influenced. Conversely an individual with only very mild impairments of cognitive function and emotional stability would have to be subjected to a severe level of influence to the point of coercion or containment before that influence would be considered undue."*

124. Second, I have already found that Mrs. Fraser was suffering from dementia in 2018. It follows that that would significantly lower her cognitive status. It is also accepted that Mrs. Fraser was an elderly lady who suffered from a number of illnesses, including diabetes, and had undergone various surgeries to treat them. She was also on a list of medication to assist with her health, she struggled to walk with a walker and she used a monocle for reading or had someone read to her. I have considered the emotional stability of Mrs. Fraser during 2018 when she executed the 2018 Wills. The evidence shows what I would consider to be a roller coaster of events that included that Bertram was providing care to Mrs. Fraser but Lauretta was trying to assist her with care, Lauretta and Bertram were not getting along, the Supreme Court case had taken place, regular visitors were not being allowed to visit with her, the police had been called to the property, Ruthann was being evicted, she had been told that she was going to go overseas on the girls' trip but she was not allowed to go, her birthday celebration was not as she expected and various trips to medical and legal appointments were taking place. In my view, as a result of her cognitive status, physical state and emotional turbulence I find that only a low level of influence was necessary to unduly influence Mrs. Fraser.

125. Third, on the evidence, Lauretta was a primary caregiver for Mrs. Fraser prior to going to Singapore to live, sharing duties with Beverly who focused on daily care, medications and meals. When Lauretta went to Singapore, Bertram was added as a Power of Attorney as Lauretta stated she believed Bertram would assist in a positive way. Upon her return from Singapore, Lauretta became alarmed at the medical condition of Mrs. Fraser. Her efforts to resolve issues with Bertram were met with significant resistance. In my view, Bertram actions and conduct seemed paranoid as he appeared to build a ring of steel and control around Mrs. Fraser, with he and Mrs. Fraser inside the ring and Lauretta, Beverly and other family members outside that ring. The conduct included the events as set out below which I accept, subject to any comments for any specific event:

a. Bertram installed cameras around Wisdom Manor and only he had access to the cameras and had access to the footage on his smartphone. On cross-examination he explained that the cameras were installed around the property to act as a deterrence

from ongoing gang activity in the area and to keep Mrs. Fraser safe. He was able to access the cameras from his smart phone.

b. He would attend Wisdom Manor if he noticed anyone there, especially if he did not know them.
c. He handled the reordering and collection of the prescription medicines for Mrs. Fraser, and he administered Donepezil to her, not including it in the medicines that Beverly had to ensure that Mrs. Fraser took.
d. He took Mrs. Fraser to all her medical appointments.
e. He took Mrs. Fraser to 4 appointments with lawyers in May 2018 and he arranged those meetings. I am entitled to infer that he had some discussion with Mrs. Fraser about the lawyer appointments.
f. He did not inform Lauretta or Beverly about the change in the neurologist appointment to a date when they were overseas. On cross-examination, Bertram explained that the doctor's office had called him to change the date of the appointment and that as Mrs. Fraser had told Beverly about the change, he did not need to inform them of the same.
g. He agreed he told Lauretta the 2017 POA was revoked when it had not been so.
h. He agreed he told his mother of the Supreme Court injunction case. He instructed counsel to assist her and to my mind appeared to be in solidarity with her against Lauretta.
i. He agreed he took his mother to the appointments with doctors and lawyers from May 2018 onwards.
j. He agreed he changed the locks on Wisdom Manor in August 2018 and he was the only one who had a key. I note this was in contrast with the position before where Lauretta and Beverly had keys and/or free access to Mrs. Fraser's home. On cross-examination, Bertram explained that he acted on Mrs. Fraser's instructions.
k. He agreed he blocked the telephone numbers of Lauretta and Beverly from Mrs. Fraser's home telephone number. On cross-examination, Bertram explained that he blocked some family members' telephone numbers after frustration over the court case, the confusion that ensued and the ill-feelings that had arisen. Further, as Mrs. Fraser had to be taken to the hospital after the court hearing earlier in the day, the

discharge notes indicated ‘Stress reaction” and “Anxiety reaction”, he wanted to protect Mrs. Fraser from further stress. In any event, other family members were able to call and visit.

l. He wrote to Hope Healthcare to remove Lauretta’s right to be notified about appointments and forbidding Mrs. Fraser’s doctors from communicating with Lauretta.
m. He initiated Ruthann’s eviction;
n. He agreed he attended Beverly’s home to demand the return of Mrs. Fraser’s car.
o. He was responsible for hiring and firing her caregivers.
p. He agreed he called the police on Lauretta when she tried to visit Mrs. Fraser.
q. He agreed he took Mrs. Fraser to various hotels and at one point in 2019, he admitted her to Westmeath without telling Lauretta and Beverly. At Westmeath, he agreed he drafted the permissible visitors list but he specifically placed Lauretta and Beverly on the prohibited list.
r. He agreed he was the only one who had access to Mrs. Fraser’s finances and bank accounts.

126. I have considered all these complaints and Bertram’s explanations. Further I have considered Bertram’s evidence where he stated that: (i) he never asked or suggested that he be the sole recipient of the balance of his mother’s estate; (ii) he never made any demands of his mother, or sought to tell her what to do; (iii) he never exercised any pressure upon her to obtain a desired outcome; (iv) he did not discuss his mother’s Wills with her; (v) he did not did not query why his mother wanted to visit Ms. Francis; and (vi) he had never taken advantage of her or abused her trust and confidence in him.

127. I have also considered the evidence from Lauretta’s witnesses about the comings and goings at Wisdom Manor in relation to Mrs. Fraser and to Bertram. I rely on *Snell’s Equity* that the requirement to provide direct proof does not extend to proof of specific acts but can include a vast penumbra of facts. Thus, I do not agree with the approach by Mr. Daniels that there is no proof of coercion as if a specific act had to be identified. In my view, there are myriad facts from which coercion can be inferred.

128. Primarily, in my view, the above events demonstrate to me that Bertram was in a full isolation operation as it related to Mrs. Fraser. The circumstances of the cameras, blocking the phones, also showing up, changing the locks, moving Mrs. Fraser around to hotels or care homes, blocking Lauretta from seeing their mother, ordering the return of the car that Beverly had used for a long time to care for Mrs. Fraser and evicting family members from the property all smack of an unnecessary preoccupation to isolate Mrs. Fraser from other members of her family and extended family and friends which is illogical, paranoid and oppressive in the circumstances of the necessary care for an elderly family member, a responsibility that a reasonable person would think would be shared by all willing adult children. In my view the combination of these effects spilled way over the line to cause me to be satisfied that they amounted to a basis to properly infer coercion.

129. Fourth, in my view, Bertram was playing on the mind of Mrs. Fraser by deploying the isolation tactics at the same time that he was ferrying Mrs. Fraser to the doctors and lawyers. Despite his position about what he did not do as set out above, it is overwhelmingly clear that the isolation tactic was undermining Lauretta and Beverly in Mrs. Fraser's eyes and it also clear that Bertram was aware why he was taking Mrs. Fraser to the doctors for capacity assessments and to the lawyers, namely that Mrs. Fraser was changing her Will. To my mind, he was taking advantage of Mrs. Fraser vulnerabilities which only needed a low level of influence to unduly influence her. Thus, I am satisfied that Bertram's conduct to isolate Mrs. Fraser from Beverly and Lauretta as set out above were designed to lead Mrs. Fraser to the belief that her daughters had abandoned her. Mrs. Fraser said as much in her answers before the Chief Justice.

130. Fifth, I have considered the evidence that Mr. Evans was appointed as the enduring Power of Attorney dated 19 October 2018 and for her Heath Directive dated 8 November 2018 and he was alternate executor of her estate pursuant to the November 2018 Will. I accept the evidence that Mr. Evans was a close friend of Bertram who worked for the electrical supply company Belco and assisted with electrical fixes after hurricanes. However, I do find it extraordinary if not strange that Mrs. Fraser would choose him to

have control over her finances, make life or death decisions as they related to her healthcare and to administer her estate. To my mind, this was more the will of Bertram then the will of Mrs. Fraser, especially in light of the existence of her daughters, other children and close relatives. Thus, I have accepted the evidence of Lauretta that Mr. Evans was not someone who was well-known to her or Beverly and did not have a first-hand knowledge of Mrs. Fraser's affairs.

131. Sixth, in light of all the reasons stated above, I am satisfied that Bertram had a main aim to isolate Mrs. Fraser away from Lauretta, Beverly and others who had provided care or friendship to her during her life. To that point, he readily took control over all aspects of her life especially by 2018, his conduct executed in a drip-drip manner resulting in poisoning Mrs. Fraser's mind against Lauretta. To my judgment, I am satisfied that Bertram deployed a high degree of undue influence over Mrs. Fraser when she was executing the 2018 Wills, although as stated above, in her physical, mental and emotional state, only a low level of undue influence was required. Thus, I rely on *John Edwards v Edwards* in that Mrs. Fraser's will was overborne as a result of the coercion. To that point, Mrs. Fraser succumbed to the pressure of Bertram who had isolated her, narrowed down her exposure to others, set Lauretta and Beverly as villains of the piece against her, played upon her mental and physical state, caused her to desire the quiet life to get away from it all and literally and figuratively delivered her to the attorneys to change her Will, unsurprisingly in his favour.

Issue 3 - Does the principle of proprietary estoppel apply to the circumstances of the case such that it would be unconscionable for Lauretta not to have ownership of Wisdom Manor

The Law

132. The equitable doctrine of property requires three main elements to be proved:

a. A representation or assurance made to the plaintiff by the deceased;
b. Reliance by the plaintiff on that representation or assurance; and
c. Detriment to the plaintiff in consequence of his reasonable reliance.

133. *Snells' Equity* at paragraph 12-038 stated that the Court must look at the matter in the round citing *Gillette v Holt* [2001] Ch 210 CA at 225, per Robert Walker LJ. It further defined proprietary estoppel into three categories: (i) acquiescence-based; (ii) representation based; and (iii) promised-based. The promise-based principle is described in *Snell's* as follows:

> *"where A makes a promise that B has or will acquire a right in relation to A's property and B, reasonably believing that A's promise was seriously intended as a promise on which B could rely, adopts a particular course of conduct in reliance on A's promise. If, as a result of that course of conduct, B would then suffer a detriment were A to be wholly free to renege on that promise, A comes under a liability to ensure that B suffers no such detriment."*

134. It is well established that a claim in proprietary estoppel survives the death of the testator and can be enforced against the testator's representative (See *Williams, Mortimer and Sunnucks 21st Edition* at 41-68)

135. In respect of representations, assurances or promise made to a plaintiff, the promise need not be made expressly and is construed widely. In the leading English case of *Thorner v Major & Others* [2009] 1 WLR 776 it was demonstrated as a "*matter of implication and inference from indirect statements and conduct.*" In that case Lord Walker also stated as follows:

> *"… that promise or expectation must be of some definite interest which the law is able to quantify. That does not mean absolute precision, but the claimant must be able to say what the expectation is."*
>
> *…*
>
> *"I would prefer to say (while conscious that it is a thoroughly question begging formulation) that to establish proprietary estoppel the relevant assurance must be clear enough. What amounts to sufficient clarity, in a case of this sort, is hugely dependent on context. I respectfully concur in the way Hoffman LJ put it in Walton Walton [1994] CA Transcript Number 479 … at para 16:*
>
> > *"The promise must be unambiguous and must appear to have been intended to betaken seriously. Taken in its context, it must have been a promise which one might reasonably expect to be relied upon by the person to whom it was made."*

136. In respect of reliance the promise of a testator must be one reason why the plaintiff acted in the way that she did but it does not have to be the sole reason. In *Snell* at 12-043

it stated that "*A's promise need not provide the sole reason for B's action: it is very rarely the case that B will act for just one reason and, for example, a claim may still arise even where B cares for A not only as a result of a testamentary promise but also because of the ties of family or friendship*". In *Richardson v Tuzo* [2007] Bda LR at paragraph 32 Ground CJ stated as follows:

> *"32. On this central issue I accept the plaintiff's evidence that, when she obtained the loan and built the apartment, she did so in reliance on an understanding that the whole property would be hers one day. That was not, however, the sole or even primary factor in her building the apartment. I have no doubt that her primary motivation was because she wanted an apartment of her own. However, I also accept that, to give rise to an enforceable equity, the promise relied upon does not have to have been the sole inducement for the conduct: it is sufficient if it is an inducement: See Balcombe LJ in Wayling v Jones (1993) 69 P & CR 170 at 173, cited with approval by Robert Walker LJ in Gillett v Holt [2001] Ch 210 at 226."*

137. In respect of detriment, the Court's approach in inheritance cases was summarised in *Gillett v Holt* [2001] Ch 210 and cited by Ground J in *Richardson v Tuzo* as follows:

> *"... the fundamental principle that equity was concerned to prevent unconscionable conduct permeated all the elements of the doctrine of proprietary estoppel; that although the element of detriment was an essential ingredient of proprietary estoppel the requirement was to be approached as part of a broad inquiry as to whether repudiation of an assurance was unconscionable in all the circumstances; that where assurances given were intended to be relied on, and were in fact relied on, it was not necessary to look for an irrevocable promise since it was the other party's detrimental reliance on the promise which made it irrevocable; that, when ascertaining whether promises and assurances repeated over a period of many years as to future rights over property were sufficient to found a claim for equitable relief, it was necessary to stand back and look at the claim in the round;" [emphasis added]*

138. *Snell* emphasized at 12-044 that detriment "*is not a narrow or technical concept*" and "*need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial*", citing *Gillett v Holt* adding that "*In testing for detriment, therefore, a court does not undertake an exercise in forensic accounting, but is engaged in a "classic evaluative exercise" and "must stand back and look at the matter in the round*".

139. In respect of a testator changing their mind over a period of time, in the Court of Appeal case of *Terceira v Terceira* [2011] Bda LR 67 at paragraph 18, Baker JA stated as follows:

> *"The judge observed that it was quite plausible that the father had encouraged Ronnie to believe he would be left the property as a spur to Ronnie getting the building erected without ever intending to follow the promise through. That, however, is nothing to the point if, as the judge found, the words were intended to be taken seriously and were so understood by Ronnie."*

Plaintiff's Submissions

140. Mr. Masters made a number of submissions in respect of the claim that Lauretta had established a right to the ownership of Wisdom Manor by way of proprietary estoppel including:

a. Mrs. Fraser made several promises to Lauretta over the years, starting in 1990 and that Lauretta relied on such promises to her detriment;
b. The construction of Wisdom Manor took place in 3 phases over time during which promises were made or reinforced by Mrs. Fraser to Lauretta that Lauretta would be gifted Wisdom Manor;
c. Phase 1 of about 2 years was the "Lauretta and Wayne Investment Phase" which included engaging architects, obtaining planning approval, clearing the junkyard and excavation of the property. Wayne did the work in this phase and he and Lauretta paid for the works as they went along.
d. Phase 2 was when Gary contributed funds on Mrs. Fraser's behalf to assist building Wisdom Manor up to the wall plate. The evidence showed that Mrs. Fraser had repaid Gary and that in 2002 she sought legal advice on how to convey Wisdom Manor to Gary and Lauretta.
e. Phase 3 was when Lauretta and her immediate family moved into Wisdom Manor, paying rent, for 11 years during which time: (i) Lauretta would provide help to Mrs. Fraser; and (ii) Mrs. Fraser encouraged Lauretta and Wayne to undertake further renovations; both circumstances thus affirming Mrs. Fraser's promise that Lauretta would inherit Wisdom Manor on her death.

The Defendant's Submissions

141. Mr. Daniels made a number of submissions to reject proprietary estoppel including the following:

a. Lauretta has either lied or embellished her claims as Mrs. Fraser never made such promises and that Lauretta never made investments into Wisdom Manor.
b. Lauretta's affidavit in the 2018 Supreme Court action showed the funding sources were mainly from Gary's initial outlay of $125,000 and Mrs. Fraser of $350,000 from her savings.
c. Lauretta has produced no evidence or records to demonstrate her purported investment in Wisdom Manor, in particular, prior to 2004. Additionally, she has produced no bank information showing that she took out cash, took out a loan or had other means by which to build Wisdom Manor.
d. Any investment in Wisdom Manor was for her own benefit whilst she lived there.
e. Lauretta simple statement that she would have an "interest" was not sufficient to establish what that interest actually was.
f. Lauretta enjoyed a rental reduction of approximately$120,000 during the period 2005 to 2015 and thus she should not be able to "double dip" by claiming for proprietary estoppel for a benefit she had already received.

Analysis

142. In my view, the claim for proprietary estoppel fails for several reasons. Lauretta and Wayne were extensively cross-examined in respect of the issues connected to proprietary estoppel by Mr. Daniels on their circumstances, their finances, their properties, their work on Wisdom Manor and their other properties, and their relationships with Mrs. Fraser. Bertram was also cross-examined extensively by Mr. Masters. I have given great consideration to that evidence.

143. In respect of the claim for promissory estoppel, I have taken into consideration Lauretta's Second Affidavit evidence in the case 2018 No. 332 ("**Lauretta's 2018**

Affidavit") which was in relation to Mrs. Fraser's healthcare and not her properties. Lauretta deposed as follows:

> *"8(a) I went overseas at 16 years old to live, study and work, returning to Bermuda at age 27 with savings from the sale of my car and furniture. I therefore disagree with Bertram statements that he accompanied me home in 1985, and that he gave me monies. Bertram had graciously transferred his old car to me for $1, in order that he could buy a new car.*
>
> *(b) I refurbished the downstairs space at Aurora House into a studio apartment, paying half of the costs together with my mother. My husband Wayne Stoneham ("Wayne") and I lived in the apartment, paid $500 rent per month for 4 years and then married in 1989. We renovated our apartments again by adding two bedrooms with our monies, paid my mother $750 rent per month, and later that year had our son Ezekiel. We lived there until 1994, after which time we moved to England to study until 1997. We funded our studies and living expenses with scholarship awards, monthly rental income from our Southampton apartments and part time employment.*
>
> *(c) ...*
>
> *(d) In 1992, my mother and brother Gary Dublin ("Gary") asked Wayne to build the property known as Wisdom Manor, which he accepted. Gary provided the initial funding of $125,000, my mother used her savings of $350,000 and had planned to obtain a bank loan to complete the project which was estimated at $600,000 (now valued at >$1,000,000). My mother, Wayne and I traveled to Florida and ordered house materials which filled two shipping containers. Wayne had almost completed the house project just before we went to study in England, save the balcony porch pillars and boundary walls. The project accounts were handed over to Gary and my mother who signed off on them without any issues or concerns.*
>
> *"9(a) following laser eye surgery in 2003, my mother invited Gary, Bertram and I to a dinner meeting at the Lobster Pot Restaurant to discuss her healthcare and rental of the upper apartment of Wisdom Manor. Gary advised that he planned to marry and did not wish to pay rent to live in the apartment. Bertram advised that he was happy living at Aurora House. My mother recommended that I move from my two-bedroom home in Southampton to her upper three-bedroom apartment, as I could take care of her health care needs, pay the rent of $3,000 per month and ongoing maintenance. My mother advised my sister Beverly and brother Kenneth Dublin of the agreement. Wayne and I agreed with my mother to move to Wisdom Manor on 1 January 2004. We offset our costs for upgrading the apartment with rental income from our three Southampton apartments. In early 2004, Wayne and I feel the shipping container in Florida with various household items, renovated the apartment, painted the exterior house and installed boundary fencing and gates for our family dog. The total cost borne by Wayne and I was more than $100,000, which is supported by a binder of original invoices. We*

physically moved into the apartment with our 15-year old son Ezekiel on the 1 March 2004.

(b) …

During the 10 years I lived at Wisdom Manor, I maintained both upper and lower apartments regularly because I knew that my mother was very house-proud. She did not have to pay for any maintenance or upgrades. My mother insisted on annually paying house insurance for Wisdom Manor and Aurora House, as well as her life insurance premium, with her life valued at $500,000 upon her death."

144. I have made detailed reference to these parts of Lauretta's 2018 Affidavit as they were made at a time when Mrs. Fraser's properties were not in issue, in other words, at a time when Lauretta was not asserting an interest in Wisdom Manor. Thus, I attach great significance to the statements as an unvarnished explanation of the circumstances at the time not influenced by the present issues. In my view, these extracts undermine Lauretta's claim to promissory estoppel in a significant manner.

Whether there were promises by Mrs. Fraser to Lauretta

145. I am not satisfied that Mrs. Fraser made promises or gave assurances to Lauretta in respect of Wisdom Manor. I am guided by the principle set down in *Thorner* that the promises can be demonstrated as "*a matter of implication and inference from indirect statements and conduct.*" Thus, I have given a wide scope to the evidence in search of a promise. However, I can find no such evidence to support a promise. To that point, I reject Lauretta's case that the promises started in 1990 when work took place to convert Wisdom Manor from the state of being a junkyard. On the contrary. Lauretta's own evidence in Lauretta's 2018 Affidavit is that Mrs. Fraser and Gary asked Wayne to build the property which he accepted. She made no reference at that point to any promise by Mrs. Fraser that she would have an interest in Wisdom Manor. To my mind, as she was living in Aurora House at that time and had renovated it by adding 2 bedrooms to it at her own expense, it seems that any promise would have been in respect of Aurora House. Putting that observation to one side, I am unconvinced that there was a promise, because in my view, if there was such a promise, it was commonsensical to include it in Lauretta's 2018 Affidavit at paragraph 8(d) along with the other details about financing.

146. Lauretta also relies on the dinner at Lobster Pot Restaurant as another occasion when a promise was made by Mrs. Fraser that Lauretta would enjoy an interest in Wisdom Manor. Taking a wide scope of the evidence, upon my consideration of paragraph 9(a) of Lauretta's 2018 Affidavit, I fail to see any evidence of such a promise. The purpose of the dinner was to discuss Mrs. Fraser's healthcare and rental of the upper apartment of Wisdom Manner. However, in the present case, Lauretta's evidence was that at the dinner, Mrs. Fraser had made it clear that whoever was paying rent would get an interest in the property. I am not satisfied of that evidence. Again, in my view, it was commonsensical to make mention of the promise in Lauretta's 2018 Affidavit along with the other details that were set out about the move to the upper apartment.

147. I have considered the evidence of Dameka Dublin that Mrs. Fraser had communicated to her that she always wanted to leave Aurora House to Bertram and Wisdom Manor to Lauretta. That may very well have been the case but that does not mean that Mrs. Fraser made any promises to Lauretta about giving Wisdom Manor to her. In my view, although the 2006 Will gave Wisdom Manor to Lauretta, Dameka's evidence is contradicted by the 2012 Will which gave Wisdom Manor to all 5 children, the 2015 Will which gave Wisdom Manor to Bertram and the 2017 Will which again gave Wisdom Manor to all 5 children. Significantly, it is clear to me that these dispositions also contradict the essence of Lauretta's evidence.

148. Further, I do not accept that another promise was made to Lauretta by Mrs. Fraser in 2002 when Lauretta was asked by Mrs. Fraser to obtain legal advice about conveying Wisdom Manor to Lauretta and Gary. The purpose was because of the investment made by Lauretta and Gary into Wisdom Manor when he loaned Mrs. Fraser $125,000 for the renovations to Wisdom Manor as well as providing cedar furniture, frames and fixtures. Lauretta's evidence is that Mrs. Fraser repaid Gary the $125,000 but the idea did not proceed as Gary did not wish to pay the Stamp Duty, although Lauretta was prepared to do so. There was in evidence a letter from Mello Jones Martin dated 23 January 2002 to Lauretta about Mrs. Fraser conveying one of her properties to Lauretta and her brother and

about the calculation of stamp duty. Despite this evidence, I am not satisfied that there was a promise or an implication or inference of a promise. This claim is also undermined by the 2006 Will in which Mrs. Fraser did not seek to leave a property to Gary.

149. In light of the above reasons and having given the widest scope of the evidence to establish a promise, I fail to find any implication or inference from indirect statements and conduct of Mrs. Fraser that Lauretta was to have an interest in Wisdom Manor. Also, in following *Thorner* I am not satisfied that evidence shows a clear assurance by Mrs. Fraser, even in the context of Mrs. Fraser owning Wisdom Manor and wishing to leave it to one, some or all of her children. Finally, in applying *Terceira,* I am unable to conclude that there were words by Mrs. Fraser to Lauretta to cause her to take them seriously and understand them to be so.

Whether there was reliance by Lauretta

150. Having found above that I am not satisfied that there were promises made by Mrs. Fraser to Lauretta, it follows that I do not find that Lauretta relied on such promises.

Whether Lauretta acted to her detriment

151. In promissory estoppel, if there were promises made and reliance then I would have to consider whether there has been detriment by Lauretta in consequence of her reliance. Lauretta was cross-examined extensively by Mr. Daniels with the central thrust including that she and Wayne were never in a position financially to invest in Wisdom Manor as other circumstances prevailed such as that they were off island, in further education overseas or had other properties and obligations that they were focused on that required funding. Lauretta in return maintained that she and Wayne had savings, investment portfolios and other funds. I have considered all the evidence in relation to the funding for the renovations of Wisdom Manor.

152. Phase 1 – In or around 1990 - 1992- Mr. Daniels thrust of cross-examination was that Lauretta and Wayne did not have the resources to fund the developments in Phase 1 and had no records to support such expenditure. I am not satisfied that Lauretta and Wayne funded the works that were carried out on Wisdom Manor in Phase 1 as per their evidence and the documentary evidence. Those works involved clearing up the junkyard, being involved with the architects, being involved in the planning application process and later on the completion/occupancy certifications albeit in the name of Mrs. Fraser and excavation and building. I have considered the evidence of Lauretta that she and Wayne funded the Phase 1 developments by using their savings, their loans against their investment portfolios, their salaries and using their rental incomes from a property they owned in Southampton. I have also considered the evidence of Wayne that he was working on the site without pay as a labour of love, but that he had some workers who were being paid.

153. However, I am not satisfied by such evidence as I again rely on Lauretta's 2018 Affidavit where she outlined how the work was funded, namely that Gary provided the initial funding of $125,000, Mrs. Fraser used her savings of $350,000 and had planned to obtain a bank loan to complete the project. In my view, it is clear that Lauretta made no mention of any funding outlay by Wayne and her for the works in Phase 1. Again, it seems commonsensical to me that if Lauretta and Wayne had provided funding then she would have stated that detail in Lauretta's 2018 Affidavit to the same extent as the other details.

154. I also rely on the point stressed by Mr. Daniels that Lauretta has not provided any records of expenditure for the Phase 1 works and prior to 2004. Lauretta's evidence is that such records may have been destroyed as a result of hurricane damage or the inability to retrieve the records otherwise. In any event, there is no such documentary support for the Court to rely upon.

155. After Phase 1 was completed Lauretta and Wayne moved to England in 1994. They returned in 1997 and Lauretta was qualified as an attorney in 1998.

156. Phase 2 – In or around 1997 to 2004 – Lauretta's evidence was that Gary provided funds of $125,000 for work on Wisdom Manor which was repaid by Mrs. Fraser by 2003 as she had stated that she was debt free by that time. I have already found above that Gary's $125,000 was provided in Phase 1.

157. In 2004 Lauretta and her family moved into Wisdom Manor paying $3,000 per month which on cross-examination Lauretta stated that Mrs. Fraser said it would be her interest and it would allow Mrs. Fraser to maintain her lifestyle. On cross-examination, Lauretta maintained that the rent was reduced to $2,000 in 2005 because Mrs. Fraser had realized that Lauretta was doing a lot of work at Wisdom Manor and had seen the payments for the same. She also stated that Mrs. Fraser was encouraging Lauretta to undertake more renovations to Wisdom Manor during the period that she lived there. Lauretta was cross-examined about a batch of invoices which she maintained were for works done on Wisdom Manor. She did admit that there were other projects being worked on, but the invoices that had "Wisdom Manor" written on them were for such works.

158. However, I rely on Lauretta's 2018 Affidavit paragraphs 9(a) and 9(c) where Lauretta stated that the total cost by Wayne and her amounted to more than $100,000 for upgrades to her apartment. What I find significant is that Lauretta stated that during the 10 years that she lived at Wisdom Manor, she maintained both upper and lower apartments regularly because she knew her mother was house-proud. The reason this is significant is because Lauretta makes no mention that the reason she was doing any maintenance or upgrades was because she was promised an interest in the property and thus was doing the works for that purpose.

159. Rent Reduction - I have considered the evidence of the rent reduction. In my view, this evidence undermines the claim of detriment - to the extent of the benefit of the rent reduction - as Lauretta would be required to act to her detriment. However, her evidence is that the reduction in rent was in exchange for the ongoing maintenance costs of Wisdom Manor. Thus, the maintenance costs were not a detriment to Lauretta, at least to the sum of $1,000 per month for 10 years between 2005 and 2015, as Lauretta was receiving the

benefit of the rent reduction. To that point, I accept Mr. Daniels arguments that such a benefit of 10 years amounted to approximately $120,000.

160. Personal/Household Items - I have considered the evidence about the Plaintiff's expenditure on Wisdom Manor. Mr. Daniels submitted in essence that some of those costs were for Lauretta's or her family's own personal benefit and were not an investment in Wisdom Manor. I am attracted to this argument as it is clear to me that items such as a home theatre system, furniture, household items, linens and customs duty on such items were not investments in Wisdom Manor. I accept Mr. Daniel's analysis that $88,546.04 was for the benefit of Lauretta and her immediate family, made up of Personal/Household Items for $19,956, Furniture for $56,736.04 and Appliances for $11,854.

161. Real Net Investment - I have considered the argument of Mr. Daniel which I accept, that arguably $146,859.23, which is the total of Fixtures & Fittings for $94,756.17 and General Maintenance & Repairs for $52,103.06 had been put into Wisdom Manor by Lauretta, subject to the caveat that it was not for another property or paid for by someone else. I also accept Mr. Daniels argument that if the $120,000 benefit of the rent reduction is applied against the figure of $146,859.23 then in real terms, a net investment is in the range of $26,859.

162. Thus, I have reminded myself of the approach in *Gillett* as cited by Ground J in *Richardson* where it was necessary for the Court to "*stand back and look at the claim in the round*" in determining whether the repudiation of Mrs. Fraser's assurances was unconscionable in all the circumstances. I have not accepted the evidence of Lauretta that during the period 1990 to 2015 she funded renovation and maintenance costs on Wisdom Manor as over $388,000, preferring Mr. Daniel's calculation of a real net investment of approximately $26,859, as supported by exhibited contemporaneous spreadsheet documents and invoices. *Snell* cited *Gillett* also that detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial. Thus, in my view, the $26,859 is not a substantial expenditure. Further, following the same *Snell* extract, to my mind, rather than applying a forensic accounting

exercise, standing back and looking at matters in the round, a classic evaluation overwhelmingly fails to support Lauretta's contention that she acted to her detriment over the years.

Conclusion

163. I have found as follows:

a. Mrs. Fraser did not have testamentary capacity to execute the May 2018 Will and the November 2018 Will;
b. Bertram exercised undue influence over Mrs. Fraser when she executed the 2018 Wills; and
c. Lauretta cannot rely on promissory estoppel to claim ownership of Wisdom Manor.

164. In light of these findings in respect of the Plaintiff's claim in the Amended Writ:

a. I grant the application for a declaration that Mrs. Fraser was not of sound mind, memory or understanding and lacked the requisite mental capacity to execute the May 2018 Will and the November 2018 Will as at the date upon which each of them were executed;
b. I make an order that the May 2018 Will and the November 2018 Will be set aside on the basis that Mrs. Fraser lacked the requisite testamentary capacity to execute them;
c. I grant the application for a declaration that the May 2018 Will and the November 2018 Will be set aside as having been procured by the undue influence of Bertram over Mrs. Fraser;
d. I make an order of a Grant of Probate of the 2017 Will;
e. I make an order for an account of the dealings by Bertram with the property bequeathed under the November 2018 Will from 21 December 2019; and
f. I make an order for the payment into Mrs. Fraser's estate of all sums found due to Mrs. Fraser's estate as a result of the account undertaken, plus interest pursuant to the Interest and Credit Charges (Regulations) Act 1975.

165. I have declined the applications for:

a. A declaration that Wisdom Manor is vested in fee simple in equity to Lauretta and for an order that it be conveyed in fee simple to her;

166. Unless either party files a Form 31TC within 7 days of the date of this Judgment to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Plaintiff against the Defendant on a standard basis to be taxed by the Registrar if not agreed.

Dated 29 November 2023

HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT