BARBADOS

No. 561 of 2009

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

BETWEEN:

JACQUELINE WILLIAMS **CLAIMANT**

AND

JUNE HARDING **DEFENDANT**

Before the Honourable Mr. Justice Olson DeC. Alleyne, Judge of the High Court

2011: January 27

2013: March 1

Mr. Deighton Rawlins for the Applicant/Claimant

Ms. Marilyn Moore of Elliott D. Mottley & Co. for the Respondent/Defendant

DECISION

INTRODUCTION

[1] By this application filed on 12 October 2010 the claimant seeks certain orders that, if granted, would result in the determination of these proceedings and a grant of probate to her.

[2] The proceedings concern the validity of a will dated 18 April 2008 (the contested will) which the claimant contends is the last will and testament of Kelly-Ann Harding, deceased (the deceased). She died on 16 July 2008.

[3] The claimant is the person named as Executrix in the contested will. She commenced contentious probate proceedings on 26 March 2009, asking the court to "pronounce in solemn form that the [contested will] is the true last will of the said deceased." At paragraph 3 of her statement of claim she asserts that the contested will "was duly executed in accordance with the provisions of the **Succession Act Cap. 249** of the Laws of Barbados".

[4] The defendant is the deceased's grandmother. She had objected to the claimant's earlier application for a grant of probate in common form, thus triggering the process that led to the commencement of these proceedings. She filed her defence on 10 August 2010. The following portions of that defence are relevant to this interlocutory hearing:

2. … The alleged Will … was not duly executed in accordance with the provisions of the Succession Act Cap 249 of the Laws of Barbados.

PARTICULARS

(a) The Deceased was unable to sign or acknowledge her signature to the said will as she had lost all function in her upper limbs at the date of the alleged execution of the will….

3. The Deceased never gave any instructions for the alleged will. The said alleged will was not read over or properly explained to her, nor did she read it herself before it was executed. The Deceased was not aware of the nature and effect of the said will nor did she know or approve of the contents of it.

4. The execution of the alleged will dated the 18 April 2008 was obtained by the undue influence of the Claimant, the purported Executrix of the will.

PARTICULARS

(a) The Deceased was terminally ill suffering with spinal chord (sic) cancer. For the last few months of her life the Claimant was in and out of hospital. During that period she spent approximately 4 weeks at the home of the Claimant. The Claimant so took advantage of the weak and emotional state of the Deceased as to assume complete domination over her. She would not allow the Deceased to see any of her maternal family unless she was present. She herself gave the instructions for the alleged will and was present when the Deceased purported to execute it. The influence of the Executrix over the Deceased was such that she was not a free agent at the date of the execution of the

> said alleged will and it was not the product of her own free will.

[5] In her reply filed on 6 September 2010, the Claimant asserts that the contested will was "drawn and prepared by Mr. Deighton Rawlins on the instructions of the deceased at the home of the Plaintiff who was not present at anytime."

THE APPLICATION

[6] The orders sought by the application are that:

> 1. The proceedings be dismissed and that a grant of probate of the last Will and testament of the deceased KELLY-ANN FELICIA HARDING be made to JACQUELINE WILLIAMS the Sole Executrix named in the said will in accordance with Rule 68(3) and 68.9(2) of the Civil Court Practice."
>
> 2. The costs of and occasioned by this Application be the Claimant's in any event.
>
> 3. Such further and other orders as this Honourable Court deems fit.

[7] The grounds of the application are as follows:

> 1. That the Defendant in the circumstances of this case is unable to plea the following:-
>
> (a) that the will was not duly executed;
>
> (b) that at the time of the execution of the will the testator was not of sound mind, memory and understanding; or

(c) that the execution of the will was obtained by undue influence or fraud.

THE RULES

[8] The applicant invokes Rules 68.8(3) and 68.9(2) of the **Supreme Court (Civil Procedure) Rules 2008 (CPR)** in support of her application. CPR 68.9(1) excludes the application of CPR 37 to probate proceedings. The latter rule deals with the discontinuance of proceedings, generally. **CPR 68.9(2)** provides that -

> At any stage of proceedings the court may, on the application of the claimant or of any party to the proceedings who has entered an acknowledgement of service, order that the proceedings
>
> (a) may be discontinued; or
>
> (b) dismissed
>
> on such terms as to costs or otherwise as it thinks just, and may further order that a grant of probate of the will, or letters of administration of the estate of the deceased person, as the case may be, be made to the person entitled.

[9] CPR 68.8 (3) provides as follows:

> (3) Any party who pleads that at the time when a will, the subject of the proceedings, is alleged to have been executed the testator did not know and approve of its contents must specify the nature of the case on which he intends to rely, and no allegation in support of that plea which would be relevant in support of any of the following other pleas that is to say,
>
> (a) that the will was not duly executed;

(b) that at the time of the execution of the will the testator was not of sound mind, memory and understanding; or

(c) that the execution of the will was obtained by undue influence or fraud,

may be made by that party unless that other plea is also set out in the statement of case.

THE ISSUE AND SUBMISSIONS

[10] The single issue that arises for determination is whether **CPR 68.8(3)** precludes the defendant from pleading that: (1) the contested will was not duly executed; (2) that at the time of the execution of the will the deceased lacked testamentary capacity; or (3) that the execution of the will was obtained by undue influence or fraud, given the inclusion in her defence of a plea of lack of knowledge and approval. Understandably, the submissions of Counsel focused on the interpretation of CPR 68.8(3) and its application to the circumstances of this case, though not exclusively so.

[11] Counsel for the applicant, Mr. Deighton Rawlins submitted that the effect of the rule is such as to bar the defendant from pleading or relying upon the identified grounds.

[12] Mr. Rawlins also asserted that he had witnessed the execution of the will and could vouch for the propriety of the process. He submitted that this should preclude the defendant from pleading as she has with respect to the status of

the contested will. This issue was not raised by the claimant in her application and it can be disposed of summarily. I find no merit in it. Such an assertion by Counsel cannot provide a legal basis for striking out the portions of the defence in issue. Not surprisingly, Counsel pointed me to no authorities to support this submission.

[13] Mr. Rawlins also submitted that there is a legal requirement to provide particulars in support of grounds such as undue influence and fraud. That principle is not in issue here and, in any event, it lends no support to the application. The defence contains no plea of fraud and it sets out particulars in support of the plea of undue influence which it contains. No question as to the sufficiency of those particulars arises on this application and I heard no arguments in that respect.

[14] Ms. Marilyn Moore who appeared for the defendant submitted that rule 68.9 (3) does not preclude the defendant from pleading any of the grounds set out in her defence. She treated the court to a most careful analysis of the terms of the provision and submitted further that the defendant has complied, in every respect, with the requirements it contains.

DISCUSSION

[15] The CPR came into operation on 1 October 2009. However, the provisions of CPR 68.8(3) are not new to this jurisdiction. Largely, they replicate Order

74 r 9(3) of the Rules of the Supreme Court, 1982 (RSC 1982), a rule that was patterned after Order 6, r 9(3) of the Rules of the Supreme Court, 1965 of the United Kingdom (UK). A similar provision was to be found at Order 74 r 9(3) of the Orders and Rules of the Supreme Court of Trinidad and Tobago, 1975.

[16] In interpreting CPR 68.8(3), reference to authorities decided with respect to these older provisions is merited. While it is important that the rules of the CPR are not hidebound by authorities relating to the old rules, it does not follow that all such authorities are redundant. Decisions relating to provisions of the RSC 1982 may provide useful guidance where, as in this case, they interpret a rule, the content and context of which is not dissimilar to a rule in the CPR.

[17] CPR 68.8(3) is a rule of pleading. It applies where a party who seeks to challenge the validity of a will, pleads lack of knowledge and non-approval of its contents by the testator. It relates specifically to such a plea and it imposes two distinct obligations, or restrictions, on a party making it.

[18] Firstly, the rule requires such a party to specify the nature of the case on which he intends to rely in support of the allegation of lack of knowledge and approval. In ***Sookram v Sookram*** **Civ. App. No 83 of 1982 (Court of Appeal, Trinidad and Tobago)**, Gopeesingh J had occasion to comment on

Order 74 r 9(3) of the Orders and Rules of the Supreme Court of Trinidad and Tobago, 1975. He stated:

> "It seems, therefore, that … if the respondent intended to contend that the testator did not know and approve of the contents of the will sought to be propounded, she was obliged, not only to plead such want of knowledge and approval, but also, to specify the nature of the case on which she intended to rely, otherwise no allegation in support of want of knowledge and approval should have been made."

[19] Secondly, CPR 68.8(3) debars the pleader from particularising any allegation in support of a plea of want of knowledge and approval that "would be relevant in support of" any of the other grounds mentioned in the provision, unless that other ground is also pleaded. Those other grounds are (1) improper execution; (2) lack of testamentary capacity and (3) undue influence or fraud.

[20] Hence, the second part of CPR 68.8(3) beginning with the words "and no allegation in support of that plea" does not have the effect contended for by the claimant. That portion of the rule does not prevent a party from pleading any ground. Its restrictive force relates only to the particulars pleaded in support of the ground of lack of knowledge and approval. Far from prohibiting the pleading of any particular ground, the effect of the rule is to require the pleading of additional grounds, if an allegation in support of a

plea of lack of knowledge or approval "would be relevant in support" of any of the other specified grounds.

[21] The case of ***Re Stott (Deceased)*** **[1980] 1 W. L. R. 246** provides a useful illustration. In that case, a defendant had challenged the validity of a will which the plaintiff sought to propound on the ground, *inter alia*, that, at the time it was executed, the testatrix did not know and approve of its contents. The defence set out a number of particulars in support of this plea. The plaintiff moved to strike many of those particulars, contending that order 76 r 9(3) of the UK rule rendered their inclusion in the defence impermissible on the grounds that they would also be "relevant" to a plea of undue influence. The defence contained no plea of undue influence.

[22] At pages 251 to 253 of the decision, Slade J considered the meaning of the phrase "which would be relevant in support of any of the following other pleas". At page 251, para C he expressed doubt as to the application of a literal interpretation, in this way:

> "On a first literal reading of the wording of this rule, I think there is considerable force in the … submission … that a party in a probate action may never plead an allegation in support of a plea of want of knowledge and approval, if such an allegation would in any sense at all be relevant in support of a plea of undue influence, but a plea of undue influence is not itself made in the action. This submission however, if correct, would have such surprising results as to make me doubt whether this can have been the intention of those responsible for introducing R. S. C., Ord. 76, r. 9 (3)."

Having identified the anomalies resultant upon a literal reading, he concluded at page 252, para H, in this way:

> … in construing R.S.C., Ord. 76, r. 9(3) a reasonably narrow meaning should, I think, be attributed to the phrase "which would be relevant in support of any of the following pleas". An allegation should not, in my judgment, be treated as being 'relevant' within this meaning, unless it would, if established either alone or in conjunction with other facts also pleaded, *affirmatively prove* the relevant alternative plea. The mere fact that the allegation, if proved, might constitute evidence that could incidentally assist the proof of the relevant alternative plea, if raised, does not seem to me to bring it within the second limb of R.S.C., Ord. 76, r. 9(3).

[23] However, I am not required to determine whether the particulars of want of knowledge and approval would be relevant in support of any of the three specified grounds since the Claimant makes no complaint that any of those particulars should be struck on that basis. Hence, I make no comment on the meaning to be attributed to the phrase "which would be relevant in support of any of the following pleas."

[24] The defendant pleads at paragraph 3 of the defence that the deceased did not know or approve of the contents of the will. The inclusion of this plea makes **CPR 68.8(3)** applicable to the defence. However, nothing in that rule precludes the claimant from pleading improper execution, lack of testamentary capacity, undue influence or fraud. The claimant's contention that the rule has such a restrictive effect is simply untenable.

[25] The claimant has not established any basis on which I can order that these proceedings be dismissed and a grant of probate made to her, at this stage. In the circumstances, the application is dismissed.

[26] I shall hear the parties as to costs.

Olson DeC. Alleyne
Judge of the High Court