Neutral Citation No: [2023] EWHC 474 (Ch)

Claim No: PT-2020-000511

IN THE HIGH COURT OF JUSTICE

BUSINESS & PROPERTY COURTS OF ENGLAND & WALES

PROPERTY, TRUSTS & PROBATE LIST (ChD)

In the estate of Selvarajah Sellathurai deceased

Date: 10/03/2023

Before :

DEPUTY MASTER LINWOOD

- -

Between :

Ms Ormila Selvarajah — **Claimant**

- and –

Mrs Indramathy Selvarajah (1) — **Defendants**

Ms Srimila Srihari (2)

Dr Srikumaran Selvarajah (3)

Mr Edward Bennion-Pedley (instructed by **Raj Law Solicitors**) for the **Claimant**

Mr Julian Gun Cuninghame (instructed by direct access) for the **Defendants**

Hearing: 15th – 17th November 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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This judgment was handed down remotely at 2.00pm on Friday 10 March 2023 by circulation to the parties or their representatives by email and by release to the National Archive and BAILLI.

Deputy Master Linwood:

1) This is a dispute over the validity of a will. It is especially unusual because there is no evidence as to how the will was created; all or some of the matters which the court would usually have evidence before it such as who was the author, how were instructions given (if not prepared by the testator himself), when and in what form any instructions were given, whether there were various drafts, or whether it was professionally drawn (as submitted by the defendants) are absent. There is no will file. There are no instructions as to execution. There appears to be no account or fee for the creation. If homemade – by the testator or someone else – there is no metadata establishing the author(s), history, amendments, dates and so on nor the like if professionally drawn. It appears, for reasons I will come to, to have been created at least in part from a precedent influenced by the laws of another jurisdiction. There are also certain other features, some unusual, some suspicious, that I will come to.

2) The late Mr Selvarajah Sellathurai ("the Deceased" or "father") died in hospital on 11th September 2016, aged 65, from multiple organ failure, pneumonia and crypogenic cirrhosis. His wife, the first defendant, ("Mrs Selvarajah" or "mother"), has survived him. They were of Sri Lankan origin and Tamil speakers. They lived together at 36 Northwood Gardens, Ilford, Essex, ("Number 36") where Mrs Selvarajah still lives. The Deceased's will is dated 8th August 2016 ("the Will"). The dispute as to its validity has sadly exacerbated the already present deep divisions between the claimant and her siblings. I will refer to the siblings by their first names with no disrespect intended.

3) The other parties are three of the four children of the Deceased, namely the claimant, Oormila, who is a dentist, her sister Srimila, a solicitor and the second defendant and their brother, Srikumaran, a Doctor of Medicine and the third defendant. Their sibling and the eldest child is Sharmila, who is an osteopath. Srimila and Srikumaran are the executors of the Will.

4) Below I set out the family background, the Will and probate, the background to the dispute, the issues I am to determine, the law, the submissions, the evidence of fact and opinion, my findings of fact and my decisions on the issues. The use of [ ] is to paragraph numbers within this judgment unless the context appears otherwise.

The Family Background

5) The Deceased was an estate agent. He had an agency called Kumarans. He also had a filling station business, Shay Service Station, ("Shay Services"), which continues to trade from Units 1 and 2 in Sutton Valence, Kent. The Deceased was the freeholder of Unit 1 and leaseholder of Unit 2, and also owned a residential property at 39 Skeffington Gardens, London E6, ("Number 39") which was let. The Deceased established a temple known as London Sri Selvavinayagar Temple ("the Temple"), of which he was the president, as well as the founder. That and other philanthropic activities played a large part in his life.

6) Oormila is married to Nirmalan Nadarajah, whose brother Muralitharan was married to, but is now divorced from, Sharmila. Muralitharan manages Shay Services under a commission agreement. There is a substantial dispute between him and the executor defendants, as he maintains he is the beneficial owner of that business. That dispute, in the County Court, is currently stayed pending the order of this court. Srimila is married to Srihari Manohar and they live mainly in India. Mrs Selvarajah has a brother, Neethyrajah Thambipillai, who lives in Canada. Sasikala Ragu is a niece of the Deceased.

The Will and Probate

7) The sole beneficiary of the Will is Mrs Selvarajah. Probate was granted on 29th December 2016, just 3 months after the death of the Deceased. The gross value of the estate was £689,427 and the net £329,480. I understand the difference is due to charges to secure money on the properties I mention above. At the request of his mother, the family home, Number 36, and the charge upon it was transferred to Srikumaran on 11th June 2019. It was jointly owned so passed by survivorship to Mrs Selvarajah.

8) Number 39, the rented residential property, consists of two flats, which together with the charge upon it was transferred by the executors, at the request of their mother, to Srimila and her husband on 30th October 2018. Srimila says the basis of the transfer was that her mother would continue to receive the rental income.

9) I have mentioned above the dearth of evidence as to the creation of the Will. Certain clauses are unusual in this jurisdiction – for example clause 6 provides "My Executor is not required to post bond." There follows a long list of duties and powers given to the executor, which are in this jurisdiction unnecessary. The attestation clause states, "We declare under penalty of perjury under the laws of the United Kingdom of Great Britain and Northern Ireland that the foregoing is correct this [eighth] day of [August, 2016] at London, England."

10) The Will appears to me to have been created from a precedent drafted by someone familiar with North American legal documents, and probably not created by someone familiar with or qualified in English law. But that does not matter as the Will is not defective as a document in itself and has been admitted to probate. Absent this dispute, it is rational on its face and complies with the law.

The Background to the Dispute

11) I set this out as neutrally as I can, indicating differing views as to matters which go to the issues. There are certain factual disputes over certain matters including especially

Shay Services where I do not consider it necessary to make a finding or mention in detail, but that does not mean I have overlooked the evidence concerned.

12) The Deceased had been suffering from ill health from around 2015. In October that year, Srimila returned from India to help him with his business and other matters and returned to India in about February 2016. Srimila says that in 2015 Muralitharan handed the keys to Shay Services back to her father, knowing of his ill-health, forcing him to manage the business himself. Srimila says that her father believed Muralitharan, Nirmalan and Oormila orchestrated this on purpose to strain his already poor health.

13) Then Srimila says her father told her he had visited Oormila's house to make amends but he returned in tears as Oormila was not remorseful for what had occurred and Nirmalan had assaulted him. As a result, the Deceased told Srimila that he would disown Oormila and did not want her or Nirmalan at his funeral. All this is denied by Oormila, but she does accept that her mother at that time asked her to return her keys to Number 36, which she did. Srimila says this was instigated by their father.

14) Srimila says that Sharmila about this time told their father that she was the sole breadwinner in their family and Muralitharan had asked their father if he would lease the business premises to him, to which her father agreed, so as to reduce the burden on Sharmila. However, as Muralitharan could not pay the premium up front they agreed he could work it on a commission basis, and an agreement reflecting that was entered into in February 2016.

15) Oormila in her witness statement dated 12th April 2021 supporting Muralitharan in the County Court proceedings says "I can say my late father gave [Shay Services] to [Muralitharan] to run it on a commission basis and this management agreement between them was oral." Oormila in the same statement also alleged that her father turned Sharmila against Muralitharan resulting in their divorce in 2018. Oormila also accuses the rest of her family of not having a clue about the business and alleges it was only Muralitharan who supported the Selvarajah family when they were all in full-time education to his detriment.

16) Oormila and Muralitharan are also in business together as they are both directors of Ellora Avenue Ltd, which is the long leaseholder of Unit 1 at Valence House, but Oormila says she holds all the issued shares.

17) The Deceased followed Srimila back to India in April 2016 trying to find a private hospital in South India for a liver transplant. Srimila says she visited a few such hospitals with her father until he returned to the UK. In early May Srikumaran wrote a detailed letter to his father's GP setting out the serious medical concerns he had, in preparation for a consultation. At the end of May 2016, the prognosis following a hospital stay was a 50% prospect of survival without a liver transplant.

18) Various inter-physician letters in June 2016 show the Deceased was having increasing difficulty with breathing and that he needed drainage. Liver transplantation was still being considered. On 3rd July 2016 Srikumaran set up a sibling WhatsApp group, as he wished Oormila to communicate with her siblings, as he put it "…if only in relation to our father's health issues." On 3rd August 2016 Srimila returned to the

UK with her husband and 3-year-old son, and the Deceased picked them up from the airport. The following day she accompanied her father to a hospital appointment.

19) The Deceased then attended Queen's Hospital in Romford, Essex, on Monday 8th August 2016, for a pre-arranged all-day procedure, at which five litres of fluid were drained from him. He apparently drove himself to the hospital and home again upon discharge, which happened at about 5pm the same day. The hospital notes say he "…was comfortable on discharge".

20) On that Monday evening it is the Defendants' case (albeit unknown to them at that time) that the Deceased executed his Will, which was attested by two old schoolfriends of Srimila, namely Ms Asma Ali and Ms Allya Syed, at Number 36. They had known each other for about 24 years. It seems Mrs Selvarajah was not present. Ms Ali and Ms Syed went to Number 36 on a pre-arranged visit to see Srimila, who was staying there at that time. She however was out but expected back shortly. They chatted to the Deceased, whom they knew quite well, and he asked them to witness him signing his Will, which they did. He asked them not to mention the Will to anyone, as he would disclose it at the right time. They complied with his request.

21) Oormila says that the Deceased was suffering from serious medical trauma and resultingly was unable to sign the Will. Further, she alleged one of Ms Ali or Ms Syed was not in the UK at the time. She alleges lack of capacity and that the Will was executed by fraud in that Srimila, knowing there was no will, caused it to be drawn up and executed and/or that the signature of the Deceased was forged by Srimila.

22) The Deceased then had an emergency admission to hospital on 12th August and was discharged on 16th August, two days after his eldest daughter Sharmila gave birth. He then was admitted to the intensive care unit on 21st August, as his condition had deteriorated, and was intubated. The family were very concerned; their father was unconscious for a few days but then recovered somewhat.

23) On the sibling WhatsApp chat on 28th August Srimila wrote:

> "People I know this is the last thing anyone wants to think about but I think it's important that papa signs a will. I know roughly how he wanted to split it but that's not important for now what is, is that if he doesn't have one, he looses almost 50% to tax and government. I think it best in this situation to write it all to [mother]. And then when he is well he can over write that will anytime. I'm thinking of speaking to [mother] and preparing a basic will and getting papaz finger print. Please let me know what u all think."

24) Sharmila and Oormila replied saying they were in favour. The Deceased was visited on 29th August in hospital by Srimila, Oormila and Ms Sasikala Ragu, his niece, but not all at the same time. Ms Ragu, who was accompanied by her husband, says that she asked the Deceased if he had made a will and he confirmed he had. That is not accepted by Oormila. The Deceased was then transferred to another hospital on 30th August for a liver transplant assessment. His condition worsened and he died on 11th September 2016.

25) Srimila in her witness statement says she found the Will when dealing with her father's paperwork after his death. This is placed chronologically after her description of trouble at the funeral, caused she says by Oormila insisting Nirmalan should attend and carry the coffin, much against the wishes of the family. However in her oral evidence Srimila said that she found the Will before the funeral, which took place on 18th September. Srikumaran in his statement says Srimila told him of the Will after the funeral. He also agrees with Srimila that Oormila made the funeral difficult by ensuring Nirmalan attended and carried their father's coffin.

26) In the siblings' WhatsApp chat was a message (which Oormila no doubt saw) that their mother was signing a Lasting Power of Attorney, which she then did on 17th October 2016, appointing Srimila and Srikumaran as her attorneys. Srikumaran says that Oormila "…was aware of the Will as early as 1st December 2016 if not before. I sent her a WhatsApp message timed at 22:41 hours stating that we were sorting out the Will".

27) The Grant of Probate was obtained on 29th December 2016. On 18th January 2017, the Deceased's bank, NatWest, wrote asking how his debt to them of about £147,000 would be repaid, stating it was secured upon Number 36 and the properties used by Shay Services.

28) Srikumaran says that he and Srimila proceeded to administer the estate, and family arguments over Shay Services caused further tensions. Then Muralitharan failed to meet his payments due to Mrs Selvarajah, and despite efforts on his part he could not convince Oormila to take on any of the loan for Shay Services.

29) On 3rd December 2017 Oormila sent her brother a WhatsApp message saying "That's exactly my problem, I can't speak to idiots! Ur the executor so I need you to give me what papa said was for me." Then in February 2018 Sharmila issued divorce proceedings against Muralitharan. According to Srikumaran, this led to Oormila being enraged with all family members. On 27 March 2018 Oormila emailed him and Srimila, requesting copies of the Grant of Probate and estate accounts, and asking when the estate would be distributed. She says she never saw the Will until some unspecified day in 2018, but upon seeing it she "…immediately realised that my father's signature was forged."

30) Earlier, on 9th May 2018, Srimila and Srikumaran as executors issued proceedings I mention above in respect of Shay Services seeking possession and arrears of rent. They say that prompted Oormila's allegation of forgery, as then she made an application to stay those proceedings on the basis that the Will was a nullity and therefore proceedings could not be brought by the executors. Oormila emailed the Probate Registry on 13th June 2018 stating that she considered the Will was a forgery.

31) The properties of the Deceased were then transferred. Srikumaran said that each property his father owned had a significant liability attached to it, and their mother wanted the liabilities taken on by him and Srimila. Number 36 was transferred to him in June 2019 to ensure his mother had certainty as to where she lived and Number 39 transferred in October 2018 to Srimila, with the intent that their mother would receive income from rent received. The liabilities of the estate were substantial - according to the Grant of Probate approximately £360,000.

32) In May 2019 Oormila was appointed as a director of Ellora Avenue Limited, as was Muralitharan in August 2019. The Claim Form in these proceedings was issued in May 2020 and the County Court possession proceedings stayed pending this trial in April 2021 with Muralitharan to pay an interim rent of £1,367 per month.

The Issues

33) As agreed between counsel these are:

(1) Did the Deceased sign the letter dated 19th July 2016 from the Temple to Lukshan Sharvaswaran on or about 19th July 2016?

(2) Did the Deceased execute the Will on 8th August 2016 at Number 36?

(3) If so, did the Deceased do so in the presence of Ms Asma Ali and Ms Allya Akram Syed and did they attest to that?

(4) If so, did the Deceased have sufficient testamentary capacity to do so?

(5) If the Will would otherwise be invalid is it now appropriate to revoke the grant dated 29th December 2016?

THE CLAIMANT'S ALLEGATIONS AND PROPORTIONALITY

34) I will now set out the allegations as appear in the Particulars of Claim (not drafted by Mr Bennion-Pedley). These are that the Will is invalid as at [4.1] it is pleaded that "…at the time at which the alleged will was created, being a date not earlier than 28 August 2016, the deceased was unwell and lacked any capacity to understand to execute" (sic). At [4.2] it is alleged Srimila "…knowing the deceased did not have a will, caused the alleged Will to be drawn up and purportedly executed", and at [4.3] that Oormila does not know if Srimila fabricated her father's signature or guided his hand.

35) Then at [4.4] it is alleged that the Deceased had no knowledge of and did not approve the Will, that he did not in fact execute it and "…could not have intended his signature to give effect to the alleged will for the purpose of s.9" At [4.5] it is pleaded one of the "witnesses" was not present when his signature was affixed to the Will.

36) Oormila also at [2 (vii)] of her statement of 15th October 2021 said "The deceased's reading and writing English was limited. He would not have understood the 2016 Will without an interpreter anyway, even if he did give instructions anytime when he could, which is denied."

37) In her statement of 14 March 2022 Oormila disputed the value of her father's estate saying that the freehold residential properties alone – Numbers 36 and 39 – were worth a total of £1,478,000 as at [10g] she states "I do not believe that my father had outstanding mortgages and/or debts owed to third parties. In any event, my father had life insurance policies on all his loans and mortgages."

38) She also alleges that there are properties and land in Sri Lanka, gold jewellery, a Range Rover, a business – namely the Temple, and other leasehold properties in the UK and also bank accounts in Sri Lanka. She concludes by stating that it is her "…legitimate and

reasonable expectation to inherit same and equal value as my other siblings…from the estate of my late father."

39) All of Oormila's claims are denied in the Defence which pleads in the alternative Oormila is barred from the relief she seeks by reason of her own laches, acquiescence and delay.

40) Deputy Master Arkush at a hearing in July 2021 asked Mr Bennion-Pedley what, if Oormila succeeded in her claims and an intestacy arose, was the value of her share. He replied that it was about £9,000 (being a one fourth share), which remained the position at trial. Deputy Master Arkush expressed great surprise at the complete lack of proportionality in that this matter was listed for a costly 3 day trial.

41) Mr Benninon-Pedley submits as to proportionality there are points of principle here, with this family torn apart, noting that the effect of revocation would be an intestacy by which Mrs Selvarajah would receive a substantial proportion of the estate. But he adds that this is not just about Oormila's entitlement; it is ensuring a forged will is not used as a device to exclude Oormila from her reasonable expectations upon the subsequent death of her mother (I note not father). I consider her approach unrealistic in all the circumstances in view of remoteness and agree with Deputy Master Arkush, noting Oormila's costs budget of £52,000 and that of the Defendants of £60,000 - sums way out of proportion to the possible gain have been expended.

42) Mr Gun Cunninghame submits that as Oormila and Muralitharan are in business together her interest is to stymie the possession proceedings brought by Srimila and Srikumaran, which is the key to understanding Oormila's motivation in bringing these proceedings.

THE LAW

43) There is no issue between counsel as to the applicable law. Mr Bennion-Pedley abandoned Oormila's allegations as to lack of testamentary capacity during his closing submissions so I need not cite the authorities he relied upon. He accepted that the burden is upon Oormila to make out sufficient grounds to revoke the grant that is in existence as far as her allegations of forgery are concerned.

44) Section 9(1) of the Wills Act 1837, as amended by section 17 of the Administration of Justice Act 1982 provides:

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

Mr Gun Cunninghame cited Neuberger LJ (as he then was) in *Channon v Perkins [2005] EWCA Civ 1808* at [7-10], referring to *Wright* and *Sherrington* to which I turn later said:

> "7. There is good reason for the requirement that one must have "the strongest evidence" to the effect that a Will has not been executed in accordance with section 9 when, as in this case, it appears from the face of the Will that it has been properly executed in all such respects and where there is no suggestion but that the contents of the Will represented the testator's intention. Where a Will, on its face, has been executed in accordance with section 9, and where there is no reason to doubt that it represented completely the wishes of the testator, there are two reasons, one practical and one of principle, why the court should be slow, on the basis of extraneous evidence, to hold that the Will was not properly executed.
>
> 8. 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 particularly reliable on, one suspects, many 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. Wills are often executed many years before they come into their own.
>
> 9. Furthermore, when one is dealing with the recollection of witnesses to a Will, one is, as my Lord, Mummery LJ, pointed out in argument, often, indeed normally, concerned with the evidence of persons who have no interest in the document that has been executed, and therefore to whom the signing of the Will would not, save in (un)usual circumstances, have been of particular significance.
>
> 10. The principled reason for being reluctant to hold that 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. That would be unfortunate, especially in a case he has taken to ensure, so far as he can, that his wishes are given effect in a way which complies with the law."

45) Whilst not cited to me during trial, in the joint authorities bundle is *Sherrington v Sherrington [2005] EWCA Civ 326.* I have had regard to Peter Gibson LJ's reference at [40] to what Lord Penzance said in *Wright v Rogers (1869) LR1 PD 678*:

> "The Court ought to have in all cases the strongest evidence before it believes that a will, with a perfect attestation clause, and

> signed by the testator, was not duly executed, otherwise the greatest uncertainty would prevail in the proving of wills."

46) Then at [41]:

> "In general, if a witness has the capacity to understand, he should be taken to have done what the attestation clause and the signatures of the testator and the witness indicated, viz. that the testator has signed in their presence and they have signed in his presence. In the absence of the strongest evidence, the intention of the witness to attest is inferred from the presence of the testator's signature on the will (particularly where, as in the present case, it is expressly stated that in witness of the will, the testator has signed), the attestation cause and, underneath that clause, the signature of the witness."

47) "Strongest evidence" was also considered by Arden LJ in *Channon* where at [45] she said:

> "So the question of what constitutes the "strongest evidence" for the purposes of this case remains to be explored. As I see it, there is a sliding scale according to which evidence will constitute the strongest evidence in one case but not in another…[it]…will depend upon the totality of the relevant facts of that case, and the court's evaluation of the probabilities. The court must look at all the circumstances of the case relevant to attestation. The more probable it is, from those circumstances, that the will was properly attested, the greater the burden on those seeking to displace the presumption as to due execution to which the execution of the will and the attestation clause give rise. Accordingly the higher will be the hurdle to be crossed to meet the requirement of showing the "strongest evidence", and the stronger that evidence will need to be."

48) She continued at [46]:

> "Likewise, if the evidence of due attestation is weak, then the burden of displacing the presumption as to due execution may be more easily discharged and the requirement to show the strongest evidence satisfied. Allegations that were not made, or were not pursued, and mere suspicion, have to be put on one side."

49) In his closing submissions Mr Bennion-Pedley relied on the well-known paragraphs 15-22 in the judgment of Mr Justice Leggatt (as he then was) in Ges*tmin SGPS S.A. v Credit Suisse (UK) Ltd and Anr [2013] EWHC 3560 (Comm),* and submits I should pay particular attention to unconscious bias and the effect of present belief on past memory, in view of the antipathy of Sharmila and Srimila to their sister. Further, Srimila with her long term friends Ms Ali and Ms Syed all have to answer questions of impropriety, so they cannot give evidence with any degree of impartiality.

50) Therefore Mr Bennion-Pedley submits it is especially important here to assess the evidence with a primary focus on contemporaneous evidence and known or provable facts. Mr Gun Cunninghame submits this is a binary issue in that either Ms Ali and Ms Syed are telling the truth or they are not; if they are, due execution is proved, the matter ends there and the expert evidence takes the matter no further forward.

51) As to civil cases being determined in accordance with the civil standard of proof on the balance of probabilities, Mr Gun Cunninghame cited *Treasury Solicitor v Doveton and Anr [2008] EWHC 2812 (Ch)* where Mr Mark Herbert KC sitting as a Deputy Judge of the Chancery Division reviewed judicial statements as to the principles regarding the standard of proof at [13] and the judgment of Richards LJ in *R(N) v Mental Health Review Tribunal [2006] QB 468:*

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

EVIDENCE – WITNESSES OF FACT

52) I heard seven witnesses of fact. Below I set out my view of them, in the order in which they appeared. Mr Neethyrajah Thambipillai, who as I mentioned above is the brother of Mrs Selvarajah, and resident in Canada, made a statement on behalf of Oormila. He was due to give evidence remotely but Mr Bennion-Pedley on the first day of trial said he was not responding to contact and so did not appear. Accordingly I have had no regard to his evidence.

Ms Oormila Sevarajah

53) Oormila gave her evidence in a quiet and certain manner but was defensive and reluctant to accept matters even when confronted by independent documentary evidence. For example, when shown the Official Copy of Register of Title for Number 36 she would not accept that property had a charge upon it to secure money – she kept saying she had not had a copy of the estate accounts, which she kept repeating throughout her evidence. This truculence continued when she was then asked about Number 39 and whether she accepted that that had been transferred within the family. Her reply was "That is what she [Srimila] claims. I don't have accounts".

54) I take no notice of her evidence as to lack of testamentary capacity due to this being conceded. As to her father's lack of understanding of English, when questioned about him conducting business in English she said "There is no question of that. The question is whether he had legal knowledge. My father could not understand this without an interpreter, due to the content …[it was]…too difficult for a lay person to understand." But in the hearing bundle are legal documents such as leases and a commission agreement signed by him. I find it unlikely that the Deceased could understand one type of legal

document but not the Will. I have to conclude that, again, Oormila is giving partial evidence to suit her wide-ranging attack upon the Will.

55) In summary therefore I place little or no weight upon her evidence unless it is supported by independent corroboration. Having said that, her evidence did not go to any of the issues. Mr Bennion-Pedley did not rely upon any of her evidence in his closing submissions.

DR SRIKUMARAN SELVARAJAH

56) Srikumaran explains in his statement how he was living in Bristol in 2015. In his oral evidence he said he had a job and career there which he was he was very happy with. His father told him how Oormila was:

> "…increasingly hostile towards him, that he had told her to get out of the house and they were no longer on speaking terms. He also told me that her husband, Nirmalan, was violent and had attempted to throw a chair at him. My father told me that he would not want either of them at his funeral if he died. I was still on speaking terms with the Claimant and tried my best to try and reconcile her relationship with our father."

57) He then said he had set up the sibling WhatsApp group in July 2016 when it became clear that their father may not survive without a transplant. Oormila, he said, was not involved during their father's ill health and "…made no efforts to assist him in any way." In his oral evidence he was clear, apologetic when he got something wrong and as helpful as he could be to the court. He clearly regretted the deep divide in the family, saying at one point:

> "I have tried and failed for several years to build bridges between my sisters and it's been a struggle, it's been really difficult for me."

58) He was also certain and direct – for example when cross examined regarding the estate accounts and asked if he could see that refusing to provide them to Oormila caused distrust and suspicion, he readily accepted that. When it was put to him that this was not very helpful he said "I didn't intend to be helpful". Mr Bennion-Pedley said Oormila was a beneficiary which Srikumaran immediately refuted.

59) As to the estate generally, he emphasised that his main concern following discussions with his mother was to resolve the debts. That directly conflicts with Oormila's statement that the properties were debt free. He explained that he had no interest in moving back to London but he did so to take on the mortgage and care for his mother.

60) Mr Bennion-Pedley said in closing submissions that Srikumaran "…came across as a genuine person saddened by the various rifts and infighting between his sisters. Careful to say he does not know whether the Will is genuine and perhaps careful not to ask." But in my note of his cross examination records he was asked "You don't know yourself if the Will is genuine" and his reply was "I've seen it. That's my father's signature." That in my view answers Mr Bennion-Pedley's question.

61) In summary I accept all Srikumaran said. He was a diligent, honest and open witness. I also found his explanation of medical terms especially helpful.

MS ALLYA AKRAM SYED

62) I was told at the start of trial that Ms Syed was too ill to travel from her home in Birmingham to London. Oormila's solicitors, Raj Law, did not object to her giving evidence remotely but understandably required medical evidence. I was concerned as she was a crucial witness and remote evidence is rarely as satisfactory as live evidence. After a short adjournment I was informed that Ms Syed had tested positive for Covid 19 which was accepted by Raj Law, so she gave evidence remotely.

63) In her statement she explained how she had known Srimila since 1998, lived just a few minutes away from Number 36 until she moved to Birmingham 5 years ago and had undertaken an internship with the Deceased (whom she called "Uncle") at his estate agency. She said that she knew Srimila was coming to the UK in August 2016 on a visit from India so that their mutual friend Asma and she decided to meet Srimila at Number 36. Eventually the 8th August was agreed upon. Her account of witnessing the Will is rather short of the detail usually included:

> "When we reached the house Uncle welcomed us warmly as Srimila was not there yet. He asked generally about our married lives and family. Uncle then asked us whether we could witness his Will as there were two of us. He specifically asked that we did not mention it to anyone so that he could tell his family at the right time. After Uncle signed his Will, both myself and Asma signed in the witness section. We did not mention this to Srimila when she reached home with her husband, Hari, and son, Jai."

64) In cross examination Ms Syed said she ran her own digital marketing business, had known Srimila for 24 years, and was in regular contact with her and Ms Ali by text and WhatsApp, using the latter in 2016. She confirmed she had changed her mobile number and telephone a few times since 2016, that she had been asked for her text and WhatsApp messages from then but she did not have any.

65) Ms Syed said she and Ms Ali together saw Uncle sign the Will which they both then signed. This took place in the living room. She was unsure whether Mrs Selvarajah was at home at the time, but it was in the evening. Uncle appeared his usual self, and she had not seen him for a while. Asked about his appearance she said "I remember thinking he had lost a bit of weight. It can happen in old age."

66) She could not recall what he was wearing but said the Will was on a dining table at the back of the living room. She did not read anything but just signed her name. She could not recall which of her or Ms Ali signed first. She confirmed it was her signature but she could not identify the manuscript date on the Will, nor whose pen she used. She was careful in her answers; as to the pen she said she must have used one given to her, but volunteered she could not recall if it was passed to her or she took it off the table.

67) When asked why she hadn't told Srimila of the Will when he died, she said, in a very natural and open way, that "I did tell her after he died. A few days later or after the funeral. She said to me she's already found the Will." She was certain that the Will had

not been signed before they witnessed it, and that Uncle had signed first. At the end of her evidence she apologised for not being able to attend in person.

68) Unfortunately the remote connection to Birmingham was poor. Ms Syed had to ask for questions to be repeated and that poor connection made hearing and giving evidence regrettably more difficult than it would have been in person. Having said that, Ms Syed gave straight forward answers and clearly wanted to help the court, by expanding answers beyond the short responses that she could have given. She made it clear when she could not recall matters, which was understandable given that the execution of the Will had taken place over 6 years before. Accordingly I accept her evidence.

MRS SASIKALA RAGU

69) Mrs Ragu is a niece of the Deceased. In her statement she says they lived together as a big family for many years and she was very close to him. In her very short statement she sets out two important matters; first that her uncle:

> "…expressed that he wanted to ensure my aunty, his wife, was financially secure as she had always remained a housewife throughout their marriage. He told me he wants to leave everything to his wife."

70) The second was:

> "I visited my uncle in hospital at the end of August in intensive care at King George Hospital with my husband Ragu. I remember asking him whether he made the will and he confirmed he had."

71) In cross examination she confirmed that she was unaware of her uncle owning Number 39 and that she did not discuss financial matters with him. She was however certain that he told her he was going to leave everything to his wife. Mr Bennion-Pedley suggested she was mistaken in that the conversation was to the effect that the Deceased would leave his wife financially secure, not that he would make a will. Mrs Ragu said her uncle told her he was going to make a will leaving everything to his wife. Mr Bennion-Pedley observed that neither Srimila nor Srikumaran were aware of that and asked her to explain why he had kept that a secret and told her and not his children. She could not explain why, which is understandable, but her evidence in this respect was not wholly convincing.

72) Mr Bennion-Pedley then turned to the hospital visit. Here her evidence was far more detailed. She explained that this was not her first visit but on 29th August she with her husband went to see her uncle. There is no dispute that they did visit then. Mrs Ragu said she was told by Srimila or a nurse not to spend too much time with him. His eyes were shut when they were shown in. When he did open them, he was very happy to see them both, especially as, she said, he liked her husband very much and had not seen him for years.

73) Speaking in Tamil, he asked her to call Srimila in. She asked her husband to do so and when he left asked the Deceased if he had written a will to which he said yes. Mr Bennion-Pedley put to her that did not happen which she said it did – he took off his mask to do so.

74) I found Mrs Ragu, whilst quite clear at times in her evidence, to occasionally be uncertain, especially when she was being questioned as to why the Deceased would tell her about his intent to make a will and not his children as I mention above. Broadly, I accept what she said, but with reservations.

MS SRIMILA SRIHARI

75) Srimila in her statement described how her father was a great man who spent his last decade giving back to the local Hindu/Tamil community, as shown by the attendance of over 1,500 people at his funeral. After marriage in 2011 she said she moved out of Number 36 and began travelling back and forth to India, and that Oormila after she married in 2010 lived in India with her husband until about 2014, when she moved back to live with Sharmila.

76) Then her father told her of his concerns as to Oormila's behaviour towards him, and how he felt Sharmila's husband, Muralitharan, was bullying her. He also said to her that he felt Oormila, Muralitharan and Nirmalan orchestrated their actions to make matters difficult in the running of Shay Services, and that despite his illness Oormila did not try to assist or comfort him. These family disputes worsened when at the funeral Oormila was adamant that Nirmalan should carry her father's coffin despite the family's wishes.

77) As to the Will Srimila said this:

> "While dealing with my father's paperwork after his death, I found my father's Will. I was surprised my father had not told the family he had made a Will. In hindsight, I believe my father did not disclose to anyone that he had made a Will leaving everything to our mother as he must have expected some pressure from the Claimant, Nirmalan and Muralitharan. He would not have wished for further family issues to arise while he was unwell."

78) At the outset of cross examination she was asked if she had drafted the commission agreement regarding Shay Services. Her reply was certain and to the point: "No. My father never referred any legal matter to me. He sees me as a little child." That immediate and heartfelt response was, I consider, truthful, and typical of her evidence.

79) Her intimate involvement in her father's care and well-being was clear – when questioned as to events on the day the Will was executed, 8th August 2016, and her father's attendance at hospital for most of that day, Mr Bennion-Pedley said he would expect a man in his condition to be in bed. She replied that she didn't think so, as he drove all the way to the hospital, and back home too – she accompanied him and was there all day. She explained she then left and went to her husband's cousin's house, some 10 minutes away, it being traditional that she and her husband would go there together, and that he was returning to India the next day.

80) As to the arrangements to meet Ms Syed and Ms Ali that evening, she thought they were made by telephone, as opposed to text or WhatsApp. In any event, she said she had no messages from that day, 8th August. She was then questioned about a change in her evidence as to when she found the Will – in her statement, whilst no date was stated, it

chronologically appeared after the funeral but in oral evidence she said it was before. She did not accept that there was any change in her evidence.

81) Srimila denied she had prepared the Will, saying that she found it in files near the table. She explained her father asking the witnesses to his will to not disclose it to anyone was in her view a cultural thing. Then she was asked if her father had asked her to keep quiet about a will, whether she would do so? She replied that maybe he was planning to get well. I thought that response unnecessarily glib.

82) In summary, Srimila was careful, clear, and direct albeit somewhat glib when giving her evidence. I accept what she said.

MS SHARMILA MURALITHARAN

83) Sharmila was not called by the Defendants but on the first day of trial Mr Bennion-Pedley applied to issue a witness summons requiring her attendance, as Raja Law were one day late in issuing it. Mr Bennion-Pedley submitted that Sharmila could give important evidence as to whether the signature on an original letter from the Temple, dated 19th July 2016, being Item 12 examined by the handwriting experts for their reports, was that of her father or whether, as Oormila said, Sharmila signed this on behalf of her father as she did with other documents.

84) The Defendants' expert opined that if it was not a genuine signature then his opinion of moderate evidence that the Will signature was genuine would be unsustainable and his opinion would change to inconclusive. Mr Gun Cunninghame objected as he said this was speculative and fishing, it should not have been left to the last minute, and only evidence in chief could be obtained. I gave a short *extempore* judgment permitting the issue of the summons, my reasons including the limited effect on costs, it was just one day out of time, the evidence could assist me and I could see no prejudice in so doing, especially as it would not impact upon the trial timetable.

85) Sharmila confirmed that the Temple was a large part of her father's life and that both she and Oormila were signatories there. She was quiet when giving evidence and clearly reluctant. For example, when asked by Mr Bennion-Pedley as to whether she signed documents in Oormila's name when her sister was in India, with Oormila's consent, she denied doing so. She was then asked how such documents got signed. She simply replied "ask her".

86) Then Sharmila was asked whether she signed documents for her father. She said no, never. She was shown Item 12 and she said she had never seen it before. She was asked if the Temple had a personal computer to which she replied she did not go to the Temple that much as then she was heavily pregnant and had to run her own business. She added she helped but not on administration matters then. Now, as chairman, she knew what was going on.

87) Sharmila was asked if the Temple had a picture file of her father's signature to be inserted in documents. Her response was that she did not know why she was being asked that as she was unaware as to whether the Temple had a PC at that time. Mr Bennion-Pedley then questioned Sharmila about the Will. She confirmed she had first seen it after her father had died. Then he said Oormila suspected some of the handwriting on the Will was hers, which she denied.

88) It was clear that Sharmila had experienced substantial personal difficulties at the material times which may explain her attitude when giving evidence. Overall, I find she was a truthful but reluctant witness.

MS ASMA ALI

89) Ms Ali appeared remotely from California where she currently lives. Fortunately, apart from a slight delay, the connection was good, far better than Ms Syed in Birmingham. She is a Portfolio Manager for Munich Re and moved to California in July 2017, having been transferred by them from London. In her statement she said she had known Srimila since they were about 12/13 years old and had been to Number 36 many times, often with Ms Syed. Her statement is very short and the execution of the Will is described thus:

> "In 2016, Srimila returned to London and Allya and I wanted to visit her. When we got to Srimila's parents' home, which is where she was residing, Srimila was not there yet so we were having a general conversation with her dad. During this time, uncle asked us whether we could witness his Will. We saw him sign the Will and signed after him. Uncle was persistent that we did not mention it to anyone as he wanted to tell them himself. We met Srimila and her family when she arrived and then left."

90) In her oral evidence she confirmed Munich Re had deleted her emails and diary upon her move to her new role and location. Asked about the Deceased's illness, she said she knew he was ill but not how severe it was – maybe a liver transplant or something. She said that she went to Number 36 the day after his death but could not attend the funeral.

91) Mr Bennion-Pedley then asked what she remembered of events on 8th August 2016. Ms Ali said that they arranged to meet at No 36, but Srimila was not there. They were speaking to uncle and waiting around. He asked if they were free and could help him sign his will. She had a quick glance and said she was happy to do it. They signed the Will and waited a while for Srimila and her family to return, and then spent some time with them. She definitively said Mrs Selvarajah was not present.

92) She continued by saying that the conversation as to the Will started in the hall and then they moved into the living room. She went straight there from work where she finished at about 5.00pm. She took the train home which was one hour, freshened up and then went to Number 36 so she thought she would have arrived about 7.00pm. The Deceased appeared normal to her, nothing out of the ordinary. When asked where the Will came from she said "…uncle just passed it to us…", and she could not recall where he got it from.

93) Mr Bennion-Pedley said by glancing at it what was she checking the Will for? She replied "I'm quite a cautious person. I want to see what I'm signing and it said something like transfer all to my spouse then I signed it." He asked what bit of the Will said that? She replied "Scroll down [he had referred to the first page of the Will at p7 in the bundle but hers was electronic] – point 9 [on p9]. So I was quite comfortable signing it."

94) Ms Ali then confirmed her signature. When asked if it was her who wrote the date which appears above the signatures she said "Maybe. Maybe not. Maybe Allya. Looks more like her writing. One of us must have done it". She went on to say she could not recall the

order in which they signed but she assumed she signed first "after uncle". She went on to say she did not recall ever mentioning the Will to Srimila. Oormila's case was put to her but she maintained that she saw the Deceased sign, she did not sign the Will with a pre-existing signature nor did she think there was no harm in such an act.

95) As with Ms Syed she was asked if she was aware that Oormila's solicitors were trying to contact her. She replied that she was not, and that whilst she still owned her home in Ilford it was let out and a managing agent handled it. I note in the trial bundle are two letters from Krish Ratna & Co, solicitors previously instructed by Ooormila before Raj & Co, dated 17th February 2020 to each of Ms Ali and Ms Syed asking if they witnessed the Will. Both were addressed to properties they had left years before, which explains their replies that they were unaware of those attempts to contact them.

96) Ms Ali was clear, direct and tried her best to assist the court. I have no hesitation in accepting what she said. Having said that, Mr Bennion-Pedley in his closing submissions raised numerous substantial queries which I address below.

THE EXPERT EVIDENCE

97) I now turn to the expert evidence, all of which was by way of written reports and joint statements.

Questioned Documents

98) Mrs Briggs for the claimant and Mr Craddock for the defendants were instructed to determine whether the signature on the Will was written by the Deceased. Both submitted reports and then addendum reports. They produced a joint statement dated 14th July 2022. At [3.2] Mrs Briggs opines that the evidence:

> "…is *inconclusive* meaning that it is not possible to determine whether or not the signature was written by him" (emphasis as in original).

99) Mr Craddock opines:

> "…there is *moderate* evidence to show that the questioned signature was written by…[the Deceased]…However, his opinion is based on the premiss that all the known signatures that he has examined are in fact the genuine signatures of …[the Deceased]…written at the date as shown. If item [PC12] and possibly any other signature is not a genuine signature of …[the Deceased]…written on the date shown, Mr Craddock's opinion of moderate evidence would be unsustainable and therefore his opinion as to whether…[the Deceased]…was responsible for signing his Will dated 08 August 2016 would be inconclusive" (emphasis as in original).

100) Mrs Briggs continues by saying she:

> "…has been instructed that the Claimant challenges the authenticity of any documents where there is no clear

> handwriting of …[the Deceased]…other than a signature and has identified these items as [PC3-PC12] and [PC18]...one of the most significant limitations to the examination is lack of any contemporaneous signatures particularly given the allegation above, which incorporates item [PC12]. This is despite the large number of known signatures submitted for examination; none of them were writen after the date of the questioned Will. Mrs Briggs is of the opinion that the documents available are not representative of the writing ability of…[the Deceased]…at the time the Will was signed."

101) Accordingly she does not consider a reliable opinion is possible so she maintains that the evidence is "inconclusive".

102) Mr Craddock:

> "…agrees with the limitations with regard to the known signatures as documented by Mrs Briggs…However, if item [PC12]…is accepted by the court to be genuine and written on the date shown, it is [his] opinion that there is sufficient evidence to support the proposition that it is more likely than not that the questioned signature of…[the Deceased]…on the Will is genuine. If item [PC12] in his report cannot be relied upon his opinion would be inconclusive."

103) I refer to item 12 in my summary of the evidence of Ms Sharmila Muralitharan at [83-87] above. I accept her evidence that she had not seen this letter before and that she had not signed it as she had never signed documents for her father nor used an electronic image to do so. On the balance of probabilities in the absence of any sustainable evidence or challenge the signature on item 12 can be presumed genuine.

104) Therefore, in summary, Mrs Briggs concludes the evidence is inconclusive, albeit I note the limitations imposed by Oormila, and Mr Craddock concludes there is moderate evidence it is genuine.

Old Age Psychiatry

105) Professor Burns and Dr Prabhakaran made two joint statements; unfortunately they initially were not provided with the same medical records. By the time of their second report dated 4th May 2022 they were satisfied that broadly they had the same information before them. They agreed they should concentrate on the Deceased's testamentary capacity on the day he executed his Will on 8th August 2016. They further agreed:

> "While there is a past history of heart disease, liver cirrhosis and high blood pressure, there is nothing to suggest a dementia, cognitive impairment or a mental health condition that could have affected Mr Selvarajah Sellathurai's testamentary capacity; There is no evidence of the presence of an insane delusion…The Court will have to rely on the non-medical evidence to come to a conclusion."

106) That puts the matter of testamentary capacity as far as medical evidence is concerned beyond doubt, although Mr Bennion-Pedley referred to it in his skeleton argument as inconclusive, to which I return below.

CLOSING SUBMISSIONS

107) The facts and circumstances here are somewhat unusual so I therefore will set out the helpful closing submissions by both counsel in some detail, both of whom provided me with their speaking notes. Mr Gun Cunninghame's case is simple; due execution is established by the evidence of Ms Syed and Ms Ali. If I accept their evidence, that is the end of the matter and the expert evidence is irrelevant. The signature of the Deceased does not have to match as if he signed it he signed it, whether it was his usual signature or not.

108) He also emphasised that the Particulars of Claim were drafted in general and unspecific terms and that none of what Mr Bennion-Pedley submitted appeared in that pleading; this is a serious allegation of fraud and forgery, and even more seriously that people lied to the court. However the evidence tendered by Oormila was mere inference and suspicion. As he said in his skeleton argument, it was surprising that Oormila could pursue a case of fraud without any evidence of fraud.

109) Next, the form of the Will is sufficient; it has a proper attestation clause in clear terms. As to *Gestmin,* the simple point remains; is the evidence of the attesting witnesses reliable and truthful? He submits the minor differences in recollections are the hall marks of honest evidence, which in general terms I accept. This is a binary issue; either they are telling the truth or they are not as there is no middle ground in misremembering.

110) Further, Mr Gun Cunninghame submitted that the joint handwriting opinion is at its highest for Oormila inconclusive. As to item 12, there was no reason nor motivation for anyone other than the Deceased to have signed it, and Oormila only challenges this and like signatures where the document concerned is typed save for the signature. I do not consider that is a reason in itself to challenge the signature. It seems in the absence of handwritten letters experts must use single signatures for comparison purposes.

111) During closing submissions I asked Mr Bennion-Pedley to address the joint medical report and explain why it was inconclusive in view of the clear conclusion of both experts that the Deceased had testamentary capacity. He replied that they had missed in their review a report of a referral to NHS 111 by an unspecified daughter on 12th August 2016 which stated "New confusion was the main reason for the assessment…the duration of the problem was more than 2 weeks."

112) I am unaware as to whether this note was before the experts. In any event, this records what the daughter told the call handler. It is not an assessment by a doctor following examination. I also consider there was ample time to have the experts reconsider this evidence, as their joint report was dated 22nd May 2022. In the event, Mr Bennion-Pedley said this was not a live issue.

113) He emphasised the fallibility of human memory and the need to assess witness evidence alongside contemporaneous documentary evidence and evidence upon which undoubted or provable reliance can be based. Or, as I think it can be put, the primacy of documentary evidence compared to the fallibility of memory. Mr Bennion-Pedley also referred to the

need to pay particular attention to unconscious bias and the effect of present belief on past memory.

114) Here, he submits that all the key witnesses must answer allegations of irregular conduct, and in the context of, for certain of them, hatred of Oormila. I think he is underplaying the seriousness of their position; the key witnesses (Srimila, a solicitor, Ms Syed and Ms Ali) and possibly others, if he is correct, have committed perjury. The context Mr Bennion-Pedley contends for is that it appears Srimila and her friends did not act for personal gain but out of a concern that without a will the family would lose 50% of the estate in tax as appears in Srimila's WhatsApp message at [23] above. She set out a plan to prepare a will and after his death the Will appeared in exactly the terms she proposed.

115) It is Mr Bennion-Pedley's submission having started with that view that a will was necessary – and her siblings supported her in that – the Will was prepared by her to ease administration rather than defraud, but everything has blown up beyond what she anticipated, and so family and friends have been brought in to maintain the story of the Will. In those circumstances, there can be no question of impartiality as far as the Defendants' witnesses are concerned. Further, the Will was an administrative document rather than a true testamentary instrument.

116) On that basis, he submits the crucial WhatsApp message from Srimila and the known and provable facts point inexorably to Srimila having done exactly what she said she would do. He submits none of those matters flow from Oormila's evidence. He is right not to rely on her evidence as, as I have set out above, I found I could place little or no weight on it, but that it did not go to the Issues I am to determine.

117) However, Mr Bennion-Pedley submits that Oormila's case is based on inference as appears in her Reply at [6]. I take the sub paragraphs in turn, paraphrasing them in italics and setting out my findings where possible:

i) *The Deceased had limited written English.* There was no evidence before me as to his lack of ability to understand and read English, and certainly not the unsubstantiated allegation that he could not have understood the Will – see [54] above.

ii) *The Deceased turned to Srimila, a solicitor, for assistance with legal and administrative matters.* This was not proven, as Srimila made it plain she felt she was always treated as a child in such matters – and I accept that evidence. Further, as I set out below, he did contact a solicitor who had been known to hm for some time.

iii) *On 28th August Srimila suggested she should prepare a will…[he] was in hospital in a high dependency unit, sedated and upon ventilation…encephalopathy ..caused profound confusion.* These are all established matters of fact and not inferences.

iv) *After his death Srimila produced the Will in the terms she had proposed and purportedly witnessed by two of her close friends.* This is the Defendants' case.

v) *Neither of the witnesses responded to Oormila's solicitors' requests for an account of the execution.* Both had left their homes where those letters were sent years before, and postal forwarding had not been set up by Ms Syed, so this point is of no substance.

vi) *Oormila's handwriting expert concluded that it was "highly likely" the signature on the Will was not genuine.* This is not her conclusion in the joint report – see [98] above.

vii) *Oormila therefore infers Srimila created the Will after 28th August, it was not executed by the Deceased on 8th August or at all and in any event was not properly witnessed.* I deal with these allegations in my findings of fact below.

viii) *The deceased lacked capacity…* Conceded in closing submissions.

118) Mr Bennion-Pedley submits against that is the Defendants' counterfactual "entirely by coincidence dad had already done it" which in his submission is wholly flawed, due to five fundamental problems. Mr Bennion-Pedley's speaking note was detailed but succinct as to these issues and I therefore set it out verbatim:

(1) <u>There is not a single contemporaneous document to evidence any change of plan</u>[1]:

- *Thousands of messages between the family*
- *D2 had identified a very serious problem (the 50% loss to the estate)*
- *D2 had a clear solution to that problem and her siblings consent*
- *There is no explanation as to <u>why</u> she did not put that plan in place as she contends*
- *Not a single message that makes any reference to the plan being abandoned*

(2) <u>There is no documentary evidence to show that a meeting in fact took place on 8 August 2016</u>

- *Very unusual in this day and age and D2 refuses to provide copies of the group whatsapp she shares with Ms Ali and Ms Syed (and two others)*

(3) <u>No evidence at all to show where the will came from (if not from D2 - the obvious candidate)</u>

- *Extraordinary, not least because we were told on instruction that Srimila has access to her father's email*

(4) <u>The will itself</u>

- *Has the look of something from the internet (Not inconsistent with D2 having prepared it – she said in evidence that she had in mind a WHSmith form and her knowledge of English wills and probate law was patchy at best)*

[1] *The reference to 'couple will' [3/776] is Not a change of plan – it still requires Mr Sellathurai to make a will in Mrs Sellathurai's favour. Alternatively there is nothing to explain why that did not proceed either.*

- *More importantly, there are four sets of handwriting on the will [1/10]*
  - *(i) Mr Sellathurai (or the person purporting to be him)*
  - *(ii) Ms Ali*
  - *(iii) Ms Syed - AND*
  - *(iv) Someone else – who wrote in the date above the witnesses' signatures.*

NOTE – careful to ask both witnesses if that writing was their's and both said no (although Ms Ali said that she thought it might be Ms Syed's writing) The existence of a fourth person is wholly inconsistent with the witnesses' evidence and consistent of course with the will having been prepared / produced by someone other than Mr Sellathurai.

(5) Non-disclosure of the existence of the will to D2

On this there are two time periods:
Before Death – when it would not be unreasonable or unusual for the witnesses to comply with Mr Sellathurai's wishes
After death – when it would be extraordinary if they did not then speak up

- *They had been told that Mr Sellathurai wanted to tell his family about the will at the right time – i.e. that the family did not and would not know about it unless and until they were told;*
- *Mr Sellathurai died within a matter of weeks during which he spent significant periods in hospital, sedated and ventilated*
- *If under a duty to remain silent prior to death then a duty to speak up after*
- *Both witnesses saw D2 (and other family members) prior to the funeral and Ms Syed attended*

119) Mr Bennion-Pedley submitted as to (5) and the non-disclosure of the Will to Srimila that the written evidence before trial was that Srikumaran was told of it after the funeral but Srimila put it chronologically being discovered after the funeral, and neither witness says they told Srimila of it before the funeral. However, at trial, Srimila said she found it before the funeral and Ms Syed said she did tell Srimila of the Will but was uncertain as to whether this was before or after the funeral. That, he submits, means the only explanations were either that the Will was not in place so there was nothing to tell or disclose to Srimila or that they did not need to tell her as she orchestrated it as she said she would.

120) Also, neither of these long standing friends of Srimila appear to have noticed the marked physical deterioration of the Deceased whereas the contemporaneous documentary evidence showed he had "wasted away", "looked really bad" and as Srikumaran put it, was "skin and bones" or as Sharmila said, he had "given up".

121) Mr Bennion-Pedley was also very critical of Ms Ali saying she checked the terms of the Will before signing which he said was highly unusual as it is a private document. To do so would be impertinent, especially with the, as he put it, generational and gender

imbalance. That checking, he continued, was more likely if she was asked to witness it after the event.

122) I address these and other substantial points by Mr Bennion-Pedley below, but before I do so I will set out which of the myriad of allegations I consider have been disposed of and which are current and unusual or suspicious so need consideration in my findings of fact.

123) The allegations I consider disposed of as being without substance are:

i. That one of either Ms Ali or Ms Syed was not in the UK at the time the Will was executed.

ii. That the Deceased would not have been unable to understand the language of the Will and would have needed an interpreter.

iii. That the Deceased lacked testamentary capacity.

iv. That the estate of the Deceased included properties all of which were free of mortgage and there were no debts owed to third parties, and the estate was worth many times more than what Oormila has now evidently accepted it is worth.

v. Further, that the estate included properties in Sri Lanka, gold jewellery, other leasehold properties in the UK, bank accounts in Sri Lanka and that the Temple was itself a business to be included in the assets.

vi. That Ms Syed and/or Ms Ali deliberately ignored correspondence from Oormila's solicitors asking them about the Will.

124) The matters which remain arguably unusual or suspicious are:

i. The provenance of the Will. I do not know what steps, if any, were undertaken to preserve and search personal computers, laptops and other electronic devices but it must exist somewhere on someone's device; or appear to have been deleted. Mr Bennion-Pedley places substantial weight on the lack of a digital footprint around the arrangements Srimila, Ms Syed and Ms Ali made to meet on the 8th August but the Will was I thought more deserving of digital inquiry.

ii. The manuscript writing on the Will in that one of the dates appears as Mr Bennion-Pedley submits to have been written by a fourth person. Twice the date has been written in. The first (in order on the page, immediately above where the Deceased signed) says "…EIGHTH…AUGUST 2016…". The second, written above the signatures of the witnesses says "…EIGTH…AUGUST 2016." So not only does the writing appear to be in a different hand but in the second version the word eighth has been mis-spelt (I realised this post trial but thought it unnecessary to refer to counsel).

iii. That Ms Ragu would ask her uncle, in his dying days, on what may have been the last time she saw him, if he had provided for his wife and made a will, and did so when there was no-one else present in that from her evidence it appeared to me she waited for her husband to leave so that she was alone with him.

iv. That there was no evidence to show a change or abandonment of Srimila's plan for a simple will leaving all to her mother, which had the agreement of her siblings, and would solve what wrongly appeared to her to be a serious money problem. This abandonment of what appeared to be a sensible solution to a serious family problem was not properly explained.

v. That the Will which eventually appeared was, in its terms, as Srimila proposed in the WhatsApp message, but no-one knew where it came from, when or how. Further, that as a solicitor, whilst not practising in that area, Srimila knew where to look and what to do as to the drafting and execution or could easily ascertain same.

vi. That to Ms Syed and Ms Ali on 8th August the appearance of the man they affectionately called "Uncle" was not surprising nor concerning, whereas the clear evidence of his children showed his physical deterioration.

vii. The failure of Ms Syed and Ms Ali to inform the family of the Will immediately upon death.

FINDINGS OF FACT

125) I start with the fact that the Deceased did, at some point in time, indicate he intended to make a will. In the trial bundle is an email from Krish Ratna & Co dated 16th November 2021 to S.Satha & Co, solicitors. In it they ask if the Deceased had contacted them regarding making a will. They replied on 21st November and said:

> "I DID NOT MAKE A will for Mr Sellathurai. But he has known to me and the firm since we established in 1997. He has called me regarding preparation of WILL but has not attended my office to give any instructions to prepare the same" (sic)

126) The writer said he could not recall the date of this telephone call. In my judgment this establishes that the Deceased at one point intended to make a will. There is no indication in the evidence nor reason for him not to maintain that intention until he did so. I appreciate that the writer did not give evidence at trial but this is independent documentary evidence of that intent, and the inclusion of it in the trial bundle means it is admissible as evidence of the contents – see CPR Part 32 PD27.2. Further, no objection has been taken by Oormila, which would be difficult as it is a document emanating from her.

127) The document referred to above as item 12 which was considered by Mrs Briggs and Mr Craddock in their reports is a short "To whom it may concern" reference on the headed notepaper of the Temple regarding "Master Lukshan Shavaswaran". It is addressed to him at a residential address and is just three sentences long. It states that he is a talented violinist for his age and an enthusiastic and helpful young man.

128) It is wholly type written save signed in manuscript. Beneath the signature appears "President Mr S Selvarajah". It is dated 19th July 2016. I accept Sharmila's evidence that she did not sign this letter on her father's behalf. On the face of the document and in the absence of any other evidence it must therefore have been signed by the Deceased. That has the consequence that Mr Craddock's opinion remains that there is *moderate* evidence that the Deceased signed the Will. It also answers Issue 1 as "yes".

129) I now turn to events on the 8th August 2016. After his day at the hospital, accompanied by Srimila, the Deceased drove himself home. At some point before that evening Ms Syed and Ms Ali arranged to meet Srimila at Number 36. Both witnesses were questioned as to communications. They confirmed that they were in regular contact with each other and Srimila and others in their friendship group, as well as the arrangements to meet that evening.

130) Mr Bennion-Pedley makes a lot of the fact that there is no documentary trail evidencing these arrangements – there must have been a digital footprint. That is a reasonable assumption. But here Ms Ali had moved position, company (albeit to a subsidiary) and country and said her emails were deleted by Munich Re when that happened. She must have changed her telephone and number. Ms Syed said she had changed her telephone and number a few times over the intervening years and explained she had been asked to look for electronic messages from 2016 but did not have any.

131) The witnesses had earlier assisted in answering Oormila's second Part 18 request in that she asked for each of them to produce their passports to show "...they were in the UK on the 08/08/2021" (sic). They produced their passports which evidence they were in the UK on 8th August 2016. I find this shows their willingness to disclose what they can.

132) Srimila maintained that the arrangements to meet that evening were made by telephone. Mr Bennion-Pedley has said (his point 2 in [118] above) that Srimila has refused to provide copies of the group WhatsApp she shares with the witnesses and others. But there is no evidence of an application for same being made, being successful and non-compliance by Srimila with an Order of this Court. If there had have been, I doubt this trial would have commenced. Further, Srimila did say in her Part 18 response, which was signed by her with a statement of truth, that she had sought call records from her mobile service provider but that they did not hold call records that far back.

133) It is not sufficient to make such allegations, demand production from the opposing party and then (if it be the case) back off in the face of refusal. The provisions of CPR 31 are for litigants to use. If a requesting party does not avail themselves of the long-standing remedies intended to assist parties and the Court get to the truth in a matter, then they cannot expect an allegation of non-production to create an inference of deliberate avoidance of production of relevant evidence.

134) In view of the above I do not accept that the failure to produce evidence of electronic communications by any of the three persons concerned means that I should draw adverse inferences as to their evidence in that respect.

135) I now return to the facts. Srimila was not at home when Ms Syed and Ms Ali arrived, which the latter thought was around 8.00pm. She was with her husband and their child visiting his relatives nearby, as he was returning to India the next day. The witnesses knew the Deceased well and for many years, albeit they had not seen him for months. It is to be expected that they would be admitted to the home and chatted with him whilst waiting around. In the hallway he asked if they were free and could help him with the signing of his will. Ms Syed said that he took the will off the dining table which was at the back of the living room which they had moved to. Ms Ali's account then differed; when she was asked where the Will came from she said "Uncle just passed it to us, I can't remember". Ms Syed did not think Mrs Selvarajah was at home then; Ms Ali said she definitely was not.

136) Both witnesses then saw the Deceased sign the Will. Ms Syed did not read any of the Will. She just signed her name. She could not remember who signed first. Ms Ali did glance at the Will, reading enough of it to satisfy herself what it was and that it said something like transfer all to Mrs Selvarajah. She was therefore comfortable and signed it. She could not recall who of her or Ms Syed signed after the Deceased but assumed she signed first. I find that a reasonable assumption as where she signed was on the left-hand side of the page i.e. where people usually start writing from in the English language.

137) Mr Bennion-Pedley submits that if the above happened as Ms Ali said, whilst it was reasonable to check the document was a will that itself is a private document and for her to read it was impertinent. Possibly it was. She may not have been familiar with a will and its language. But she said the reason she did read it was because she is a cautious person. I have already said I accept her evidence (and that of Ms Syed) and the position is no different here. What in general terms may appear to one person to be unusual or in this instance impertinent does not in itself mean it was, as Mr Bennion-Pedley put it, extraordinary for her to do so. He cites a generational and gender imbalance. Ms Ali may differ and not recognise that dual imbalance, given her age and career amongst other matters, but that was not put to her. She was in any event close to the Deceased.

138) As to the facts, and the date which appears above their signatures, (the mis-spelt one) Ms Ali said it may be her writing, it may not be, it may be Ms Syed. It looked more like her writing, but one of them must have signed it. Ms Syed could not recall who signed first but confirmed her signature and her handwriting. She said the date above was not written by her and she did not recognise the writing. These differences are to be expected when a number of witnesses give oral evidence about an event and especially so when the event was years before and they had no idea that their recollections would be tested in Court.

139) Both however were the only people present apart from the Deceased. Mr Bennion-Pedley submits that there is a fourth hand on this fourth page of the Will, who wrote the date above their signatures. I find on the balance of probabilities it was one of them. My concern is the date above the signature of the Deceased. That handwriting differs from that of either witness. That manuscript was not challenged and not the subject of the expert evidence. In those circumstances it must be taken as that of the Deceased and there was therefore no "fourth person" who wrote on the Will.

140) Both witnesses were asked how he looked. Ms Syed said she remembered thinking he had lost some weight, as happens in old age. Ms Ali said he did not appear out of the ordinary, normal to her. That contrasts with the views of his children as I have set out above. I do not think anything in the overall circumstances turns on that. The witnesses were there to see Srimila, and this exchange was in the run up to that.

141) I find the Deceased asked both not to mention the Will to anyone else, as he would tell his family at the right time. In view of the family rows and distrust, as especially evidenced by the dispute over Shay Services and later Oormila's insistence upon Nirmalan carrying her father's coffin at the funeral plus her subsequent unsubstantiated allegations, that was more than likely on the balance of probabilities, indeed wholly understandable in all the circumstances.

142) Then Srimila, on 28th August 2016, not knowing of the Will, sent her WhatsApp message to her siblings. That is unremarkable. However there was no follow up by her on

her solution nor a single piece of evidence, in writing or oral, which points to the plan being abandoned. Likewise there is no explanation as to why. In a further message later that day Srimila referred to a "couple will" also of which no more was heard.

143) The witnesses' compliance with his request after his death was again understandable in the wider family situation. The non-disclosure to Srimila was not in my judgment extraordinary as Mr Bennion-Pedley submits. He refers to a duty upon them to speak up. I see them complying with "Uncle's" request. Both did see Srimila and other family members immediately after his death and Ms Syed attended the funeral.

144) It may be another coincidence or reason for suspicion that Srimila found the Will. But I accept her evidence that that was what happened. There is only inference or suspicion which indicates otherwise which I turn to below. But in any event this Will was not as Srimila intended a simple will. It was long, at four pages. Mr Gun Cunninghame submitted in his skeleton argument it was professionally drawn. I disagree, and it was certainly not prepared by any lawyer with knowledge of the laws of this jurisdiction. Srimila is a solicitor and clearly unaware of inheritance tax and probate practice. However I cannot accept that she would take such a complicated will off the internet as opposed to a simple one page will naming her and Srikumaran as executors and giving the estate to his wife, and drafted in accordance with what is usual in this jurisdiction. That would take very little research.

145) In any event, the Will was wholly rational on its face as to the executors and the sole bequest. It is logical and to be expected especially with a relatively low value estate, where there is no evidence of the Deceased maintaining anyone other than his wife. I now turn to the evidence of Mrs Ragu. She said and I accept that the Deceased told her he would leave everything to his wife. He removed his mask to say that he had made a will in reply to her question. I accept all that evidence. But if I did not it would not overturn the evidence as to attestation but add to the unusual features and suspicious circumstances Mr Bennion-Pedley relies upon.

146) There are in these events unusual matters and suspicious circumstances. Some can be understood or explained. Not all can. But the case Mr Bennion-Pedley puts forward requires one to accept a conspiracy on a large scale over a long period of time involving several individuals. He posits that it all began with a simple request by Srimila to the witnesses to attest to a pre-existing signature on the Will, at some point uncertain in time. But years later – as it took Oormila years to institute these proceedings – it grew in to a lie which expanded exponentially and had to be maintained and indeed buttressed in the face of Oormila's allegations and the enquiries of her solicitors.

147) But that necessitates Ms Syed and Ms Ali both staying with the lie. I find that hard to accept in circumstances where even if they had witnessed a pre-existing signature it is unlikely they would on the balance of probabilities continue with the deception especially as once proceedings began, they had to make witness statements and then give oral evidence. I find that because they are each independent professional women with substantial careers. Mr Bennion-Pedley submits they cannot be impartial. But they are not part of the family and are separate geographically and financially.

148) Further each of them could have easily refused to co-operate at any time up until and especially just before they were called and gave their oral evidence. That was what Oormila's witness, Mr Thambipillai, appears to have done. His evidence, which appeared

to be hearsay, was that Srikumaran told him there was no will. But he became uncontactable in circumstances which were never explained. As the trial continued for three days it cannot have been an immediate problem which stopped him appearing. Ms Ali, situated like him in North America, could have done likewise.

149) However, such a conspiracy could have the most severe consequences professionally for Srimila, involving possible findings of forgery and lying on oath. The same applies to the witnesses as such findings could affect them professionally. All three could face fines and/or prison as well.

150) Mr Bennion-Pedley makes much of partiality on the part of the witnesses. I have taken that into account, but I accept their evidence, which is to a degree supported by the handwriting evidence, although the latter by itself is not determinative. This claim has been driven by Oormila's suspicions and at times wild allegations, most of which are not just unsupported by evidence, but the evidence actually disproves them.

151) In summary, here there is just not the "strongest evidence" in all the circumstances relevant to attestation. Mr Bennion-Pedley has made eloquent and carefully drawn closing submissions, but as Arden LJ at [46] in *Channon* said, "Allegations that were not made, or were not pursued, and mere suspicion, have to be put on one side." The evidence of the witnesses as to the Deceased signing the Will and their attestation is conclusive; my answer to Issues 2 and 3 is in the affirmative. Issue 4 has been disposed of and as to Issue 5, there is no other reason to revoke the grant of probate.

152) I will now hear counsel as to the terms of the order and costs.

Deputy Master Linwood 10th March 2023