



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO: FSD 249 OF 2021 (DDJ)

BETWEEN:

- (1) **MONIQUE CATHERINE HAMATY-SIMMONDS**
- (2) **BASIL NORMAN HAMATY**

PLAINTIFFS

AND:

- (1) **SYLVIA CARLENE HAMATY**
- (2) **FREDRICK CLIVE HAMATY**
- (3) **NEIL HAMATY**
- (4) **DELROSE WILLIAMS**

DEFENDANTS

Before: The Hon. Justice David Doyle

Appearances: Hector Robinson KC, Jessica Vickers and David Ramsaran of Mourant Ozannes (Cayman) LLP for the Plaintiffs
William Helfrecht and Sarah Allison of HSM Chambers for the Second and Third Defendants

Heard: 12-19 September 2023 with further written submissions filed with leave of the Court on 22 September 2023 on behalf of the Second and Third Defendants and on 27 September 2023 on behalf of the Plaintiffs

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HEADNOTE

Determination of various issues in respect of testamentary documents – the requirements for the due execution and attestation of testamentary documents – the presumption of due execution – the need for positive, reliable and strong evidence to rebut such presumption – the fallibility of human recollections – the power to omit words from testamentary documents – whether a former invalid will can be republished by a subsequent valid codicil – whether a copy of a testamentary document can be admitted to probate – whether a grant of probate of a previous will can be revoked – the importance of engaging lawyers where possible to prepare testamentary documents and to ensure valid execution and attestation

JUDGMENT

Introduction

1. In many countries throughout the world there are, for good reasons, strict formal requirements in respect of the signing and witnessing of testamentary documents such as wills and codicils. The Cayman Islands are no exception.
2. Section 6 of the Wills Act provides that no will (such word includes a codicil by virtue of section 2) shall be valid unless it be in writing and signed at the foot or end of it by the testator or by some other person, in the testator's presence and by the testator's direction and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time and such witnesses shall attest and subscribe the will in the presence of the testator, but no form of attestation shall be necessary.
3. I well remember being lectured as a student at university in 1980 on these requirements by Professor Clark (of *Parry and Clark on the Law of Succession* fame), before the implementation of section 17 of the English Administration of Justice Act 1982 which has not been incorporated as part of the law of the Cayman Islands.
4. It is well established that if the strict formal requirements as to execution are not followed the testamentary document is invalid. The English cases date back many years. See for example *Cooper v Bockett* (1843) 3 Curt. 648. For more recent English cases prior to the statutory changes in 1982 see *In the estate of Davies* [1951] All ER 920 and *In re Colling decd* [1972] 1 WLR 1440. *Davies*

was referred to in *In the estate of Ebanks* 2003 CILR 223. In that case a 2002 will was not properly executed because the attesting witnesses had not signed it in each other's presence.

5. I refer to the testator, the parties and witnesses in this case by their familiar names for ease of reference and without any disrespect to them.
6. Robert Michael Hamaty ("Robert") was born on 12 February 1948. His daughter Monique Catherine Hamaty- Simmonds ("Monique") describes him as "a much loved and admired stalwart in his family and his community". He was born in Jamaica, where he lived and initially worked as a pilot for Air Jamaica. Monique and her brother Basil Norman Hamaty ("Basil"), the Plaintiffs, were also born in Jamaica and lived with their father and mother, Jacqueline Celia Rosemary Cawston ("Jacqueline"), until they all relocated to Miami, Florida in 1978.
7. Robert separated from Jacqueline and emigrated to the Cayman Islands to begin a role as captain with Cayman Airways in 1979. Robert met Sylvia Carlene Hamaty ("Carlene"), the First Defendant, shortly thereafter and in 1984 they established the Tortuga Rum Company Limited ("TRC"). They married in 1988. Robert died on 13 June 2020.

Further background

8. The First and Fourth Defendants did not file any pleadings and did not play an active role in the proceedings as parties. The Plaintiffs (the daughter and son of Robert) and the Second and Third Defendants (Robert's brother and his brother's son) helpfully filed an agreed case memorandum (revised on 14 September 2023) and a lot of what follows by way of further background is taken from that document and is uncontroversial.

2009 Will

9. Robert made a will dated 5 June 2009 (the "2009 Will") which he signed and that document was witnessed by Peter Broadhurst, an attorney in the Cayman Islands and by the Third Defendant. It appeared to be common ground that it was prepared by Broadhurst, the Cayman attorneys. It is clear on its face and was duly signed and witnessed. No issues arose as to the proper preparation and due execution and attestation of the 2009 Will.
10. In June 2009 Robert had two adult children (the Plaintiffs) and three grandchildren. By 2019, Robert had two additional grandchildren and had acquired additional properties not provided for

under the 2009 Will.

The First 2019 Will

11. On 25 or 26 March 2019 Robert executed another document stated to be his last will and testament. That document bears the date 24 March 2019 (the “First 2019 Will”).

The Second 2019 Will

12. On or about 18 December 2019, Robert made amendments to the First 2019 Will. These include amendments to substantive provisions for the distribution of his primary assets, namely the allocation of specific portions of his shares in the TRC and Muntana Limited to each of his five grandchildren. The new document (the “Second 2019 Will”) also shows changes to the formatting and some manuscript content of the First 2019 Will. The Second 2019 Will bears the date 24 March 2019. Robert signed his initials to each page of the Second 2019 Will and sent a copy by email to his brother, the Second Defendant, stating that he had “made the changes”. The Second 2019 Will also bears the date 24 March 2019 and includes a statement that the testator “subscribed [his] name this 26th august [sic] 2018,”. There is no evidence that the Second 2019 Will was executed in accordance with the formal requirements of section 6 of the Wills Act.
13. By its terms, the Second 2019 Will states that Robert revoked all former wills and codicils made by him.
14. After Robert's death a copy of the Second 2019 Will was located at the residence shared by Robert and his wife, the First Defendant. The Second 2019 Will was read to the key members of Robert's family on 21 July 2020.
15. No original of the Second 2019 Will has been located by Robert's family, despite exhaustive searches.

The 2020 Codicil

16. Robert executed a codicil on 20 April 2020 (the “2020 Codicil”).
17. The 2020 Codicil contains a statement whereby Robert, at the outset of the document in the first paragraph, declared that “this is a codicil to my last will and testament dated the 24th day or march (sic) 2019”. Robert then made reference to his five grandchildren. The 2020 Codicil contains in its

last paragraph a separate statement that “Otherwise I hereby confirm and republish my will dated the 5th day of June 2009 in all respects other than those herein mentioned.” The 2020 Codicil contains an execution clause for Robert in usual form and an attestation clause for the witnesses which refers to Robert and ends with the wording “who then signed the codicil in our presence and now in the presence of each other we now sign our names as witnesses.” It is signed by Robert and by Gina Howard and Shanique Miller as witnesses. I will come to the conflicting evidence in respect of the witnessing of the 2020 Codicil in more detail later in this judgment.

18. The 2020 Codicil was drafted by the Third Defendant who inserted the date “5th day of June 2009” as the date of Robert's last will and testament, without knowing the true date of Robert's last unrevoked will.
19. The Third Defendant pointed out to Robert the date he had inserted as the date of Robert's last will and gave Robert instructions as to the execution of the 2020 Codicil. A forensic examination of the TRC IT servers shows that a copy of the Second 2019 Will appeared on the TRC servers on 20 April 2020, the same date as the date of execution of the 2020 Codicil. The forensic examination also shows that on the same day Robert sent a copy of the Second 2019 Will by email to himself.
20. The final version of the 2020 Codicil shows the date “5th date of June 2009” amended where it first appeared in the draft prepared by the Third Defendant to “24th day of march (sic) 2019”. There is no amendment to the date “5th day of June 2009” where it appeared for the second time in the draft prepared by the Third Defendant.

Grant of Probate

21. In the months immediately following Robert's death, questions arose as to whether there existed a valid will which effectively revoked the 2009 Will. The executors of the 2009 Will, including the Plaintiffs, submitted the 2009 Will to probate. Probate of the 2009 Will was granted on 20 January 2021 (the “Grant of Probate”).
22. The Plaintiffs now seek to set aside the Grant of Probate.
23. The Plaintiffs contend that the 2020 Codicil was validly executed in accordance with the formal requirements of the Wills Act. The Second and Third Defendants put the Plaintiffs to proof as to the formal validity of the execution of the 2020 Codicil.
24. The Plaintiffs contend that the Second 2019 Will was validly confirmed and republished by the

2020 Codicil such as to render the Second 2019 Will validly executed as at the date of execution of the 2020 Codicil. The Plaintiffs say that the Second 2019 Will, as confirmed and republished by the 2020 Codicil, revokes the 2009 Will.

25. The Second and Third Defendants say that the 2020 Codicil fails for ambiguity. The Second and Third Defendants say that their aim “has been limited to ensuring that all the relevant evidence is before the Court and that they have the opportunity to cross-examine the Plaintiffs’ witnesses and make submission (sic) on the law. In short, the Defendants simply require the Plaintiffs to satisfy the Court that they are entitled to the relief they seek” (paragraph 6 of the undated skeleton argument of the Second and Third Defendants filed on 5 September 2023).
26. The Plaintiffs seek an order that a copy of the Second 2019 Will and the original 2020 Codicil be admitted to probate, with the words “dated the 5th day of June 2009” in the 2020 Codicil omitted as an obvious error which does not reflect Robert’s true intention at the time he executed the 2020 Codicil. In the alternative, the Plaintiffs seek an order that the 2020 Codicil be rectified by deleting the words “5th day of June 2009” and replacing them with the words “24th day of March 2019”.
27. The First Defendant and the Fourth Defendant have filed no defence to the claim.

Issues for determination

28. The parties helpfully set out the issues for determination by the Court as follows:
 - (1) whether the 2020 Codicil was validly executed in compliance with the formal requirements of section 6 of the Wills Act (“Issue 1”);
 - (2) whether the 2020 Codicil fails for ambiguity (“Issue 2”); and if not,
 - (3) whether the 2020 Codicil should be admitted to probate omitting the words “dated the 5th day of June 2009”, or alternatively, whether the Court should rectify the 2020 Codicil by deleting the words “5th day of June 2009” and replacing them with the words “24th day of March 2019” (“Issue 3”);
 - (4) whether the 2020 Codicil effectively confirmed and republished the Second 2019 Will, such as to cure any defects in the execution of the Second 2019 Will (“Issue 4”); and
 - (5) whether in the absence of an original the Court should admit the copy of the Second 2019

Will read at the Family Meeting to probate (“Issue 5”); and

- (6) whether the grant of probate dated 20 January 2021 of the 2009 Will should be revoked (“Issue 6”).

The Evidence

29. I have considered all the evidence presented to the Court. I refer to some of the more relevant evidence below.
30. Monique says that the grandchildren were incredibly important to Robert- “He always loved them and treated them equally”. Carlene, Basil and Monique are the main beneficiaries under both the 2009 Will and the Second 2019 Will. Under the 2009 Will Monique’s three children (born before 2009) also benefit but not Basil’s two children who were born after 2009. Under the Second 2019 Will all the grandchildren benefit.
31. Monique says that she has had various positions within TRC since she was in high school. She refers to TRC entering a joint venture agreement in Jamaica in 2010 and adds that she was the chief marketing officer of Tortuga International Holdings Ltd until 26 May 2017. She says she then returned to TRC at her father’s request as “he considered me to be his successor.”
32. Monique says:
- “This application is not about greed. Whether I or someone else benefits more under the 2009 Will or the 2019 Will is completely beside the point. That does not matter to me. I do not need or want for any more than I have. What matters is that my father executed the 2019 Will and 2020 Codicil and entrusted his family with ensuring that his wishes were granted. My father was an honest and humble man, and his family meant the absolute world to him. I have no doubt he would be ashamed and saddened to see the destructive actions that some members of this family have taken since his death. I can only pray that each of them sees the pain their actions have caused and will find it in their hearts to be truthful in whatever they know about the wishes of my father.”
33. Monique under cross-examination stated that her father was “a loving man who loved his children and his grandchildren and he made changes that reflect that in 2019 and they were not included in the 2009 will.” She was questioned as to the application for probate of the 2009 Will and responded

“Yes, and that was following my communication with my uncle...that we needed to get a will into the system and we could put the 2009 will into the court system and disperse the assets according to the 2019 will.” Monique adds that there was then “a move by other members of the family, specifically Carlene Hamaty, to ensure that we knew that certain things were not going to be the way we thought they were going to be...”

34. Carlene says that she like the other Defendants is “neutral as to which of the competing Wills is ultimately upheld by the Court”. She says her wish “is simply to see all the relevant evidence before the Court to enable it to resolve” the issues for determination. She adds “I am saddened by how a dispute over which of my late husband’s Will should be upheld has torn our family apart and I am distressed by the huge costs that have already been and will continue to be incurred. I am deeply wounded when I think of how the money spent in legal fees to date could have gone to the welfare and education of my grandchildren...as far as I am concerned, the outcome of these proceedings- whatever that may be- will not change my firm intention that the Hamaty grandchildren will be the primary beneficiaries of my Estate. That has always been and will continue to be my wish.”
35. Carlene in cross-examination said she had occupied the position as executive director at TRC “since last year ... I was the CEO”. She was asked if the employees held her in high regard and she responded “I hope so”. She was asked whether they looked up to her “especially now that Mr Robbie has passed – as the boss in that sense” and she responded “Yes, sir.”
36. She agreed that Robert loved his grandchildren dearly and equally and wished to make adequate provision for them after he passed away- “I know he loved his grandchildren equally, and he would have provided for them.” Carlene also agreed that if Robert was executing a document which he considered to be making provision for his grandchildren that he would not revoke it without making new arrangements for the grandchildren.
37. Frederick Clive Hamaty (“Freddie”), an attorney at law in Jamaica, the Second Defendant, and Robert’s brother, says that in his later years Robert had an aversion to spending money on lawyers if he believed that was not necessary. The name of Freddie’s firm in Jamaica is MN Hamaty & Co. His father started the firm. Freddie recalls that on 25 March 2019 he received a telephone call from Robert who was concerned that a will he had made had not been properly witnessed, as one of the attesting witnesses had left the room before the other witness attested the will. Freddie urged Robert to take advice from Peter Broadhurst, the attorney involved with the 2009 Will, but Robert declined to do so. He said “I’m not spending money on lawyers.” Freddie added “he [Robert] was

- very resistant to lawyers for some reason. I don't know why. He came from a family of lawyers, and I didn't understand why he would want not to spend money to get something done properly."
38. Freddie says that on 26 March 2019 Robert sent him an email with the subject being "revised Will dated 24 March 2019" and an executed copy of the 2019 Will was attached.
39. On 18 December 2019 Robert sent Freddie an email subject "made the changes" and stating "Fred I changed the shares of my %60 to basil and Monique 20% and each grandchild %4. Fred the %13 shares in TIHL is in the name of Tortuga rum co ltd I have not made mention of that should I? it's an asset of the company so I own 60% and Carlene %40. So my%60 division of share to children and grandchildren should take care of that correct?" and attached a copy of the Second 2019 Will. Freddie replied on 28 December 2019 saying "yes, go ahead with that Robbie". Freddie confirmed that he did not need to make specific provision for the shares owned by TRC.
40. Freddie says that in February 2020 Robert came to Jamaica to renew his US Visa as his health was failing and he knew that his time was coming to an end: "I recall my brother saying that he was concerned about whether his will had been properly witnessed." Freddie tried again unsuccessfully to persuade Robert to go to a lawyer to make a new will. Robert's response was that "lawyers charged too much".
41. Freddie says his next involvement with his brother's testamentary affairs was on 31 March 2020 when he received an email from his (Freddie's) son Neil Frederick Hamaty ("Neil"), the Third Defendant, attaching a draft codicil and asking "Dad can you review this Codicil for me. Uncle Robbie recently acquired shares and wants to include it in his will."
42. Freddie says that on 2 April 2020, he received another email from his son asking him to "take a look. Can I send Uncle Robbie for execution. Just a thought. How should we deal with execution considering we are trying to keep uncle Robbie from as many people as possible. Don't witnesses need to sign their names in his presence and in the presence of each other." Freddie understood Neil's concern was in relation to the particular need for Robert, whose health was poor, to protect himself from infection by the COVID-19 virus. Freddie adds that he received a number of telephone calls from his bother about his codicil and he replied to his son approving the draft codicil. Freddie was asked whether he recalled concerns about due execution of testamentary documents with his brother and he responded "I kept telling him he has to be careful about details, and that he needs to follow what I have told him on many occasions, that the witnesses must be

present at the same time.” Freddie said that he knew that his brother “was making specific provisions for his grandchildren.” Freddie said “He did make provisions for his grandchildren, like every grandfather would.”

43. Freddie accepted that from time to time he would send his brother certain legal precedents of forms including an affidavit of due execution.
44. Neil is an attorney at law having qualified in Jamaica and admitted to practice in 1993. He practiced civil law in Jamaica in the Chambers of the Attorney General until 2007 when he moved to the Cayman Islands in order to join the TRC as Franchise Manager, a position he presently holds alongside being the compliance officer. Neil refers to accompanying Robert in June 2009 to the offices of Broadhurst LLP to meet Peter Broadhurst in connection with making a will and Neil and Peter witnessed that will in Robert’s presence.
45. Neil also recalls receiving an email from Robert on 27 March 2019 attaching a precedent for an affidavit of due execution and asking him to “do up a form like this...My Will has been witnessed by Gina Howard and Noel Gonzales.” Robert also attached the Cayman probate rules and highlighted 2 of them at the foot of the email and he prepared affidavits of due execution as requested and emailed them as Word attachments.
46. On 20 December 2019 Neil sent an email to his uncle Robert with a copy to his father Freddie subject Codicil/Shares in TIHL and attached a draft codicil adding “Dad can you take a look at the Codicil and see if you would change anything”. In the first paragraph of the draft codicil the date of the will was left blank, in the last para the reference to the date of the will was “2019” and the attestation clause included the words “he signed the Codicil in our presence and at his request in his presence and in the presence of each other we now sign our name as Witnesses.” Neil cannot recall why he entered 2019 as Robert never told him he had made a new will after 2009 but he may have mentioned that he was planning to do so.
47. Neil says that his next involvement in his uncle’s testamentary affairs was on 25 March 2020 when his uncle Robert sent him an email (also sent to Marcus Simmonds, Monique and Basil) informing Neil that he had purchased 10,000 shares in Elegance Brands Inc. (“Elegance”) and asking Neil to “...draw up and (sic) addendum to my will...” and explaining that he wished to leave his 5 grandchildren 2,000 Elegance shares each. On 25 March 2020 Neil responded “Will do. I will send a draft later today for you to review”. On 30 March 2020 Robert sent a chaser “Need that today”.

Neil says that on 30 March 2020 he sent Robert an email attaching a draft Codicil dealing with the Elegance shares and informing him he intended to send the draft Codicil to his father, Freddie, for him to review. Neil adds that on 31 March 2020 he sent his father the draft Codicil and asked him to review it. He says he sent his father a follow up email on 2 April 2020.

48. There is an email in the bundle dated “31 March 2020 3:51” from Neil to Robert with an attached Codicil “RH this is a draft. Let me pass it by Dad to make sure all is in order. The attestation clause may need some tweaking”. In answer to questions in cross-examination Neil explained the reference to “the attestation clause may need some tweaking” as “that may have been a miswording. I meant how the witnessing was to be done because of COVID. We were in the middle of COVID, and I was concerned for him...in relation to the witnesses being present at the same time, and how that was to be done. That’s what I really meant to say, when I was speaking about attestation...Looking back, I don’t think I meant the attestation clause itself. It was how the witnesses were going to witness the codicil.” The draft Codicil in the first and last paragraphs referred to the date of the last will as 5 June 2009. On page 1 there is reference to “attesting witnesses who subscribe their names in my presence” and on page 2 after reference to Robert the following words appear “who then signed the codicil in our presence and now in the presence of each other we now sign our names as witnesses.”
49. In the bundle there is an email dated 3 April 2020 (and also one dated 2 April 2020 in identical terms which may be the product of how these emails were retrieved for insertion into the bundles and nothing turns on it) from Neil to Robert with a copy to Freddie with the Codicil attached:

“Uncle Robbie see draft Codicil attached. Since execution of wills requires specific formalities I spoke with Dad. You need to sign in the presence of 2 witnesses who are to sign in the presence of each other. The two witnesses need not be in the same room with you- but within your vision so to maintain social distancing they can actually sign in the office next door to you. Once signed you should deposit a copy with Peter Broadhurst since he prepared your original will. The copy of your will I have on file is dated June 5th 2009. If there are no revocations since that date, then that is the testamentary copy that stands.

Let me know if you have any specific requests as to who you wish to witness the document.

Love Neil”

50. As to the office layout Neil explained “ There is a larger outer office . . .then there is an inner, smaller office. . .and it has a solid door, so what I meant was that door would be opened, the two witnesses would be in that larger office within his line of vision, so he wouldn’t have to be close to them, and they would be able to witness, and he would be able to see both of them.” Neil agreed that he was very specific with his instructions as to the attestation by the witnesses. Neil also recalls telling Robert to change the dates if he had made a new will which revoked the previous one.
51. On 2 April 2020 Robert wrote “Ok talk in the morning changes made peter (sic) no longer involved”. Freddie on 2 April 2020 writes “Remember the witness must not be a beneficiary under the Will ok..Fred”. On 3 April 2020 Robert responds, “Thanks Fred”.

The conflicting evidence in respect of the witnessing of the 2020 Codicil

52. I now turn to the conflicting evidence in respect of the witnessing of the 2020 Codicil. There were two witnesses to the 2020 Codicil. Gina Emilia Howard (“Gina”), who was a receptionist at the TRC during the period 2002 to 2005 and then again from 2013 to mid-2020. She is now a Chaplin assisting those at the prison. Shanique Miller (“Shanique”) who has been employed full-time by TRC since November 2017 as an Accounts Officer. She works in TRC’s Treasury Department and is responsible for processing store sales, money transfers from the stores and everything else connected with the operation of the Treasury Department. She presently benefits from a work permit in connection with her work. Although not stated in her 3 page statement dated 13 September 2023, during cross examination it transpired that Shanique went to the University of Technology in Jamaica and studied business administration and accounting and she has a Bachelor’s degree in accounting with over 17 years’ experience as an accountant.

Gina Howard’s evidence in examination-in-chief

53. In her statement dated 10 February 2023 which formed part of her evidence in examination-in-chief Gina, in respect of the 2020 Codicil, stated:

“THE CODICIL

21. I recall that one day in or around April 2020, Mr Hamaty telephoned me on reception from his office and said words to the effect, “can you get my will from

Shanique, it is in the safe?" I walked over to Treasury and asked Shanique for Mr Hamaty's will.

22. Shanique gave me a manila envelope which I took upstairs to Mr Hamaty's office. When I arrived at Mr Hamaty's office, Mr Hamaty said, "*where is the second envelope, there are two envelopes?"* I then recall Mr Hamaty telephoning Shanique on his office phone which was on speaker. Mr Hamaty asked Shanique to find the second envelope. I remember hearing Shanique replying, "*I can't find it Mr. H, it isn't here*". Mr Hamaty responded, "*it is there, there are two envelopes*". Mr Hamaty then asked me to go downstairs to Treasury. By the time I got to Treasury, Shanique had located the second envelope. I then took the second envelope and walked back upstairs to Mr Hamaty's office and handed it to him.
23. I saw Mr Hamaty open one of the envelopes which was taped shut. He took out his will and disposed of the envelope by folding it in half and throwing it on his office floor. This was the same will that I had witnessed in 2019. I know that it was his will because I saw the front page of the document.
24. At this time, Shanique arrived at Mr Hamaty's office. Mr Hamaty took out a document from the second envelope and Mr Hamaty asked us both together, "*can you witness this document for me, I want to leave shares for each of my grandchildren*". Mr Hamaty had in front of him on the desk the document headed "*CODICIL TO WILL OF ROBERT MICHAEL HAMATY*" (the Codicil).
25. I saw Mr Hamaty sign the Codicil in the presence of both myself and Shanique. The Codicil has two pages. Mr Hamaty signed on the first page. He handed me his pen and I then signed on the second page as a witness to Mr Hamaty's signature. I then saw Shanique also sign the Codicil as a witness to Mr Hamaty's signature. Shanique then left the office. The document which appears at pages [23-24] of Exhibit GEH-1 is a true copy of the Codicil on which Shanique and I signed as witnesses to Mr Hamaty's signature in April 2020.
26. I recall Mr Hamaty then turned to me and asked me for an even bigger envelope than the one from which he had taken the Codicil. I obtained and gave him a larger envelope, as he requested. This envelope was about 18.5 inches by 12.5 inches. I

watched Mr Hamaty place both the Codicil back into its original envelope and his will back into its original envelope, which Mr Hamaty had picked up from the floor. Mr Hamaty then placed both of those envelopes into this bigger envelope.

27. Mr Hamaty then sealed the larger envelope, placed tape lengthwise along the seal to further seal the envelope, and then he signed his signature over the top of this tape. After sealing this large envelope containing the original Codicil, the Will and a smaller manila envelope, Mr Hamaty then asked me to take this envelope to the safe in Treasury, which I did. At the Treasury, I saw Shanique place the large envelope into the Treasury safe.”

Gina’s recollection is that she witnessed the 2020 Codicil by signing it after Robert had signed it and in the presence of Robert and Shanique and then Shanique signed the 2020 Codicil in their presence.

Shanique Miller’s evidence in examination- in-chief

54. In her statement dated 13 September 2023 which formed part of her evidence in examination-in-chief Shanique gave the following account of her role as a witness to the 2020 Codicil:

- “3. On occasion, Mr. Hamaty would ask one of my colleagues or me to access the safe to store or retrieve company or personal documents for him. It was not part of my job to record, and I did not record the movement of those personal documents in and out of the safe.
4. One such occasion was in early 2020. I recall being at my desk when Mr. Hamaty telephoned my extension and asked me to retrieve his Will from the safe and to give it to Gina Howard, who was employed by TRC as a Receptionist at the time.
5. Having retrieved Mr. Hamaty’s Will from the safe at his request on two or three prior occasions, I was aware that his Will was contained in a manila envelope located on the top shelf of the safe, along with other personal documents belonging to Mr. Hamaty.
6. The door separating the reception area from the Treasury Department is fitted with a buzzer entry system. I recall letting Gina into our office and then opening the safe to remove the envelope containing the Will. I handed the envelope to Gina and she took

it upstairs to Mr. Hamaty's office on the second floor. While we would usually keep a record of any cash or important company documents being removed from the safe, we did not, as I have said, adopt this practice for Mr. Hamaty's personal documents.

7. Shortly after I provided Gina with the manila envelope, I received a second telephone call from Mr. Hamaty on my extension. He told me that he was sending Gina back to my office with a document for me to sign and witness. Mr. Hamaty did not explain the nature of the document I was to sign, nor did I ask.
8. I was still at my desk when Gina returned to my office and handed a document to me to sign. A true copy of which is now shown to me and exhibited in the Core Bundle of Documents. I recall that Gina and I were the only two people in my office at the time, as my colleague, Marlyn, had by then left for the day.
9. I am not sure whether Mr. Hamaty had already signed the document. I do remember thinking that the date of "20th April 2020" was correct, and I proceeded to complete TRC's address in the signature block and signed the document at my desk on page 1. I also signed my name and recorded my address on page 2. At no time before or after signing the document did I go to Mr. Hamaty's office.
10. I clearly recall that I handed the signed document to Gina, who took it back upstairs to Mr. Hamaty. I was not afterwards given the document by Gina or Mr. Hamaty to return to the safe."

Shanique's recollection is that she did not witness the 2020 Codicil in the presence of Robert and Gina in Robert's office. Her recollection is that she witnessed it in her office downstairs only in the presence of Gina.

Gina Howard's evidence in cross-examination

55. In cross-examination Gina accepted that in addition to acting as receptionist she was also Robert's personal assistant in respect of both his business and personal affairs. She says she acted very often to witness Robert's signature, "maybe once a month". Reception is on the ground floor as is the Treasury department and Robert's office is upstairs. In respect of the 2019 Will she recalls seeing

the odd words GNE etc. and although at paragraph 9 of her witness statement she says “I did not question it” in her oral evidence she said that she asked Robert what the coding meant but he did not answer, and she signed the document anyway. She agreed that sometimes she signed documents without reading them and that she trusted Robert because she thought he was a man of integrity. It was put to her that the expert evidence was to the effect that the document she signed had no coding on it. In respect of the memorandum of wishes she signed it a few days before she witnessed the Will in March 2019 and then walked it down to Marguerite Leon (“Marguerite”) a fellow employee at TRC who worked in Treasury as Marguerite had some mobility issues. She said that she did not frequently witness a document and then take it for someone else to witness, this was unusual. She took it to Marguerite “because of the condition that she have. She have conditions in her legs walking up the stairs, so that’s the reason why I took it to her”. It was put to Gina that her affidavit of due execution was not true as she had not witnessed the 2019 Will in the presence of Noel Gonzales (“Noel”) as at paragraph 12 of her statement she stated that she had left before Noel had signed. Gina said “I thought by having Noel in the room and knowing that he was going to sign the document” was sufficient.

56. Gina agreed that it would be fair to say that if Robert asked her to sign an affidavit she would do so “without reading it or questioning”. Gina was also cross-examined in respect of the various envelopes she had referred to but nothing in my judgment turns on this. Gina said that when Shanique arrived at Robert’s office, he took out a document from the second envelope and asked them both together “can you witness this document for me, I want to leave shares for each of my grandchildren” and he had in front of him the codicil. Gina agreed that Robert would not usually explain documents he was asking her to witness so that was unusual.
57. It was put to Gina that the document she witnessed was not taken out of an envelope in light of the expert evidence and the evidence of Carlene. Gina responded “I’m not an expert in computers or what you are talking about but I know that what I’m telling you is what I saw and what I signed on those dates. When he scanned it into the computer I have no idea.” It was put to Gina that the document she signed on 20 April could not have been in the second envelope. Gina responded “I know what I saw.” And added “I’ll stick to what I’m saying because I know what I saw, I know what I did, and I know what I signed.”
58. Shanique’s statement was put to Gina and in particular her evidence to the effect that she was in her own room when she witnessed the 2020 Codicil, Gina replied “Not true.” Gina says that she

did not take anything for Shanique to sign. Gina disagreed with Shanique's evidence in respect of the witnessing of the 2020 Codicil.

59. Gina was referred to an email sent by Carlene to Delrose Williams, Marlyn, Shanique and Maggy Millar Leon subject Personal Documents at 18:12 on 13 June 2020 (the day of Robert's death) which read:

"Good afternoon,

I am asking that no one be allowed to remove any of Robbie's personal documents, including but not limited to any and all estate planning documents i.e. Last Will and Testament from the safe in operations until I am there and present.

Thanks much

Carlene"

60. Gina maintained that a few days after that Delrose Williams removed an envelope from the safe.

Shanique Miller's evidence in cross-examination

61. During cross-examination it was put to Shanique that she has not been willing to attend to give evidence and she responded "no, because I did not think it was a concern to me". She accepted she was unwilling even after she was served with a subpoena to attend and she had spoken to an attorney about the subpoena. She agreed that she had a very high level of responsibility at TRC. In response to a question as to whether she would be attentive to detail in a document she was asked to sign Shanique responded "It all depends." She stated that there were some documents where she would not be attentive to detail.
62. An email dated 19 December 2021 subject "information requested" from Shanique to Carlene which listed 28 questions and answers and a 5-page file note from Mourant of a meeting on 8 December 2021 were put to Shanique and she was asked if she took a written note of the meeting or whether she had a recording device and she responded in the negative. It was put to her that it was a remarkable recollection in terms of accuracy and detail. She responded "Well, yes it is, according to what I remember." She says she had specific recollection of the contents of that particular discussion. Mr Robinson stated "Might I suggest to you that you provided this email pursuant to a mission which was given to you to record what took place, and this is why the – this

note is so accurate. That is my suggestion to you?” Shanique responded “No, sir. I was not.” It was put to her that she felt an obligation to provide a level of detail to Carlene. And she responded “Well, she asked, just like Ms Monique called and asked if I could go in and speak to her attorney , I said okay, no problem, I went in, Ms Carlene called afterwards because staff was complaining that they were getting calls from an attorney, so she asked if I was contacted by an attorney and I told her yes, I was contacted by an attorney, so she said if I can remember what was asked in that meeting and I said okay, I’ll try to remember all the detail that was asked in that meeting, so that’s why I provided this email .” In her email of 19 December 2021 Shanique at question 8 “Where did you sign this document” recorded “At my desk”. She reported that the questioner “then said that Gina Howard had informed him that I went to Mr Hamaty office to signed (sic) the document and I told him no and that I was sitting at my desk when Mr Hamaty called to advised (sic) that he was sending a document down with Gina for me to signed (sic) which I did and returned it with Gina.”

63. The Mourant file note of the meeting on 8 December 2021 records “Gina says her recollection the day you signed was you were in Mr Hamaty’s office?” and Shanique’s response is recorded as “She was in the office and Mr Hamaty called me from his office. Gina was in the office and Hamaty said Gina was coming down with the documents for me to sign. Then I fixed my name and signature then the document went back upstairs. Most of the time he has something to sign he calls us and Gina brings it down. That would be it. We don’t normally go up to the office.”
64. Carlene’s response to Shanique’s email dated 19 December 2021 was on the same day about 2 hours later “Shanique, Very sad that you have been brought into this mess. All about greed. Many thanks. Best Regards,”. Shanique agreed in her evidence that it was very sad that the staff had been brought into “this mess”.
65. Shanique said she did not read the entire 2020 Codicil (some 2 pages) and she did not notice the word Codicil but did notice the names of the grandchildren. Shanique agreed that she read the section “I subscribe my name to the Codicil this 20th day of April 2020” and inserted her address. She was asked if she thought it an important document and replied “not necessarily...it was not my personal business... It was Mr Hamaty’s personal business”. She maintained that she did not read the entire document but put in her address and name. She said that she did not read the words “who then signed the codicil in our presence and now in the presence of each other we now sign our names as witnesses.” Shanique was asked if the statement in the document about presence was true or false she replied “I was at my desk when I signed it”. Shanique denied signing a false document

and stressed “I said I signed this document while I was at my desk”. She said the statement in the codicil was not her statement but it was her signature. She added “I have no need to lie”. Shanique denied that she had been told by others to make false statements- “I have no need to lie. I have nothing to gain or benefit from this so why would I come here to lie?”

Shanique Miller's evidence in re-examination

66. In re-examination Shanique said she was accustomed to simply signing documents that Robert gave her to sign. During the course of the interview at Mourant she says that she was asked to be a witness in this case and that she said no.

Determination and reasons

67. I now turn to my determination of the issues and brief reasons for such.

Issue 1 – was the 2020 Codicil validly executed and attested?

68. I am satisfied that the 2020 Codicil was validly executed and attested in compliance with the formal requirements of section 6 of the Wills Act.
69. At paragraph 13.1 of *Williams on Wills* (Eleventh Edition) under the heading *Presumption of due execution* it is stated that if a will, on the face of it, appears to be duly executed, the presumption is in favour of due execution. I appreciate that the force of the presumption varies depending on the circumstances but even where there are internal inconsistencies in the wording of the document if there is a proper attestation clause, as in the case before me, the presumption applies. Williams adds at paragraph 13.2 that where there is a proper attestation clause “the court requires the strongest evidence before deciding that the will was not duly executed”.
70. In *Poole v Everall* [2016] EWHC 2126 (Ch), [2016] WTLR 1621 the presumption was not rebutted even though both attesting witnesses had originally stated in correspondence that one of them had not been present when the testator signed the will, as Williams states at footnote 3 under paragraph 13.2 “they both gave different evidence at trial”.
71. At paragraph 13.3 under the heading *Evidence rebutting the presumption* Williams states that such evidence must be positive and reliable. Williams states that “the evidence of one of the witnesses

has been held to” rebut the presumption and at footnote 5 of para 13.3 refers to *Cregeen v Willoughby* (1860) 24 JP 408 and *Noding v Alliston* (1850) 14 Jur 904 but notes to the contrary various other authorities including *Keating v Brooks* (1845) 4 Notes of Cases 253 (where the presumption prevailed although one witness said her signature was forged).

72. Williams notes that even an apparently positive recollection contradicting the attestation clause must be treated with caution and at footnote 6 refers to *Channon v Perkins (a firm)* [2005] EWCA Civ 1808, [2006] WTLR 425. In that case Neuberger LJ, as he then was, at paragraph 7 referred to the good reasons based on practicality and principle for the requirement that one must have “the strongest evidence” to rebut the presumption. At paragraph 8 he stated:

“The practical reason is that oral testimony as to the way in which a document was executed many years ago is not likely to be inherently reliable on, one suspects, most occasions. As anyone who has been involved in contested factual disputes will know, people can, entirely honestly and doing their very best, completely misremember or wholly forget facts and events that took place not very long ago, and the longer ago something may have taken place, the less accurate their recollection is likely to be...”

73. Neuberger LJ at paragraph 10 noted the principled reason for being reluctant to hold a will, properly executed on its face, representing the apparent wishes of the testator should be set aside on extraneous evidence, is that one is thereby declining to implement the wishes of the testator following his death. Arden LJ, as she then was, and Mummery LJ agreed with Neuberger LJ. Arden LJ at paragraph 45 stressed that the court must look at all the circumstances of the case relevant to attestation. Mummery LJ at paragraph 52 stressed the need for the “strongest evidence” for “displacing a presumption as strong as the presumption of due execution.”, a presumption which he felt was “based on sound public policy reasons”. Williams also at the same footnote refers to *Olins v Walters* [2007] EWHC 3060 (Ch), [2007] All ER (D) 291 (Dec) where Norris J found (at [32]-[40]) that a witness’s express recollection contradicting the attestation clause was nonetheless unreliable.
74. I have considered the additional written submissions, filed after the hearing with my leave, in respect of these authorities. All these cases are, of course, very fact sensitive and much depends on the evidence presented to the Court in each case. I am more concerned with the correct legal principles to be gleaned from the case law and its application to the facts and circumstances of the

case presently before the Court than the actual result arrived at in previous cases, based on the evidence in those cases. The presumption of due execution is well established and to rebut it needs positive and reliable evidence and what is described in some of the leading authorities as “the strongest evidence”.

75. The attestation clause in the case before me, albeit with some blanks being unfilled on page 2, clearly referred to the testator signing the Codicil in the presence of the witnesses and “now in the presence of each other we now sign our names as witnesses”. There is before the Court no reliable, let alone “the strongest evidence” to rebut the presumption of due execution in this case.
76. The Court was faced with the conflicting recollections of Gina and Shanique in respect of the attestation of the 2020 Codicil. In view of the clear wording of the attestation clause the presumption of due execution applied in the circumstances of this case. Gina said both witnesses were present in Robert’s room with Robert when they witnessed his signature. Shanique said she witnessed the signature in her room with only Gina present. Faced with the presumption of due execution, Mr Helfrecht in his closing submissions on behalf of the Second and Third Defendants had to resort to a forensic attack on Gina’s evidence. Although he did not go so far as to suggest that she was providing untruthful evidence, he made the following submissions in an endeavour to persuade the Court to exercise great caution in accepting her evidence in relation to the witnessing of the 2020 Codicil:
- (1) Gina would spend no more time than necessary in Robert’s office when asked to witness a document;
 - (2) she recalled the odd coding when witnessing the First 2019 Will in March 2019 but the expert evidence suggests that such was not on the document in March 2019;
 - (3) in her statement she said she did not question Robert in respect of the coding but under cross-examination she said she did ask Robert about it but he did not reply;
 - (4) she says she witnessed the Codicil in the morning but the expert evidence establishes a 12 minute window between 3.36 and 3.48pm;
 - (5) her evidence in respect of the envelopes was “absurd and cannot be right”;

- (6) she accepted that she took the Memorandum of Wishes downstairs to Marguerite Leon (who had mobility issues) for signature; and
- (7) she was mistaken about the timing that Ms Delrose Williams received an envelope from the Treasury safe.
77. Taken individually or collectively these complaints (many of which were correctly categorised by Mr Robinson as minutiae) do not significantly taint Gina's evidence as to the presence of both witnesses in Robert's room.
78. Mr Helfrecht also felt the need to portray Shanique as "more accurate" and submitted that her evidence ought to be preferred by the Court. I have to say that I found Shanique to be a reluctant and hesitant witness. Her evidence on the crucial point of presence was contradicted by Gina's evidence. Gina gave her evidence in a clear and confident way. I accept, however, that clear and confident witnesses can sometimes be mistaken. I also accept that Gina was at times perhaps a little too adamant and too unwilling to admit that she may have been mistaken on some relatively minor points, although she did admit to a mistake in respect of her recollection in respect of Shanique and the second envelope. Under cross-examination she accepted that she took the second envelope and walked upstairs: "Yes. Sorry, my mistake yes I did. I did that.". The recollections of both Gina and Shanique suffered from the defects of evidence given by any human being reliant on memories of distant events. Human beings are fallible, as are their recollections over a period of time. Suffice to say I do not regard Shanique's recollection as to her lack of presence in Robert's room together with Robert and Gina when the 2020 Codicil was witnessed as positive, reliable or the "strongest evidence". It is certainly insufficient to rebut the presumption of due execution.
79. I have not lost sight of the fact that Shanique was able, within just under 2 weeks after the 8 December 2021 meeting, to produce a remarkably detailed account of it in her 19 December 2021 email to Carlene. This led Mr Robinson to suggest to her during his cross-examination that she had been sent on a mission and had recorded the meeting, which she denied. Shanique's account provided at the December 2021 meeting and her detailed email thereafter were both produced many months after she had witnessed the 2020 Codicil which she recalled was "in early 2020". It is common ground that the 2020 Codicil was witnessed on 20 April 2020, some 20 months before Shanique provided her recollections at the 8 December 2021 meeting. I have concluded that Shanique's recollections in December 2021 and in her reluctant evidence before this Court in

September 2023 are insufficient to rebut the presumption of due execution in respect of the 2020 Codicil.

80. In short summary, the 2020 Codicil on its face has a proper attestation clause and appears to have been duly executed and attested. In such circumstances there is a presumption that the document was duly executed in accordance with the requirements of the Wills Act. The presumption is rebuttable only where there is at the very least “positive and reliable” evidence to the contrary. The leading authorities refer to the need to have the “strongest evidence” that the document was not duly executed (see Peter Gibson LJ in *Sherrington v Sherrington* [2005] EWCA Civ 326 at paragraph 41). The recollections of Shanique do not fall within the category of “positive and reliable” and are far from “the strongest evidence”. The presumption of due execution prevails in this case.

Issue 2 and Issue 3 – does the 2020 Codicil fail for ambiguity or can words be omitted or deleted and inserted?

81. To determine issues 2 and 3, I need first to consider the relevant law and evidence.
82. *In the Goods of Oswald* (1874) LR 3 P&D 162 is an early example where the English Courts of Probate and Divorce at first instance exercised the power to omit from probate words introduced *per incuriam* (through lack of care).
83. *In the Goods of Boehm* [1891] P 247 is another early example where the English Probate Division at first instance granted probate omitting a word in the will. Jeune J at page 251 referred to “the principle of striking out a word clearly inserted in mistake”. Jeune J was “willing to grant probate of this will as prayed with the omissions specified.”
84. In *Re Swords* [1952] 2 ALL ER 281 Wallington J sitting in the English Probate, Divorce and Admiralty Division at first instance, had regard to all the facts and documents before the court, and also exercised the court’s power to admit to probate a codicil omitting words of revocation that had been inserted by mistake.
85. In *Re Morris decd* [1970] 2 WLR 865 it was held at first instance in the English Probate Division that when it was proved that a will had been read over to or by a capable testator and he then executed it, *prima facie*, the inference would be that the testator knew and approved the contents, but that the court was not precluded from considering all the evidence to arrive at the truth, and that

that was so not only if fraud but also if mistake was suggested; and that, although the testatrix was competent, did in a literal physical sense read the codicil and did duly execute it, it was clear from the evidence that she did not in fact know and approve its contents. In that case a slip had been made without the testatrix's knowledge and approval and the testatrix was not bound by it; and accordingly, the case fell into the category where the court had power to do what it could by omission.

86. Latey J at page 872 referred to an earlier case and the position where a will has been read over to or by a capable testator as giving rise to a very grave and strong presumption that he knew and approved all the contents, a presumption that could be rebutted only by the clearest evidence adding:

“Indeed, when those conditions are satisfied *prima facie* the inference would be that the testator knew and approved, but the point is that the court is not precluded from considering all the evidence to arrive at the truth, and this is so not only if fraud is suggested but also if mistake is suggested.”

87. At paragraph 875 Latey J stated “this case on its facts falls into the category where the court has power to do what it can by omission. The introduction of the words “clause 7” instead of “clause 7 (iv)” was per incuriam. The solicitor's mind was never applied to it, and never adverted to the significance and effect. It was a mere clerical error on his part, a slip ... Accordingly, the case is one in which the court has power to rectify, using that word in a broad sense, so far as it can.”

88. More recently in the well-known case of *Marley v Rawlings* [2014] UKSC 2, [2014] 1 ALL ER 807 Lord Neuberger at paragraph [46] referred to the typical example of only part of a will being rejected on the ground that it was not known and approved by the testator namely where such part was self-contained “eg a particular clause or sub clause”:

“However, it is also true that, in some cases, a simple word or expression can be deleted ‘if shewn to have been inserted by mistake’ – per Jeune J in *Re Boehm's Goods* [1891] P 247 at 250, [1891-94] ALL ER Rep Ext 2044 at 2045.”

89. Having briefly considered the relevant law I now turn briefly to the relevant evidence. I have dealt above, in some detail, with the evidence of Neil and Freddie in respect of the 2020 Codicil. In his email in April 2020 Neil made it clear to Robert that the copy of the will he had on file was dated

5 June 2009 (the one prepared by Broadhurst and which Neil had witnessed) and that is why he had referred to such date in the draft codicil he had prepared. Neil stated “if there are no revocations since that date, then that is the testamentary copy that stands”. Neil also recalls telling Robert to change the dates if he had made a new will which revoked the previous one. Robert responded to the effect “changes made peter (sic) no longer involved”. Robert plainly had made a further will since 2009 when Peter Broadhurst had been involved but he failed to change the reference to 5 June 2009 in both places where such date appeared in the draft Codicil Neil had prepared. He only changed it where it first appeared. He failed to change it where it appeared the second time. He made a mistake. On the evidence presented to the Court I am satisfied that the second date did not appear with his approval and it was not his intention to refer to the 2009 Will. I am satisfied that it was his intention to refer to his last will which on the evidence before the Court was the Second 2019 Will which he had expressly inserted in the first paragraph of the 2020 Codicil.

90. Mr Helfrecht in his oral submissions made it clear that it was not the Second and Third Defendant’s case that the 2020 Codicil fails simply because it is ambiguous. Mr Helfrecht also rightly conceded that where words have been erroneously entered into a will and therefore the testator did not know and approve of such words on the ground of mistake, the Court has power to exclude the words from probate which the testator did not have knowledge and approval. The 2020 Codicil does not “fail for ambiguity”.
91. I should record that Mr Helfrecht properly conceded that the Court could have regard to the material surrounding circumstances including Neil’s email communications. In short summary, having considered the relevant and admissible evidence on the point I have concluded that the words “dated the 5th day of June 2009” were plainly inserted by mistake. The plain intention was that reference be made to the testator’s latest will. Neil had produced a draft which in two places referred to 5 June 2009 which he erroneously believed, through no fault of his own, was Robert’s last will. Robert plainly intended to refer to his last will namely the Second 2019 Will. He expressly corrected the first reference in the first paragraph so it referred to his last will namely the Second 2019 Will but, by mistake, he failed to correct the second wrong reference in the last paragraph of the 2020 Codicil. Robert’s email of 2 April 2020 that “peter (sic) no longer involved” is also evidence that he had moved on from the 2009 Will which had been prepared by Broadhurst and had been witnessed by Peter Broadhurst. Having regard to the evidence before the Court it was clear to me that the testator’s intention was to republish his latest will namely the Second 2019 Will as referred to in the second line of the first paragraph of his 2020 Codicil which he duly signed.

The stray remaining reference to “5th day of June 2009” can properly be omitted. The 2020 Codicil should be admitted to probate omitting “dated the 5th day of June 2009.”

92. This is sufficient for present purposes. I do not need to go further and decide upon the disputed legal issue between the parties as to whether this Court also has the power under Cayman law to rectify the 2020 Codicil by, in addition to simply omitting “dated the 5th day of June 2009”, also inserting “24th day of March 2019”. Mr Robinson relies on the comments of Lord Neuberger in the well-known case of *Marley v Rawlings* [2014] UKSC 2, [2014] 1 All ER 807 at para [28].
93. Lord Neuberger at paragraph [27] stated that “it has always been assumed that the courts had no such power to rectify a will” but at paragraph [28] added:

“As at present advised, I would none the less have been minded to hold that it was, as a matter of common law, open to a judge to rectify a will in the same way as any other document: no convincing reason for the absence of such a power has been advanced. However, it is unnecessary to consider that point further, as Parliament has legislated on the topic, in s 20 of the 1982 Act (s20).”

94. Mr Helfrecht says that these obiter comments do not form part of Cayman law and should not be followed. Mr Robinson argues to the contrary. As I say I do not need to resolve that interesting legal debate on the facts of this case. Mr Helfrecht rightly agrees that the Cayman Court has a common law power to admit a testamentary document to probate omitting words introduced without the testator’s knowledge or approval, through a clerical error or which do not reflect or otherwise frustrate the testator’s true intention. Mr Helfrecht says this common law power rather than rectification is the Plaintiffs’ potential remedy. Having provided the Plaintiffs with the first remedy they seek in respect of Issue 3 I do not need to go on to consider whether the Court also has the power to rectify a testamentary document at common law, although I accept that Lord Neuberger’s considered comments provide strong support for such a power.

Issue 4 – did the 2020 Codicil republish the Second 2019 Will?

95. I agree with Mr Helfrecht’s submission (at paragraph 59 of his undated skeleton argument filed on 5 September 2023) that where a testamentary paper intended to operate as a will or codicil has not been validly executed and attested and a further document describing itself as a codicil has been duly executed and states that it is a codicil to the testator’s last will, the invalidly executed and

attested document will be incorporated, provided there is clear evidence that it is indeed the paper referred to in the duly executed and attested codicil (*Allen v Maddock* [1858] 14 ER 757 (PC)). In the case before me the 2020 Codicil in its first paragraph refers to “this codicil to my last will and testament dated the 24th day of march (sic) 2019”. This is a clear reference to the Second 2019 Will.

96. In my judgment the 2020 Codicil did effectively confirm and republish the Second 2019 Will. The Second and Third Defendants agree that if the 2020 Codicil was properly executed and the court finds that the reference to “5th day of June 2009” can properly be omitted then “the ambiguity would be resolved and the effect of the Codicil would be to revive any invalid will to which it adequately referred” (paragraph 60 of their undated skeleton argument filed on 5 September 2023). The 2020 Codicil at its first paragraph adequately refers to the Second 2019 Will.
97. It is well established (see for example *William on Wills* (Eleventh Edition) at paragraph 22.2, *Tristram & Coote’s Probate Practice* (Second Supplement to Thirty-second edition) paragraphs 3.129 and 3.191, *Re Champion, Dudley v Champion* [1983] 1 Ch 101 at 109 and *Re Reeves; Reeves v Pawson* [1928] 1 Ch 351 at page 355) that if a will was invalidly executed or attested, the republication by a subsequent codicil is effective to render the will valid as at the date of the codicil.
98. In fairness the Second and Third Defendants did not strongly press any arguments against republication of the Second 2019 Will. In my judgment Robert directed his mind to his latest will (the Second 2019 Will) and intended to republish such will at the time he made the 2020 Codicil hence his express inclusion of the date of the Second 2019 Will in the first paragraph of the 2020 Codicil.

Issue 5 – should the Court admit to probate the copy of the Second 2019 Will?

99. In the absence of the original the Court should admit the copy of the Second 2019 Will to probate. Section 3 (7) of the Succession Act provides that applications to the Court for grants of probate shall be in the manner prescribed. Rule 23 of the Probate and Administration Rules provides that where an original will cannot be satisfactorily reproduced the Clerk of the Court may require an engrossment suitable for reproduction to be lodged. The Rules do not appear to address the circumstances where the original will has been lost. I have however considered Rule 54 of the Non-Contentious Probate Rules 1987 (the “English Rules”). I am satisfied that the Court has

jurisdiction to admit a copy of a will to probate. If need be reliance can be placed on Rule 54 of the English Rules and section 42 of the Succession Act and section 11 of the Grand Court Act. In fairness the Second and Third Defendants did not seriously take issue with a copy of the Second 2019 Will being admitted to probate if the Court was against them on their other arguments. The Second and Third Defendants state that they are unaware of any evidence which might indicate that the photocopy of the Second 2019 Will is not a true copy of the will executed in March 2019 (paragraph 61 of their undated skeleton argument filed on 5 September 2023).

100. The evidence before the Court was clear and compelling and rebutted the presumption that the testator had revoked the Second 2019 Will by destroying it. A copy of the Second 2019 Will should be admitted to probate alongside the 2020 Codicil.

Issue 6 – should the Court revoke the grant of probate in respect of the 2009 Will?

101. The Grant of Probate should be revoked. The Court has determined that the 2020 Codicil and the Second 2019 Will were Robert's last testamentary documents. The 2009 Will has effectively been revoked and the grant of probate in respect of it should also be revoked.

Draft Order

102. Counsel should provide for my approval a draft Order reflecting the determinations contained in this judgment within 7 days from its delivery.

Any consequential issues

103. If there are any consequential issues such as, in the absence of agreement between the parties, costs the parties should file applications and concise written submissions (no more than 10 pages) within the next 21 days and any concise written submissions in response (no more than 5 pages) within 14 days thereafter. I would be minded to deal with such on the papers. If any consequential issues are agreed a draft consent should be provided for my approval within next 21 days.

Thanks and concluding comments

104. As I said at the end of the hearing, Mr Robinson and Mr Helfrecht are two fine local examples of the very high written and oral advocacy standards that prevail in this jurisdiction, and I thank them

for their valuable assistance to the Court. I also thank Sarah Allison for her clear and concise cross examination of the expert produced late in the day by the Plaintiffs. I thank the witnesses for the evidence they put before the Court and I thank the parties for their sensible co-operation in that respect.

105. I thank Marshall Akeem Hydol for keeping the case on track and assisting with the witness logistics and I thank the transcribers for the production of the valuable daily transcripts. I am also grateful to judicial clerk Florence Allan, my personal assistant Karen Hoskins and the rest of the FSD support staff for all their valuable assistance.
106. If there is a lesson to be learnt from this case, apart from the importance and desirability of family unity, it is that it is well worthwhile spending money on practising lawyers qualified in the relevant jurisdiction to get things right and to ensure that testamentary documents are duly prepared, signed and attested. It is often a false economy to try and undertake important legal matters without the benefit of assistance from duly qualified independent lawyers. Freddie was right to mention that he found it difficult to understand why his brother Robert, coming from a family whose father and brother were lawyers, was reluctant to spend a little of his considerable wealth on Cayman lawyers to ensure the validity of his testamentary documents. With the benefit of hindsight it is clear that if Robert had engaged a Cayman law firm to assist in the preparation, execution and attestation of his final testamentary documents he would have saved much time, trouble and money. It is however easy to be wise after the event. Moreover, it is of course a personal decision of every individual, who can afford to engage lawyers, whether they wish to engage lawyers or not.
107. I hope that the parties may now be able to put this difficult time behind them and focus on a future enhanced by family unity for the sake of the grandchildren and in loving memory of Robert, who contributed so much to his family and the community within which he spent his life.

David Doyle

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT