

**IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION**

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL
26/10/2017

B e f o r e :

MR JUSTICE MORGAN

Between:

NIKI CHRISTODOULIDES

**Appellant/
Claimant**

- and -

ANDROULLA MARCOU

**Respondent/
Defendant**

**Mr John McLinden QC (instructed on direct access terms) for the Appellant
Ms Kate Selway (instructed by DBP Law) for the Respondent**

Hearing dates: 19 and 20 October 2017

HTML VERSION OF JUDGMENT APPROVED

MR JUSTICE MORGAN:

1. This is an application by Mrs Niki Christodoulides for permission to appeal against the order made by Mr Recorder Lawrence Cohen QC sitting in the County Court at Central London on 10 February 2017. On 8 May 2017, Asplin J ordered that the court would consider the application for permission to appeal at an oral hearing with the substantive appeal to follow if permission to appeal were to be granted.
2. The Respondent to the proposed appeal is Mrs Androulla Marcou who is the sister of Mrs Christodoulides. Without intending any disrespect to the parties, I will refer to the Appellant as Niki and to the Respondent as Andre as the parties and the judge have done in the course of these proceedings.
3. The dispute between the sisters, with which this judgment is concerned, relates to the validity of a will made by their mother, Mrs Agni Iacovou, on 7 August 2012 shortly before her death on 9 August 2012.
4. By the will, Agni appointed Niki to be her executor and the trustee of the will. Under the will, after payment of any debts and expenses, the entire residuary estate was left to Niki. Clause 3 of the will contained a declaration by Agni that she had not made any provision in the will for Andre.
5. Niki issued these proceedings on 18 June 2014. By her proceedings, Niki asked the court to pronounce for the will in solemn form. Andre defended the claim by alleging that the will was procured by the fraud of Niki practised on her mother. The conventional legal phrase for such a plea is that there was a fraudulent calumny. Andre alleged that Niki committed a fraudulent calumny of her to her mother and as a result the mother made no provision for Andre in the mother's will. Andre counterclaimed a declaration that the will was invalid and there being no other valid will that Agni had died intestate. Niki served a Reply and Defence to Counterclaim. In relation to Andre's case that there had been a fraudulent calumny, Niki's Reply pleaded:

"The elements of a claim in fraudulent calumny is that the person alleged to have committed fraud has poisoned the mind of the testatrix by casting untruthful aspersions about, or making untruthful allegations against, other potential beneficiaries, which caused the discretion and will of the testatrix to be overborne; and that such aspersions were made either knowing that they were false, or not caring whether they were true or false."
6. The claim was tried by the Recorder over a period of some 10 days. The trial also dealt with a further claim in a separate action between the sisters relating to a transfer of a residential property in the autumn of 2011. It is not necessary in this judgment to refer to the detail of the dispute as to the transfer of that property. In summary, Niki

acting on behalf of the estate of her mother applied for that transfer to be set aside on the ground that the transfer had been procured by the undue influence of Andre.

7. At the combined trial of the claims, the judge heard evidence and submissions in relation to the dispute about the transfer as well as evidence and submissions in relation to the dispute about the will. The Recorder reserved his judgment and on 10 February 2017, he handed down a lengthy judgment dealing with both the will and the transfer. The Recorder held that Andre had established that Niki had committed a fraudulent calumny of Andre to Agni with the result that Agni had left everything to Niki and nothing to Andre.
8. In the order which he made to give effect to his judgment, the Recorder pronounced against the force and validity of the will of 7 August 2012 and he declared that the will was invalid on the ground that it had been procured by fraudulent calumny by Niki and that Agni had died intestate.
9. In his judgment, the judge gave detailed reasons for rejecting Niki's case in relation to the transfer which he held was valid. Pursuant to a separate appellant's notice, Niki has sought permission to appeal that decision also.
10. Both sisters were represented at the trial by counsel. Mr Holbech appeared for Niki and Ms Selway appeared for Andre. On this application for permission to appeal Mr McLinden QC has replaced Mr Holbech and Ms Selway appears again for Andre.
11. Although Asplin J's order provided for both applications for permission to appeal to be dealt with at the same hearing, I heard full argument on Niki's application for permission to appeal (and the potential appeal, if permission were to be granted) in relation to the dispute about the will and I then indicated that I would give judgment on that application and/or on the appeal (if permission were granted) before dealing with the application for permission to appeal in relation to the dispute about the transfer. Ms Selway submitted that if the appeal in relation to the will failed, then the proposed appeal in relation to the transfer would be academic as the property in question would be owned 50/50 by Niki and Andre whether or not the transfer was set aside. Mr McLinden did not agree with that submission but in any event, the course which was taken has resulted in me giving this judgment before hearing argument on the application for permission to appeal in relation to the transfer.
12. In order to deal with the many challenges made by Niki to the Recorder's judgment in relation to the will, it is necessary to refer to that judgment in some detail and, indeed, to set out large parts of it. The judgment contains a number of footnotes which I will omit from my references to the judgment.
13. At paragraphs [6] – [8], the Recorder said:

"Calumny Claim - Summary

6. Andre's claim to set aside Agni's Will can be described briefly thus:

6.1 Beyond the obvious mother/daughter relationship, Niki took care of her mother's cash resources which were in form of fixed term bank deposits of approximately €1m (but in both € and £ denominations) in both England and

Cyprus after the death in 2012 of her husband, Pani. The accounts in question were put into the joint names of Agni and Niki for what Niki described in her evidence as "*administrative convenience*". According to Niki in her oral evidence, regardless of the bank mandates indicating that there was joint ownership on the part of Agni and Niki and that the accounts would pass to their survivor on the first death, that did not indicate that ownership had changed from Agni to Agni and Niki.

6.2 It was always Agni's intention to ensure a roughly equal distribution of her estate between her daughters. Even Niki accepts that this was Agni's intention as late as March 2012. Andre relies on the evidence of Mr Antoniou to say that this intention continued right up to the drafting of Agni's will. He was the professional will writer who, only about a week before Agni's death, took instructions and arranged for Agni's Will to be drafted. His evidence was that Agni believed that excluding Andre "*would allow a more even distribution of her assets to both daughters as Androulla had helped herself to a substantial amount of assets already and that Niki had not*".

6.3 After a series of incidents in March 2012 which I shall have to examine closely later in this judgment, €500,000 was transferred by Agni from the joint names of Agni and Niki into new accounts in the joint names of Agni and Andre. I can say neutrally but with complete accuracy that this greatly angered Niki. Despite Niki being added as joint account holder to these new accounts after only a few days when she travelled to Cyprus, the effect that this transfer had on Niki never appears to have dissipated.

6.4 Andre's case is that Niki's anger was manifested not only by accusing the Bank of Cyprus of improper conduct including one of its employees having taken a *backhander* (presumably from Andre) to effect the transfer but also by Niki then proceeding to poison Agni's mind over the following months by representations made by words and actions indicating that Andre had stolen her mother's money. Whether the word used was *stolen* or *taken* or even as Mr Antoniou says in his evidence *helped herself to a substantial amount of assets*, the substance is the same. The representations are said by Andre to be not only false but also fraudulent. I will be examining carefully the words and actions of Niki later in this judgment so that there is no need to summarise them at this point.

6.5 When Agni made a will excluding Andre from benefit a few days before her death and leaving everything to Niki, her intention was still to ensure a more even distribution of her estate between her daughters. The exclusion of Andre was because Agni believed that Andre had stolen assets from her or, if it be different, *helped herself* to use the words of the professional will writer.

6.6 Agni's belief was based upon fraudulent misrepresentations by Niki that Andre had either stolen or taken a large amount of money from her. These fraudulent misrepresentations poisoned Agni's mind to exclude Andre.

6.7 It is right to point out a further aspect which emerged during the trial: Niki, who was managing all of Agni's cash in England, was present at the giving of the instructions for Agni's Will when a materially inaccurate account of Agni's assets was given so that the will writer's advice on Agni's intention to make a more even distribution of assets to her daughters was given on a false basis. I shall have to consider this aspect later in this judgment and, specifically,

whether it was Niki who gave the information which she knew to be false or, perhaps, she merely stayed silent when Agni provided the information.

7. Niki's response is to deny that she made any representations to her mother at all, at least any which she did not honestly believe were true. She tried to keep her mother calm and insulate and protect her from the distress caused by what Andre did. Agni excluded Andre from her will because that was her desire and, whatever she may have believed, it was not because Niki had poisoned her mind against Andre by fraudulent misrepresentations. Niki maintains the position that Andre did behave badly by moving control of Agni's Bank of Cyprus account (in the joint names of Agni and Niki) to joint accounts in the name and requiring the signatures of both Agni and Andre. The control issue was not resolved by placing the money in all three names a few days later. She refused to get involved in the issue of whether £1,000 had been stolen from Agni's rent. As for *seeing wild dogs running along the wharf or paintings*, Andre was questioning her mother's sanity and this was Agni's belief as well as her own when she read her the e mail. Agni's own beliefs were formed without any suggestion by Niki that Andre had stolen her money. A pleading point was also taken in closing submissions with which I shall deal at the end of my judgment.

8. Three further subsidiary issues have arisen in the course of the trial which I must note and they have been deployed by the parties in different ways. So far as Niki is concerned, they may explain why Agni, as a result of things Andre did or which are connected to her, took against Andre and excluded her from her will. So far as Andre is concerned, they are probably no more than extra particulars of the course of conduct amounting to a poisoning of Agni's mind. Time has been taken in the evidence on them by both parties and I think it right both to note them and reach a decision on them. They are as follows:

8.1 Agni appears to have believed that Aris, Andre's husband, had stolen £1,000 from her by collecting rent due to Agni and pocketing £1,000 out of what had been collected. To Agni, this was a complaint which reflected on Andre. Niki does not seek to support Agni's belief as being factually correct but says that her belief was not induced by anything which she said or did. Andre on the other hand says that Niki told her mother that Aris had stolen the money.

8.2 Niki explains Agni's upset and anger with Andre in June 2012 in no small part on her view that Andre had "forced" Agni herself to pay for the oxygen cylinder which she needed on a plane journey in June 2012 from Cyprus to London (approximately €85). This may seem trivial, especially for a woman who had hundreds of thousands of Euros in the bank. According to Andre, it only makes sense if Agni had come to believe as a result of Niki's representations that Andre had indeed run away with Agni's money. It is, according to Andre, wholly wrong in its factual basis because her mother wanted to pay for the oxygen cylinder and exemplifies susceptibility to her sister's lies and influence because Agni came to believe Niki's untrue version of this though Agni not Niki was actually present at the time in question .

8.3 Niki says that Andre was questioning Agni's sanity which greatly upset her and further poisoned her against Andre. The way in which this occurred was that Andre sent an e mail to Niki on 18 June 2012 at 10:17 (the time may be

significant as hereafter appears). Agni had gone to England from Cyprus on 16 June – this was her normal pattern when Pani was alive as Cyprus is rather hot in summer. The e mail was dealing with various medical issues being dealt with by doctors and a bundle of papers was attached. Its final paragraph stated *Just as a reminder mum cannot see very well and Dr Raziz did suggest she have the YAK procedure which would benefit her eyesight greatly and maybe if she can see she will then attempt to read instead of falling asleep. I am also concerned that she see imaginary dogs and pictures moving, this may be as a result of her eyesight.* Niki says she translated this into Greek for Agni (or perhaps just summarised it) and told her that Andre was asserting that Agni was losing or had lost her mind because she was seeing *wild dogs* which did not exist. According to Andre, a perfectly sensible letter clearly dealing with an eyesight problem on the suggestion of Agni's eye doctor was distorted to become reported as a suggestion that Andre was questioning Agni's sanity. So, when properly viewed, Andre's says this is another episode of poisoning with no honest basis."

14. At [16] – [18], the Recorder dealt with the relevant legal principles which he said were not in dispute. He commented that:

" ... it is wholly unnecessary to explore interesting subtleties in order to decide this case."

15. The Recorder then set out in full paragraph [47] from the judgment of Lewison J in Re Edwards [2007] WTLR 1387. I will also set out that passage later in this judgment. Both parties proceeded on the basis that the relevant legal principles were contained in that paragraph. At [17], the Recorder explained that the burden of proof rested on Andre and that the standard of proof was the civil standard on the balance of probabilities. He added:

"Although the standard of proof is the civil standard (ie on the balance of probabilities) and undue influence can be found by the court drawing inferences from all the circumstances, the cogency and strength of the evidence required to prove fraud is heightened by the nature and seriousness of the allegation (Re Boyes [2013] EWHC 4027 (Ch) at para. 113). I accept this submission without hesitation. I would add to it that the less likely is an allegation, the more convincing the evidence will have to be to prove it."

16. The Recorder then made his assessment of the witnesses who had given evidence before him. He considered Niki's credibility and reliability in great detail between paragraphs [25] and [45]. He began his assessment by saying:

"Niki was the second witness who gave evidence but hers is undoubtedly the principal witness evidence on her side and it is sensible to take it first. She was in the witness box for a little over two Court days and I have therefore had more than ample opportunity to assess her character and evidence. For reasons which I will explain, I find Niki to be a thoroughly dishonest and manipulative individual to whom integrity and truth are less important than achieving what she wants, even when she knows she is not entitled to it."

17. The Recorder made his assessment of Andre at [53] in these terms:

"Andre was a calm and sensible witness who dealt with all questions some of which were difficult and personal put to her in a convincing fashion. Her evidence obviously needs to be compared to the contemporaneous documents but there is nothing in that process or her evidence in general which causes me to doubt her evidence. I would observe that although Andre is able to give evidence about what she saw, much of her case must inevitably depend on what was going on between Niki and Agni which Andre did not see or hear. In this respect, evidence other than Andre's is important."

18. As to other witnesses, it is relevant to refer to the Recorder's assessment of Mrs Georgiou, Mr Antoniou and Nektaria Christodoulaki. He held that Mrs Georgiou was generally reliable. As to Mr Antoniou he said:

"Although I do not doubt Mr Antoniou's integrity, he had poor recollection of detail in connection with the material events. Nonetheless, what he did remember provides important if not critical pieces of the factual matrix, namely as to what Agni believed as to her assets at the time and her intention in making a will. It also provides evidence of the part Niki played in the preparation of the will."

19. As to Nektaria, the Recorder was impressed by her evidence and said that he accepted it without hesitation.

20. Between paragraphs [57] and [100], the Recorder made careful and detailed findings of fact as to a large number of distinct matters. Some of those findings related to the disputed transfer. As regards findings of fact in these paragraphs which might be said to be relevant to the dispute about the will, I did not understand Mr McLinden to challenge those findings for the purposes of the proposed appeal in relation to the will.

21. At paragraph [101], the Recorder turned to consider the events of March 2012. He began his findings by saying:

"The events of March 2012 are critical in understanding this case and I must deal with them in detail. They are at the heart of the factual disputes between the parties."

22. Between paragraphs [101] and [139], the Recorder set out in meticulous detail his findings on the evidence as to the events in March 2012. These findings made a significant contribution to his later conclusions that the will was procured by fraudulent calumny on the part of Niki. Mr McLinden referred to only a few of these findings in this part of the judgment. These were the findings in [115.4], [121.1], [121.2] and [133].

23. Paragraph [115.4] consisted of a quotation from a letter written by Niki to a Bank in Cyprus in which Niki referred to a conspiracy to defraud her mother and that someone was expecting a backhand for participating in the conspiracy.

24. Paragraph [121.1] contained findings as to an argument in Agni's apartment on 20 March 2012 where the Recorder held that Niki accused Andre of improper conduct by tricking Agni and of putting Agni's money where she would never be able to get her hands on it again. The Recorder found that Niki's accusation was untrue and that Niki must have known that it was untrue.
25. Paragraph [121.2] contains findings about an untrue accusation of cheating by Andre's husband. The Recorder commented that the accusation might not have been material but for the fact that he was satisfied on the evidence that this untrue accusation, which Agni believed, had come from Niki. The judge found that Niki realised that this "piece of poison" would be likely to reflect badly on Andre in her mother's eyes.
26. Paragraph [133] contains findings about further accusations made by Niki to Agni about Andre. The findings concerned a discussion as to whether Andre should be reported to the police for fraud on Agni. The Recorder found that Agni would thereby have understood that Niki was saying that Andre had stolen Agni's money.
27. At paragraph [142], the Recorder dealt with the comments by Andre about Agni's eyesight. He held that Niki had unfairly distorted Andre's comments when she told Agni that Andre was questioning Agni's sanity.
28. The Recorder made further important findings at paragraphs [144] – [146] which I will set out in full:

"144. **30 July – the will writer:**

144.1 I hope that I can deal with this subject with brevity.

144.2 I have quoted in paragraph 6.2 above from Mr Antoniou's witness statement which is relied on by Andre. I accept this evidence. In my judgment, this proves with the clearest possible evidence the following:

144.2.1 Agni believed and intended the exclusion of Andre would have the effect that there would be a more even distribution of assets between her daughters;

144.2.2 Agni's belief as to this effect was based on her mistaken belief that *Andre had helped herself to a substantial amount of assets already and Niki had not*. I remain conscious that a mistaken belief on the part of Agni is no reason by itself to set aside her will. That consequence only follows if the mistaken belief was induced by fraudulent misrepresentations or fraudulent calumny which is no more than a specific type of fraudulent misrepresentation.

144.3 Mr Antoniou's evidence assists me with the question of misrepresentation by Niki in one respect: Niki, who had set up the meeting with Mr Antoniou through her accountant and was there for most of it, was plainly the one who gave the information to Mr Antoniou on Agni's assets. As someone who was managing her mother's financial affairs and, as I have already pointed out, was actually a trustee of the funds in bank accounts where she was a joint account holder, she had a duty to speak. Silence will not do for a fiduciary. The listing of assets was woefully inaccurate. Agni's home in Cyprus was not on the list. As for the Cyprus bank accounts, the following

note recorded by Mr Antoniou was critical to begin to advise on whether the exclusion of Andre effected the more even distribution of assets intended by Agni: "*USE TO HAVE £500,000 IN CYPRUS BUT NOW IN ANDROUILLA'S NAME IN DISPUTE*". The Cyprus accounts were not to Niki's own knowledge in Andre's name. They were in the joint names of Agni, Andre and Niki and, if Agni died, the succession of the accounts so far as the banks were concerned would be an equal division between Andre and Niki. I tend to think that Niki had already appreciated that the monies were Agni's and so would fall to be disposed of according to the will. I do not believe for a moment that Agni was being deceptive or devious in sitting silently when Niki gave this information – Mr Antoniou's evidence was that Niki probably did give the information. It indicates what Agni had come to believe, namely that Andre had taken the money and would have it. Whether this is put as *helped herself, taken the money and run* or just *taken*, it comes to the same thing. In my judgment this belief was brought about by Niki's representations which she knew to be untrue and which were fraudulent. Even if there had been no representation prior to this date, Niki's failure to correct what she knew to be false when she was a manager and trustee of Agni's money was a misrepresentation. I have no doubt that these were fraudulent misrepresentations and it is they which were the direct and, if it matters, the sole cause of Agni's mistaken belief.

145. **Agni's Will** In my view, nothing changed after the instructions to Mr Antoniou. Mrs Georgiou (who confirmed in her evidence that she did think that Agni wanted an even distribution between her daughters) confirms that Agni's mistaken beliefs continued to subsist. The circumstances in which the will was collected by Niki on 7 August with Agni just out of intensive care and executed the same day do not provide me with any assurance that Niki believed anything other than her mother was likely to die imminently. She had, after all, been told on 1 August of the seriousness of the situation and that without treatment she would pass away within days. She does not appear to have said quite this to Andre who I can be sure in the light of her behaviour when Pani was dying – Andre at the end of her chemotherapy course and against medical advice came immediately. Andre's presence was the last thing which Niki wanted before she had managed to procure the will to be executed by Agni.

146. In summary, my finding is as follows: Agni's mistaken belief that her will would effect a more even distribution of assets considering what Andre had helped herself to was induced by the fraudulent misrepresentations of Niki that Andre had stolen, helped herself or taken Agni's money and run– this is fraudulent calumny as Niki had successfully poisoned Agni's mind against Andre. I regard the subsidiary episodes relied on differently by both parties (Aris pocketing £1,000 of rents; wild dogs – Andre was questioning Agni's sanity and the oxygen cylinder) as properly viewed as incidents of this same course of conduct."

29. The Recorder then dealt with a submission which had been made to him by counsel for Niki. At paragraphs [147] – [150], under the heading **Pleading**, the Recorder said:

"147. Mr Holbech on behalf of Niki has developed a pleading point in his closing submissions. He says that the case of fraudulent misrepresentation amounting to calumny is not adequately pleaded against Niki.

148. Any allegation of dishonesty ought, in my view, to be pleaded with the greatest particularity which is possible in the circumstances. The Court must be astute to ensure that any deficiency in the pleading does not cause prejudice to the opposite party in any fashion such as not having the opportunity to prepare or present her case as she may wish if she knew fairly what the allegation is against her. To this degree, I accept Mr Holbech's submission.

149. I can readily accept that the pleading on behalf of Andre can fairly be said to be much more sketchy than it might have been if its subject had been explored with 8 days of evidence before it was written. What I do not accept is that has caused one ounce of prejudice to Niki. I have not understood Mr Holbech to have suggested that it has. There are special features of a case such as this which are in marked contrast to a fraudulent misrepresentation case between the party who received and the party who made the representation. The representations in a calumny case are not made to the claimant and can almost never be pleaded with the same degree of precision or particularity as would be expected in a commercial fraud case. The representee is dead and, if the claim is made good, has gone to his or her grave with the poison having done its work. In this particular case, much has been learned as the evidence emerged. For example, it could never have been known that Mr Antoniou would say what he did say (prior to his witness statement of 7 November 2016) as to Agni's intention to exclude Andre in order to ensure a more even distribution of assets because Andre had helped herself to a substantial amount already. Nor could the behaviour with regard to District Court in Cyprus be unwound and understood before the evidence of both Niki and Mr Constantinides. These are examples only.

150. I have read Andre's pleading with care and, whilst not perfect, it is sufficient in my judgment to support the case which has been advanced. Although it is true that some of the points (see paragraph 7 above) were not part of Andre's pleaded complaint, they have been introduced by Niki to explain Agni's belief other than by reference to her fault. Both sides have freely investigated the points and the evidence has been taken without a murmur of objection. Most influentially of all, it has caused no prejudice. If the point had been pressed before closing submissions, it might (I do not put it higher) have led to an application to amend. I can think of no witness who might have been called but who was not and no line of questioning which might have been followed which was not. An objection of this kind at the stage it was raised is without substance in the circumstances of this case and I reject it."

30. I will now consider the grounds of appeal put forward on behalf of Niki. CPR 52 CPD at 5(1) states that grounds of appeal must identify, as concisely as possible, the respects in which the judgment of the lower court is (a) wrong or (b) unjust because of a serious procedural or other irregularity. This PD applies to appeals to the Court of Appeal but this requirement as to the concise expression of grounds of appeal ought to be observed also in relation to appeals to the High Court.

31. The grounds of appeal in this case are not concise. They extend to some 8 pages and do not distinguish between grounds of challenge to the judgment and argument in support of the grounds of challenge.
32. It seems to me that the grounds of challenge can be stated, concisely and in a logical order, as follows:
 - (1) The Recorder allowed Andre to advance a case of fraudulent calumny and to lead evidence in support of it which went beyond her pleaded case;
 - (2) The Recorder made findings of fact in relation to the case of fraudulent calumny which went beyond Andre's pleaded case;
 - (3) If the Recorder had confined Andre to her pleaded case, that case would have failed;
 - (4) The Recorder made findings in paragraphs [121.1], [121.2], [133], [142] and [144] which were not supported by the evidence;
 - (5) The Recorder failed to distinguish as he should have done between money being "taken", "withdrawn" and "stolen";
 - (6) The Recorder's assessment of Niki's dishonesty clouded his assessment of the evidence;
 - (7) The Recorder failed to apply the correct legal principles and in particular failed to apply the principles as stated in Re Hayward [\[2017\] 4 WLR 32](#) because he failed to analyse the legal consequences of his findings of fact;
 - (8) In particular, in relation to the application of the relevant legal principles, the Recorder did not adequately consider whether Niki's statements caused Agni to make no provision for Andre in the will; and
 - (9) The Recorder failed to consider the other possible explanations for Agni's decision to make no provision for Andre in the will.
33. I will take the first three grounds of appeal together. Andre's Amended Defence and Counterclaim contained a clear allegation that the will was obtained by the fraudulent calumny of Andre committed by Niki. The allegation was particularised in 11 subparagraphs of the pleading. Andre made allegations as to Agni's belief as to what Andre had done with Agni's money. The pleading puts that allegation in various ways ranging from theft of the money to other ways in which Andre had obtained Agni's money without permission. The pleading also asserts that Agni believed that it was not appropriate to make provision for Andre in the will because Andre had already helped herself to Agni's assets and Niki had not. The pleading then asserted that Agni's state of mind in these respects came about because Niki had told Agni that Andre had stolen or tried to steal from her. Finally, it was pleaded that Niki's statements to Agni were false and were known by Niki to be false.

34. Mr McLinden submitted that the Recorder should have held Andre strictly to this pleading and he relied on what was said by Lord Millett in Three Rivers DC v Bank of England (No 3) [2003] 2 AC 1 at [183] – [190]. In that passage, Lord Millett explained what is required for a proper plea of fraud or dishonesty. He also explained what is required by way of sufficient particulars in support of such a plea. In the same case at [47], Lord Hope of Craighead explained that if the particulars support the allegation of fraud or dishonesty then the question as to whether the pleading is supported by evidence is to be determined at the trial and not at the pleading stage. Lord Hope at [50] also approved the comments in McPhilemy v Times Newspapers Ltd [1999] 3 All ER 775 at 792J-793A as to the respective roles played by pleadings and by witness statements.
35. In his judgment at [147] – [150], the Recorder dealt with a similar point to the one I am now dealing with. I have set out those paragraphs above. I agree with the Recorder that the matter was adequately pleaded. I do not accept that the Recorder was at fault in not confining the evidence at the trial so as to exclude parts of it. In any case, counsel then appearing for Niki made no such application to the Recorder before the evidence was given. Counsel engaged with all of the evidence which was called and cross-examined all of the witnesses called for Andre. Indeed, counsel for both parties prepared a lengthy and thorough statement setting out proposed findings of fact. There were altogether some 82 proposed findings of fact. In relation to each finding, each counsel set out a full list of evidence relied upon including transcript references. All of the matters to which objection is now taken were included in the findings of fact which the Recorder was asked to make. Accordingly, the Recorder was in no way at fault in making the findings which he did.
36. In any event, I do not accept that Andre has failed to prove the particulars which she pleaded. The suggestion to the contrary depended on an excessively narrow reading of the particulars and a suggestion that the evidence of Nektaria was inconsistent with the allegation that Niki told Agni that Andre had stolen her money. I do not accept that reading of the particulars and I also do not accept the submission that Nektaria did not come up to proof. The Recorder plainly accepted her evidence.
37. Niki has no real prospect of success in relation to the first three grounds of appeal and I refuse her permission to appeal in those respects.
38. I will now deal with the fourth, fifth and sixth grounds of appeal. It may be that some of the time, during his submissions, Mr McLinden was challenging specific findings on the ground that the relevant matter of fact had not been pleaded. Insofar as that was his submission, I have dealt with it and dismissed it when considering the first three grounds of appeal. Insofar as he also challenged some findings of fact on the ground that the finding was not supported by the evidence, that matter was explored in the course of the oral argument on this application. I am wholly unpersuaded that the Recorder made findings which were not supported by the evidence.
39. Mr McLinden spent some considerable time seeking to develop a submission between money which was "taken", money which was "withdrawn" from a bank account and money which was "stolen". The suggestion seems to have been that all that Niki did was to tell her mother, accurately and honestly, that Andre had "withdrawn" money from Agni's bank account. The further suggestion seemed to be that what Niki had

said did not involve an allegation that Andre had stolen Agni's money or had taken it to keep it without Agni's consent. It seemed then to be submitted that in so far as the Recorder found that Agni believed that Andre had stolen Agni's money and that Andre had helped herself to Agni's assets, that belief had nothing to do with Niki who had, accurately and honestly, been making an entirely different point about what Andre had done. The Recorder obviously was not prepared to accept these suggestions and he said so. I am not persuaded by them either. In view of the findings of fact in other respects, it is plain that Agni believed that Andre had done her a very great wrong, that she had stolen the money. It is also plain that the source of this belief was Niki.

40. It was also argued that the Recorder had allowed his findings as to Niki's dishonesty to cloud his judgment when assessing the evidence and making his findings of fact. I see no sign of that having happened. The Recorder made very adverse findings as to Niki's conduct, her dishonesty and her credibility. He was entitled to make those findings. His judgment shows that he took immense care over the evidence and the detailed expression of his findings. If his conclusion was that Niki was dishonest and had carried out a fraudulent calumny, it was his duty to express those findings and that is what he did.
41. The fourth, fifth and sixth grounds of appeal have no real prospect of success and I refuse permission to appeal on those grounds.
42. I will now consider the seventh, eighth and ninth grounds of appeal. These grounds of appeal, as presented in oral argument, raise issues as to the relevant legal principles and the application of those principles to the Recorder's findings of fact.
43. Included within Mr McLinden's submissions were the contentions that the Recorder applied the wrong legal principles, and that if he had applied the correct legal principles he would have (and the court on appeal should) reach a different result. It was also submitted that if he really did apply the correct legal principles he failed to analyse his findings properly and he was wrong to reach the result which he reached.
44. The relevant legal principles were not in dispute at the trial. The Recorder applied the legal principles which both parties asked him to apply. Both parties relied upon the statement of principle in Re Edwards [2007] WTLR 1387 per Lewison J at [47]:

"47 There is no serious dispute about the law. The approach that I should adopt may be summarised as follows:

- i) In a case of a testamentary disposition of assets, unlike a lifetime disposition, there is no presumption of undue influence;
- ii) Whether undue influence has procured the execution of a will is therefore a question of fact;
- iii) The burden of proving it lies on the person who asserts it. It is not enough to prove that the facts are consistent with the hypothesis of undue influence. What must be shown is that the facts are inconsistent with any other hypothesis. In the modern law this is, perhaps no more than a reminder of the high burden, even on the civil standard, that a claimant bears in proving undue influence as vitiating a testamentary disposition;

- iv) In this context undue influence means influence exercised either by coercion, in the sense that the testator's will must be overborne, or by fraud.
- v) Coercion is pressure that overpowers the volition without convincing the testator's judgment. It is to be distinguished from mere persuasion, appeals to ties of affection or pity for future destitution, all of which are legitimate. Pressure which causes a testator to succumb for the sake of a quiet life, if carried to an extent that overbears the testator's free judgment discretion or wishes, is enough to amount to coercion in this sense;
- vi) The physical and mental strength of the testator are relevant factors in determining how much pressure is necessary in order to overbear the will. The will of a weak and ill person may be more easily overborne than that of a hale and hearty one. As was said in one case simply to talk to a weak and feeble testator may so fatigue the brain that a sick person may be induced for quietness' sake to do anything. A "drip drip" approach may be highly effective in sapping the will;
- vii) There is a separate ground for avoiding a testamentary disposition on the ground of fraud. The shorthand used to refer to this species of fraud is "fraudulent calumny". The basic idea is that if A poisons the testator's mind against B, who would otherwise be a natural beneficiary of the testator's bounty, by casting dishonest aspersions on his character, then the will is liable to be set aside;
- viii) The essence of fraudulent calumny is that the person alleged to have been poisoning the testator's mind must either know that the aspersions are false or not care whether they are true or false. In my judgment if a person believes that he is telling the truth about a potential beneficiary then even if what he tells the testator is objectively untrue, the will is not liable to be set aside on that ground alone;
- ix) The question is not whether the court considers that the testator's testamentary disposition is fair because, subject to statutory powers of intervention, a testator may dispose of his estate as he wishes. The question, in the end, is whether in making his dispositions, the testator has acted as a free agent."

45. I have also quoted at [5] above the way in which the legal principles were described in Niki's Reply and Defence to Counterclaim.
46. Mr McLinden relied heavily on the decision in Re Hayward now reported at [\[2017\] 4 WLR 32](#). This case was decided on 16 December 2016 which was just before counsel for the parties made their closing submissions to the Recorder in this case. I was told that counsel then appearing for Niki included a copy of the judgment in his bundle of authorities but it appears that he did not cite it. In re Hayward, the Deputy High Court Judge (now His Honour Judge Klein) had to consider the legal principles as to fraudulent calumny. In his judgment, he set out paragraph [47] from re Edwards. He commented that Lewison J may well have obtained his statement of the principles from Boyse v Rossborough (1856) 6 HL Cas 2. It is plain that the Deputy Judge considered that he should apply the principles in re Edwards. He then directed himself, at [122], by reference to the facts of the case before him as to the matters he had to decide. I will set out what he said in that paragraph but I will substitute the

names of the relevant persons in this case for the names which were relevant in that case. So adapted, paragraph [122] reads as follows:

"122 It seems to me that, to succeed on this plea, [Andre] must satisfy the following to a sufficient degree; namely,

- i) that [Niki] made a false representation
- ii) to [Agni]
- iii) about [Andre's] character
- iv) for the purpose of inducing [Agni] to alter [her] testamentary dispositions and
- v) that [Niki] made such a representation knowing it to be untrue or being reckless as to its truth and
- vi) that the ... Will was made only because of the fraudulent calumny."

47. Mr McLinden addressed me by reference to these six matters. As regards the matters in i), ii), iii) and v) it is clear that all of those matters must be shown. It is also clear to me that all of them have been shown in this case. The Recorder's findings of fact, which I have set out above, were to the effect that Niki had made a false representation to Agni about Andre's character and that she knew that the representation was false or that she was reckless as to its falsity. I then heard argument as to the accuracy of what the Deputy Judge said in re Hayward as to his matters iv) and vi).
48. Mr McLinden submitted that Andre had to show that when Niki made a knowingly false representation to Agni about Andre's character, Niki's purpose in doing so was to induce Agni to change her will in a way adverse to Andre (and, on the facts of this case, inevitably in favour of Niki). Mr McLinden submitted that the Recorder had not made that finding and so Andre's challenge to the will should fail.
49. I have considered the detailed findings made by the Recorder. Based on those findings, there was plainly a very strong case that Niki's false representations to Agni were made for the purpose of inducing her mother to make a will which was adverse to Andre and favourable to Niki. The argument in support of that case would rely on the facts that:
- (1) The representations were made in the period from March 2012 to Agni's death on 9 August 2012;
 - (2) In that period, Niki knew that her mother had serious health problems and might not live very long;
 - (3) Niki also knew that her mother had substantial assets;
 - (4) Niki knew that her mother's natural inclination would be for her estate to be divided equally between Niki and Andre;

(5) Niki's representations were for the purpose of persuading her mother to think badly of Andre and, in particular, to persuade her mother that Andre had already had part of the mother's assets;

(6) Niki was closely involved in arranging for her mother to make a will (and see the specific findings in paragraph [145] of the judgment);

(7) Niki falsely told the will writer that £500,000 which used to belong to her mother was in Andre's name.

50. Nonetheless, I agree with Mr McLinden that the Recorder did not make a specific finding that Niki's purpose was to induce her mother to make a will which was adverse to Andre and favourable to Niki, although the findings in paragraph [145] come very close indeed to such a finding. I consider that it is clear why the Recorder did not make any such finding. Despite counsel for the parties putting to the Recorder a list of 82 findings of fact which they wished him to make, the list did not include any finding as to Niki's purpose. This was consistent with the fact that both counsel described the relevant legal principles to the Recorder in a way which did not involve the necessity of considering Niki's purpose. I have already referred to the fact that the Reply and Defence to Counterclaim pleaded the relevant test for fraudulent calumny and, as so pleaded, the test did not require a finding as to Niki's purpose. The same can be said of the law as summarised in re Edwards. Further, there was no suggestion in the written and oral submissions of counsel for Niki that the Recorder had to make a finding as to Niki's purpose nor was there a submission that her false representations were made for some different purpose.
51. I also note that the grounds of appeal do not contain any explicit challenge to the judgment based on the omission of the Recorder to make a finding as to Niki's purpose. It is true that the grounds of appeal and Mr McLinden's skeleton argument cited re Hayward and submitted that the Recorder had failed to analyse and apply the requirements set out in that case but there was no explicit submission that the Recorder went wrong in failing to make a specific finding as to Niki's purpose. However, in the course of his oral argument, Mr McLinden did submit that the Recorder's judgment should be set aside because of his failure to make a finding as to Niki's purpose.
52. Although the argument as to Niki's purpose only arose in the course of oral argument, I heard submissions on the legal principles. The starting point might be said to be the general principle which applies for the purpose of civil liability for fraud, in the tort of deceit. The general rule is that it must be shown that the representor intended that the representee should rely on the representation. However, there is a rebuttable presumption of fact that the representor did so intend: see Goose v Wilson Sandford & Co (No 2) [2001] Lloyd's Rep PN 189 at [47]. Further, it is not necessary to show that the representor intended the representee to act on the representation in the precise way in which he did act: see Clerk & Lindsell on Torts, 27th ed., at 18-30 and Goose v Wilson Sandford & Co (No 2) at [48]. If those principles were applied here, then Niki would be presumed to have had the intention that her mother should rely on her representations and it would not be necessary to show that Niki had the specific intention of persuading her mother to change her testamentary intentions.

53. Mr McLinden submitted that it was well established that a challenge to a will based on fraudulent calumny required the challenger to show that the false representations were made for the purpose of causing the testator to alter his testamentary intentions. No doubt in many, if not all, of the cases where fraudulent calumny has been established, the facts showed that the calumny was committed for just that purpose. In support of the submission that such a purpose had to be demonstrated in every case, Mr McLinden relied on two decisions of the House of Lords, namely, Allen v M'Pherson (1847) 1 HL Cas 191 and Boyse v Rossborough (1856) 6 HL Cas 2.

54. In Allen v McPherson, the issue for decision related to the jurisdiction of the ecclesiastical court and of the Court of Chancery. The case did not directly consider the test to be applied for fraudulent calumny. Lord Lyndhurst began his judgment at page 207 by setting out the case of the party challenging the will. That party's allegation of fact was that the representor had made fraudulent representations to the testator "for the purpose of imposing upon the testator". Lord Lyndhurst asked whether such a case if established by evidence would be sufficient. He then quoted this statement from a textbook by Swinburne: "If a testator be circumvented by fraud, the testament loseth its force". This statement from the text book is also quoted in the 1911 edition of Mortimer on the Law and Practice of the Probate Division of the High Court. The test focusses on the effect of the fraud rather than the purpose of the fraudster. Lord Lyndhurst then continued:

"There cannot be a stronger instance of fraud than a false representation respecting the character of an individual to a weak old man, for the purpose of inducing him to revoke a bequest made in favour of the person so calumniated."

It might be argued that this statement was by reference to the claim made in that case rather than a definition of what had to be shown in every case. Then Lord Lyndhurst quoted from the unreported case of Butterfield v Scawen decided in 1775. The test as stated in that case did include an ingredient that the representor had the purpose of inducing the testator to change his intentions.

55. In Boyse v Rossborough at page 613, Lord Cranworth LC stated a test for undue influence, including fraud, which turned upon the will being executed in consequence of the fraud, rather than turning on the purpose of the fraudster. However, at page 615, Lord Cranworth stated that the undue influence must be exercised "in relation to the will itself, not an influence in relation to other matters or transactions". At page 616, in relation to the allegation of fraud in that case, he asked whether there was evidence to show that the representations were made "in order to induce" the testator to change his intentions.

56. In these circumstances, there is obviously scope for argument as to whether when considering a challenge to a will based on fraudulent calumny, the court should apply the usual rule for the tort of deceit or whether there is a stricter rule in the case of wills which requires the challenger to show that the fraud was practised for the specific purpose of inducing the testator to change his testamentary intentions. If this point had been raised before the Recorder and the evidence had been called and examined in relation to Niki's purpose and if the Recorder's decision depended on a ruling that it was not necessary to show that Niki had the specific purpose of inducing

her mother to change her testamentary intentions, then it would be appropriate to grant permission to appeal such a ruling.

57. However, the point now taken as to Niki's purpose was not taken at the trial. If it had been, it would have been (it certainly should have been) explored in the course of the evidence. The established approach of an appeal court is not to allow a point of this kind to be taken for the first time on appeal in those circumstances: see White Book, Vol. 2 para. 9A-56.1. Further, in this case, if the point had been taken there was a strong case for saying that Niki had the relevant purpose and the Recorder only omitted to deal with the point because it was not suggested to him that it would be relevant for him to make a finding upon it. In these circumstances, the right response to the point now being taken is to refuse permission to appeal on that ground.
58. The sixth matter, based on the formulation from re Hayward was whether Agni made her will in the terms in which she did only because of the fraudulent calumny on the part of Niki. That formulation may well have been appropriate on the facts of re Hayward but I would not regard it as a correct statement of the relevant test.
59. The question for the court is one of causation or inducement. The calumny must induce the change in the testator's intentions. The challenger must prove that on the balance of probabilities. If it is possible that the calumny did induce the change, but the court is not persuaded on the balance of probabilities that it did induce the change, the challenge will fail. If there are other possibilities or other explanations and those other explanations persuade the court to find on the balance of probabilities that the calumny did not induce the change, the claim will fail. Conversely, although the court is given other possible explanations, if the court is nonetheless satisfied that on the balance of probabilities that the calumny did induce the will, then the claim succeeds. That is what is meant by the references to consistent and inconsistent hypotheses in re Edwards, which is itself based on Craig v Lamoureux [1920] AC 349. However, the use of the word "only" should not be understood as requiring a finding that there must have been no other reason operating in conjunction with the effect of the fraud for the testator to change his or her intentions.
60. The question of causation or inducement was therefore a matter of fact for the Recorder. He made a clear finding that Niki's fraud had induced her mother to change her intentions. The evidence in support of that finding was very clear and cogent. At the trial, Niki denied that she was guilty of any fraud and attempted to explain why her mother had changed her intentions and had not treated her two daughters equally. She put forward certain explanations but plainly the Recorder was not convinced by them in view of the most obvious explanation for the change in intentions. In view of the Recorder's clear finding of fact on causation or inducement, he was not required to do any more in terms of discussing the suggested reasons for Agni's decision. In any event, he found that some of the other suggested reasons were the consequence of Agni being turned against Andre by what she had been told by Niki. The position in relation to the oxygen cylinder is an example of that.
61. Accordingly, I do not consider that Niki has a real prospect of success in disturbing the Recorder's findings as to causation or inducement and I will refuse permission to appeal on that ground of appeal.
62. I have now considered all of the suggested grounds of appeal. Whether the grounds are considered individually or collectively, Niki does not have a real prospect of success on appeal and I will therefore refuse permission to appeal. This judgment is more lengthy than would be typical for a judgment refusing permission to appeal. I have dealt with the points thoroughly out of deference to the detailed and sustained

submissions of Mr McLinden but the length of the judgment does not indicate that his points had a real prospect of success.

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