A v H

Jurisdiction:	Jersey
Judgment Date:	07 February 2018
Neutral Citation:	[2018] JRC 31
Date:	07 February 2018
Court:	Royal Court

Text

Between
A
Plaintiffs
K
Second Plaintiff
L
Third Plaintiff
and
H
First Defendant
John Bisson and others (practicing under the name and style of Appleby)
Second Defendant

[2018] JRC 31

Before:

Sir Michael Birt, Commissioner, and Jurats Crill and Sparrow

Royal Court

(Samedi)

Estate — appeal against the decisions of the Master in his judgments dated 15th June and 7th July 2016.

Authorities

In the matter of II [2016] JRC 106 .

In the matter of II [2016] JRC 116 .

White v Jones [1995] 2 AC 207 .

Clerk and Lindsell on Torts, (21st edition)

Flenley and Leech, Solicitors' Negligence and Liability (Second Edition).

Three Rivers DC v Bank of England (No. 3) [2003] 2 AC 1 .

Makarenko v CIS Emerging Growth Limited [2001] JLR 348

The First Plaintiff appeared in person.

The Second Plaintiff appeared in person.

The Third Plaintiff did not appear.

Advocate O. A. Blakeley **for the First Defendant**.

Advocate D. R. Wilson **for the Second Defendant**.

THE COMMISSIONER:

1 On 15 th June, 2016, *In the matter of II* [2016] JRC 106 ("the June judgment") the Master struck out all of the claims in the Order of Justice of the second and third plaintiffs with the exception of that pleaded at paragraph 21 of the Order of Justice.

2 On 7 th July, 2016, *In the matter of II* [2016] JRC 116 ("the July judgment") the Master struck out all the allegations of fraud in the Order of Justice against the first defendant and the second defendant ("Appleby").

3 The second and third plaintiffs ("the sons") appeal against the June judgment and the first plaintiff appeals against the July judgment.

4 The test on an appeal against a decision of the Master in procedural matters is well established. This Court hears the matter afresh and reaches its own decision whilst paying

due regard to the decision of the Master.

Background

5 As this was a strike-out application, the factual background is to be taken from the Order of Justice. It is summarised in the June judgment to which recourse may be had if necessary.

6 The first defendant and the first plaintiff are brother and sister. Their mother (“the deceased”) made a will of immovable property in 1975 which left such property to the first plaintiff and the first defendant (as the deceased's only two children) in equal shares with gifts over to their respective children in the event of either of them predeceasing the deceased.

7 In April 2008, the deceased made new wills of movable and immovable estate (“the 2008 wills”). These left her entire estate to the first defendant. The wills went on to provide that should the first defendant predecease the deceased, the relevant estate should be left equally to the deceased's four grandchildren, namely the sons and the two children of the first defendant. Thus nothing was left to the first plaintiff in the 2008 wills.

8 It is alleged that this is because the first plaintiff was at the time engaged in acrimonious divorce proceedings with her then husband and the deceased was anxious to ensure that, should she die before the divorce was finalised, no part of her estate should fall into and form part of the matrimonial assets such that the former husband might become entitled to a share.

9 According to paragraph 51 of the July judgment, the first plaintiff told the Master that she was aware of the scheme because she had been told of a similar scheme by her ex-husband (in relation to the ex-husband's father) and had discussed it with the first defendant and the deceased, leading to the deceased executing the 2008 wills. When the first plaintiff became aware of the 2008 wills, she was not surprised by their content as it was what she was expecting.

10 Key allegations as to assurances given by the first defendant are set out at paragraphs 15 and 20 of the Order of Justice as follows:-

> *“15. THAT the First Defendant repeatedly assured the Deceased both before and after the execution of the 2008 Wills, that he would divide the Estate equally with the First Plaintiff on the death of the Deceased regardless of the Deceased's testamentary dispositions provided that the First Plaintiff was then divorced, with the proviso that if the First Plaintiff was not divorced at the time of the Deceased's death, he would hold the First Plaintiff's half share of the Estate on trust for the First Plaintiff.*

…

20. THAT since the death of the Deceased, the First Defendant has repeatedly reaffirmed to the Plaintiffs and others, some of whom have as a result extended credit to the First Plaintiff, that he would honour the Deceased's wishes to provide for him and the First Plaintiff equally…."

11 The Order of Justice goes on to make various allegations against the first defendant in relation to his alleged conduct prior to the deceased's death and thereafter. The prayer of the Order of Justice claims that the first plaintiff should receive half the value of the deceased's immovable property together with her legitime share of the movable estate. There is also a claim for damages for all the plaintiffs for the economic loss and personal injury sustained as a result of the conduct of the first defendant and/or Appleby, the allegation against Appleby being essentially one of failing to advise the deceased properly or at all.

12 The Order of Justice was not drawn up by an advocate and is sprinkled with suggestions of fraud. On 4 th February, 2015, the Master directed the plaintiffs to specify:-

(i) all grounds relied upon in respect of allegations of fraudulent misrepresentation against the first defendant;

(ii) whether the plaintiffs allege fraud or dishonesty by the second defendant; and

(iii) if fraud or dishonesty is alleged against the second defendant the grounds relied upon with sufficient details so that the second defendant understands the case against it.

13 A document purporting to comply with that requirement (the particulars of fraud) was filed by the plaintiffs on 27 th April, 2015. The particulars of fraud is a somewhat discursive document and it was summarised at paragraph 31 of the skeleton argument filed by the first defendant for the hearing before the Master in the following terms:-

"The attempt of the Plaintiffs to file a further pleading in order to clarify the claims has been completely unsuccessful. That further pleading appears more of a narrative, akin to an affidavit, and does little more than repeat the vast majority of the claims in a different way and label more of them as fraud."

14 It is not easy to extract from the Order of Justice and the particulars of fraud the exact nature of the causes of action relied upon by the plaintiffs but it seems to have been accepted before the Master that the following causes of action are arguable:-

(i) Lack of capacity of the deceased at the time she made the 2008 wills.

(ii) Duress or undue influence of the first defendant over his mother.

(iii) A breach of the legitime rights of the first plaintiff.

(iv) Mismanagement of the estate of the deceased by the first defendant as executor.

(v) Claims in breach of contract and/or estoppel and/or unjust enrichment based upon the alleged assurances of the first defendant that he would divide the estate equally with the first plaintiff regardless of the testamentary dispositions and his failure to adhere to these assurances.

15 The Order of Justice was issued as long ago as March 2012 and there has been a lamentable lack of progress in the proceedings, which have been beset by adjournments and procedural wrangling. The history is set out in some detail in both the June and July judgments when the Master explained why he was refusing on each occasion to accede to the application by the relevant plaintiff to adjourn yet again the determination of the summonses issued by the defendants as long ago as September 2015. We do not propose to repeat that history in this judgment but would refer to paragraphs 5–31 of the June judgment and 6–23 of the July judgment.

16 There has also unfortunately been delay in the hearing of this appeal. It was originally fixed for hearing in November 2016 before a court presided over by the Deputy Bailiff but unfortunately he fell ill and the matter had to be adjourned. It was then fixed for 2 nd May 2017. On that occasion I was reluctantly persuaded by the plaintiffs that the matter should be adjourned because of an apparent misunderstanding on their part as to whether the appeal was actually to be heard and a concern as to whether they had had sufficient time to respond to the bundle filed by the defendants. However I explained that the grounds of appeal against both the June judgment and the July judgment appeared to focus exclusively on the failure of the Master to adjourn both hearings and did not engage with the merits of the Master's decision. I directed that they should file amended grounds of appeal so as to state exactly where and why they considered the Master had been wrong.

17 That direction has not been entirely successful. The only amendment made by the first plaintiff in respect of her appeal was to add two new grounds of appeal as follows:-

“5. The First Plaintiff wishes to appeal the decision of the Master and have it overturned in its entirety on the basis that the Master's decision handed down on 7th July 2016 was wrong and unjust based on mis-directions and/or erroneous findings as to fact(s), the law, the wrongful exercise of the court's discretion and/or serious procedural irregularity in the proceedings.

6. Further since the hearing on 6th June 2016 there have been further developments which the First Plaintiff will wish to see brought to the attention of the court.”

18 The amendment made by the sons was simply to insert at paragraph 9 of the grounds of appeal a reference to the fact the Master had unjustly exercised the Court's discretion

against the plaintiffs and that there had been procedural irregularities and mistakes as to fact and law and a similar assertion that, since the filing of the original notice of appeal, there had been further developments which all the plaintiffs will wish to bring to the attention of the Court. The grounds of appeal annexed an affidavit which in turn simply attached the particulars of fraud.

Appeal by the sons against the June judgment

19 In the June judgment, the Master accepted the submission of the defendants that, subject to the minor claim referred to at para 1 above, the Order of Justice did not disclose a reasonable cause of action on the part of the sons against either the first defendant or Appleby. He set out his reasons for so concluding at paras 52 – 74.

20 In briefest summary, his reasoning was as follows:-

(i) If the 2008 wills were invalid because of a lack of capacity, undue influence or for any other reason, the consequence would be either that there was an intestacy or that the 1975 will of immovable property would revive under the doctrine of dependant relative revocation. In either case, the result would be that one half of the relevant estate would accrue to the first plaintiff Therefore, she was the only person who could claim loss as a result. Although the sons might expect in due course to inherit from their mother, that was too remote to permit them to claim directly in respect of their grandmother's estate.

(ii) If there was a claim in unjust enrichment, breach of contract or estoppel based upon the alleged promise by the first defendant to ensure that the first plaintiff would receive her half share regardless of the content of the 2008 wills, that again was a claim which could only belong to the first plaintiff. She was the only person who could claim a loss as a result of the first defendant's failure to proceed in accordance with his promise. No promise or assurance was given to the sons and they therefore had no claim.

(iii) So far as Appleby were concerned, even if they had acted negligently in connection with the 2008 wills, any loss would, for similar reasons, have been suffered only by the first plaintiff.

(iv) Although it had not been pleaded, when making his oral submissions before the Master, the second plaintiff apparently asserted that promises had been made by both the deceased and the first defendant that they would support the sons through all their school and university education if their father did not meet school fees or the cost of any tertiary education. At the time of the hearing before the Master, the second plaintiff was about to graduate and the third plaintiff had left school in 2013 and was at university at the time. The second plaintiff went on to explain to the Master that the sons were struggling to meet the cost of university. However he accepted that their school fees had been paid by their father and in respect of their university education, they had received some financial assistance by way of tuition fees and the costs of

living from the States of Jersey together with an allowance from their father. He further explained that the reason why the sons were in financial difficulties was that, in relation to the money they received for their university education, some of these funds were being used to support their mother so that she could keep the family home. The Master held that such a claim was untenable. Even assuming the promises had been made and were intended to have legal effect, there had been no loss caused as a result of any breach. The school fees had been paid by the father and their university fees had been paid by a combination of funding from the States and their father. The fact that the sons were in financial difficulties was because of their voluntary (if commendable) decision to give part of the money provided to them for their education to their mother.

(v) To the extent that any claim by the sons against Appleby was formulated in negligence for failing to give effect to the intentions of the deceased to benefit the sons, they could not articulate what those intentions were. The Master referred to the leading case of *White v Jones* [1995] 2 AC 207 and passages at paras 10–112 and 10–113 of Clerk and Lindsell on Torts, (21st edition) to the effect that the principle in *White v Jones* did not extend a lawyer's duty of care to an individual whom a testator might have intended to benefit absent those intentions being communicated to the lawyer concerned. There was nothing to suggest that Appleby had failed to give effect to the deceased's intentions in this regard.

21 The sons now appeal against the decision of the Master. As already stated at paras 16 and 18 above, their grounds of appeal are not very informative as to why they say the Master was wrong. They did not file any written submissions prior to the hearing. At the hearing, the second plaintiff produced a handwritten document which he supplied to us. Much of that contained criticisms of the procedure followed before the Master and at earlier hearings but this does not assist us in determining whether the Master's decision was correct.

22 As to the merits of the Master's decision, the second plaintiff submitted that, even if the first plaintiff were to fail in her claim on the basis that the deceased did intend to disinherit her, it was the sons' case that the deceased would never have intended to disinherit the sons as well. They were therefore disappointed beneficiaries and had a claim which was separate from their mother. In particular, Appleby should have advised the deceased in a way which protected the sons' interest even if the deceased intended to protect her estate from any claims by the first plaintiff's former husband. He submitted that the principle of *White v Jones* was not as restrictive as the Master had understood it to be and thought there had been some cases to that effect.

23 The Court allowed him time to file any written material to that effect after the hearing. We duly received from him material which included extracts from Flenley and Leech, Solicitors' Negligence and Liability (Second Edition), the relevant passages being at paras 11.03 to 11.16. However, we have not found anything in those passages to suggest that the Master misunderstood the principle established in *White v Jones*.

24 We have come to the clear conclusion that the Master reached the right answer for the right reasons in the June judgment. We cannot improve on his reasoning as set out at paragraphs 52 – 74 but in very short summary:-

(i) The claim as to the invalidity of the 2008 wills does not lie with the sons. If the 2008 wills are declared invalid, there will either be an intestacy or the 1975 will will revive. The only person who would benefit in these circumstances is the first plaintiff. The claim therefore rests with her.

(ii) The claims in unjust enrichment, breach of contract or estoppel all relate to the alleged promise by the first defendant as summarised at paragraphs 15 and 20 of the Order of Justice that, despite the terms of the 2008 wills, he would share the estate of the deceased equally with the first plaintiff. The only person who has lost by reason of his alleged failure to comply with such a promise is the first plaintiff and therefore the claim rests with her. The sons have suffered no loss as a result of any such breach. Any alleged loss caused by the fact that they might expect to inherit from their mother in due course is far too remote.

(iii) The unpleaded claim in respect of the alleged promise concerning school and university expenses (referred to at paragraph 20(iv) above) must also fail. According to the explanation of the second plaintiff given to the Master (which he did not elaborate before us), the promise by the first defendant was to pay such expenses if their father did not meet them. The school fees were paid by the father. As to the university education, it had been paid by a combination of a contribution from the father and assistance from the States. Accordingly, even on the sons' case, there has been no breach of the alleged promise and the Master was correct to so find.

(iv) As to the claim against Appleby, there is simply no evidence or even assertion that the deceased informed Appleby that she wished to benefit the sons, even if, as they allege, she should be taken to have had such a secret intention. Thus there is no question of Appleby failing to give effect to the deceased's instructions. The sons can only succeed therefore if there was a duty on Appleby to suggest to the deceased that, rather than leave the estate to the brother (in order to avoid the risk of the assets falling into the first plaintif's matrimonial pot), they should have advised her to leave half to the sons. In our judgment, it is clear that the *White v Jones* principle does not extend to allowing a disappointed beneficiary to sue the lawyer advising a testator for failure to advise the testator that she could leave her estate in a different way to that which she envisaged and in which she instructed the lawyer.

25 For these reasons, which are essentially the same as those of the Master, we dismiss the sons' appeal against the June judgment.

Appeal against the July judgment

26 In the July judgment, the Master struck out all the allegations by the first plaintiff of fraud, essentially on the ground that the facts pleaded in support were equally consistent with a

simple breach of the alleged promise.

27 The Master helpfully set out the relevant paragraphs of the Order of Justice and we would repeat paragraphs 34 – 39 of his judgment as follows:-

> ***"34. As the focus of argument became the allegations of fraud, I set out the relevant paragraphs of the order of justice where allegations of fraud, fraud misrepresentation or malicious and fraudulent falsehoods are made. These are found in paragraphs 16, 20, 23, and 26 which provide as follows*** :-
>
> ***"16. That as the Deceased was most anxious that both her offspring should be happy with her final dispositions, however having been made sole heir the First Defendant went to great lengths to delay and prevent the Deceased from formally revoking the 2008 Wills, deliberately making misrepresentations to her about his intentions and the laws of the Island regarding trusts of immoveable estate as well as malicious and fraudulent falsehoods about the First Defendant's management of the money and assets*** .
>
> ***20. That since the death of the Deceased, the First Defendant has repeatedly reaffirmed to the Plaintiffs and others, some of whom have as a result extended credit to the First Plaintiff, that he would honour the Deceased's wishes to provide for him and the First Plaintiff equally but has seemingly deliberately caused the First Plaintiff financial distress by making false representations to her and others thereby thereby causing First Plaintiff to act to her considerable financial detriment and greatly increasing the already great emotional stress on the Plaintiffs*** .
>
> ***23. That the First Plaintiff was kept out of capital while the First Defendant profited through unjust enrichment and fraudulently induced the First Plaintiff to assume more debt with false representations upon which the First Plaintiff relied seemingly in order to weaken the First Plaintiff, both financially and emotionally, so that she would not be able to cope with litigation*** .
>
> ***26. That due to the First Defendant's fraud and/or undue influence with regard to the Deceased as set out in paragraph hereof and with regard to the First Defendant's fraudulent misrepresentations to the First Plaintiff and others interest has accrued on the First Plaintiff's increased debt, her assets are at risk of a forced sale and she has been kept out of the income she could have received had she had control of her assets and the inheritance the Deceased intended her to have" (underlining added)*** .
>
> ***35. In respect of the second defendant the only clear allegation of fraud in the order of justice is at paragraph 33 which provides as follows*** :-

"That at all material times the Second Defendant failed to recognise the Deceased's obvious and increased vulnerability to undue influence and/or fraud on the part of the First Defendant."

36. However paragraph 34 pleads "that the second defendant has joined with the first defendant in misrepresenting the first defendant's intentions with regard to the disposition of the estate and allowing or encouraging the first plaintiff to act to the detriment on the basis of such misrepresentations". Advocate Wilson was concerned that this paragraph was also hinting at fraud and/or dishonesty .

37. The first plaintiff seeks as relief for her claim the sum of £500,000 or half a share of her mother's estates together with "such financial compensation for the first defendant's fraudulent or otherwise improper misappropriation of sole title to the same as the court deems fit" .

38. In the particulars of fraud filed, the first plaintiff further appears to allege that her mother was induced to change her wills by the first defendant .

39. In relation to allegations of undue influence the particulars of fraud at paragraph 9 state as follows :-

"The First Plaintiff's suspicions that the First Defendant was up to no good continued to be aroused when, having insisted on involving himself and his wife in the First Defendant's divorce he constantly let the First Defendant down apparently the first Plaintiff now believes in an attempt to spin out the divorce proceedings and add to the Plaintiff's distress. The First Plaintiff spent a considerable amount of time looking after the Deceased in spite of the First Plaintiff's own ill health as a cancer patient and became increasingly worried ***about the level of control which the First Defendant exerted over the Deceased and her affairs.*** All the Deceased's financial records were locked in the Deceased's study and the First Defendant said the key was lost. The First Defendant took control of the Deceased's credit cards and would not give the First Plaintiff money to buy the Deceased decent food. The Deceased cried regularly that she was not getting proper food and the First Plaintiff brought food for the Deceased when she initially in the course of these events at times had money of her own from a succession of loans from third parties to do so. Unfortunately the First Plaintiff was left in acute financial difficulties by divorce proceedings as she had no income at all which impacted severely on all the Plaintiffs. Often the Deceased and the First Plaintiff made do with a daily diet of porridge and cheap hamburgers. The First Plaintiff arranged Meals on Wheels for the Deceased and registered her concern about the level of control the Defendant was exerting on the Deceased with a GP and Age Concern. The Plaintiff was not even allowed petrol money from the Deceased's own funds, which the First Defendant completely controlled, to take her dying mother out for drives as the first defendant tightened his level of control over both the First Plaintiff and the Deceased. The First defendant refused to

countenance putting in place an adequate level of care for the Deceased because of the expense leaving the First Plaintiff to be on call and to regularly spend all day with her mother which was more that the First Plaintiff could adequately manage given her own ill health and the great demands upon her of an extremely acrimonious divorce, acute financial difficulties and two young sons whose lives were being severely disrupted by a lack of security and deprivation. The First Defendant did not wish to pay social security contributions or any carers for the Deceased and did not. The First Plaintiff contacted homecare organisations such as Christies in an attempt to get proper care for her mother but the First Defendant resisted on the grounds of cost.""

28 As previously stated, the first plaintiff amended her grounds of appeal but her criticism of the Master's decision is in very general and unspecific terms. She did not submit any written material prior to this appeal. During her oral submissions, which ranged quite widely, she essentially made the point that she believed that the first defendant had been guilty of fraud in that, when he made the various promises, he did not intend to keep them even then. However, she was unable to point to any specific facts in support of that belief other than those already pleaded in the Order of Justice and the particulars of fraud.

29 In our judgment, the Master again came to the correct decision for the right reasons. He set out the applicable principles as to pleading of fraud contained in the opinion of Lord Millett in *Three Rivers DC v Bank of England (No. 3)* [2003] 2 AC 1 at paragraphs 184–190 as follows:-

> ***"184. It is well established that fraud or dishonesty (and the same must go for the present tort) must be distinctly alleged and as distinctly proved; that it must be sufficiently particularised; and that it is not sufficiently particularised if the facts pleaded are consistent with innocence: see Kerr on Fraud and Mistake 7th ed (1952), p 644;*** *Davy v Garrett* (1878) 7 Ch D 473, 489 ; *Bullivant v Attorney General for Victoria* [1901] AC 196; *Armitage v Nurse* [1998] Ch 241, 256. ***This means that a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and that facts, matters and circumstances which are consistent with negligence do not do so***.
>
> ***185. It is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him. If the pleader means "dishonestly" or "fraudulently", it may not be enough to say "wilfully" or "recklessly". Such language is equivocal. A similar requirement applies, in my opinion, in a case like the present, but the requirement is satisfied by the present pleadings. It is perfectly clear that the depositors are alleging an intentional tort*** .
>
> ***186. The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars***

of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved .

187. In *Davy v Garrett* 7 Ch D 473, 489 ***Thesiger LJ in a well known and frequently cited passage stated:***

"In the present case facts are alleged from which fraud might be inferred, but they are consistent with innocence. They were innocent acts in ***themselves, and it not to be presumed that they were done with fraudulent Intent."***

188. In *Armitage v Nurse* [1998] Ch 241 ***the plaintiff needed to prove that trustees had been guilty of fraudulent breach of trust. She pleaded that they had acted "in reckless and wilful breach of trust." This was equivocal. It did not make it clear that what was alleged was a dishonest breach of trust. But this was not fatal. If the particulars had not been consistent with honesty, it would not have mattered. Indeed, leave to amend would almost certainly have been given as a matter of course, for such an amendment would have been a technical one; it would merely have clarified the pleading without allowing new material to be introduced. But the Court of Appeal struck out the allegation because the facts pleaded in support were consistent with honest incompetence: If proved, they would have supported a finding of negligence, even of gross negligence, but not of fraud. Amending the pleadings by substituting an unequivocal allegation of dishonesty without giving further particulars would not have cured the defect. The defendants would still not have known why they were charged with dishonesty rather than with honest incompetence*** .

189. It is not, therefore, correct to say that if there is no specific allegation of dishonesty it is not open to the court to make a finding of dishonesty if the facts pleaded are consistent with honesty. If the particulars of dishonesty are insufficient, the defect cannot be cured by an unequivocal allegation of dishonesty. Such an allegation is effectively an unparticularised allegation of fraud. If the observations of Buxton LJ in *Taylor v Midland Bank Trust Co Ltd* ***(unreported) 21 July 1999 are to the contrary, I am unable accept them*** .

190. In the present case the depositors (save in one respect with which I

> ***shall deal later) make the allegations necessary to establish the tort, but the particulars pleaded in support are consistent with mere negligence. In my opinion, even if the depositors succeeded at the trial in establishing all the facts pleaded, it would not be open to court to draw the inferences necessary to find that the essential elements of the tort had been proved."***

30 In *Makarenko v CIS Emerging Growth Limited* [2001] JLR 348, the Court said as follows at para 5:-

> ***"We would remind practitioners of a fundamental rule of pleading, namely, that general allegations of fraud are not permitted.*** Any pleading which alleges fraud must set out the facts, matters and circumstances relied upon to show that the party charged has or was actuated by a fraudulent intention. The acts alleged to be fraudulent must be stated fully and precisely, with full particulars. Furthermore, it is of course the duty of counsel not to enter a plea of fraud on the record unless he or she has clear and sufficient evidence to support it."

31 We agree with the Master, for the reasons he sets out at paras 64 – 72 of the July judgment, that the facts relied upon in the Order of Justice and the particulars of fraud are equally consistent with a simple breach of a promise, i.e. it has not been honoured. There is nothing in the facts relied upon which points specifically to the first defendant being dishonest or fraudulent rather than just failing to honour the promise that he had made.

32 The Master then considered whether the first plaintiff should be given an opportunity to amend her pleading so as to plead facts which would justify the allegation of fraud. He refused to do so for the reasons set out at paragraph 74 – 80 of the July judgment and we agree with those reasons. Furthermore, the first plaintiff has now had over a year since the judgment to come up with additional facts upon which she relies but none has been produced. We therefore agree that it would be wrong to prolong this aspect by adjourning the matter for possible amendment to the pleading.

33 For these reasons, we dismiss the first plaintiff's appeal against the July judgment.

34 We would however emphasise that, as the Master also made clear, this should not ultimately affect her claim. As well as the allegation that the 2008 wills should be declared invalid on the grounds of lack of testamentary capacity or otherwise, the nub of the first plaintiff's claim appears to be that, as set out at paras 15 and 20 of the Order of Justice, the first defendant assured the deceased before she made the 2008 wills leaving everything to him that he would nevertheless share the estate equally with the first plaintiff and he repeated these assurances to the first plaintiff and others after the death of the deceased. If the first plaintiff is successful in proving that the first defendant made promises in these terms, it seems likely that she will succeed under one or other of the headings of unjust enrichment, breach of contract or estoppel. In that event, the measure of damages will be

the same as it would be if the promise had been made fraudulently.