

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

CV NO. 1015 of 2012

BETWEEN:

RONALD FITT

CLAIMANT

AND

RICHARD JOHN BLAIR

DEFENDANT

*Before the Honourable Madam Justice Michelle I. L. Weekes, Judge of the
High Court*

Date of Oral Decision: 20 March 2019

Appearances:

Mr. Gregory Nicholls, Attorney-at-Law for the Claimant

Mr. Bryan Weekes, Attorney-at-Law for Defendant

REASONS FOR DECISION

INTRODUCTION

[1] On 20 March 2019 I delivered an oral decision in favour of the Claimant and undertook to provide reasons. Those reasons are set out below.

BACKGROUND

- [2] This is a Probate action in which the Defendant is seeking, by way of **Further Amended Application for Case Management** filed on 5 March 2014 to have Paragraphs 8 and 11 of the Claimant's **Amended Statement of Claim** struck out or dismissed and also to have injunctions granted by Chandler J on 20 June 2012 varied and or discharged.
- [3] Ronald Fitt, the Claimant, son of Gloria Theresa Edwards, ("the Testatrix") is the named Executor of a will executed on the 30th day of April 2012, (the "April Will"). The April Will was lodged in the Supreme Court Registry on the 2nd of May 2012.
- [4] Richard Blair, the Defendant, met and became friends with the Testatrix at The Church of the Glorious Christ about twenty years prior to her death. The Defendant allegedly became her full time provider in the short period before her death, and lived with her at #6 Welches Gardens, St. Michael. The Testatrix died on the 9th of June 2012.
- [5] However after the Testatrix's death it was discovered that she had executed another Will on the 21st of May 2012, (the "May Will"). This Will named the Defendant as the Executor and sole beneficiary of the Testatrix's estate. The May Will was executed three weeks prior to the

Testatrix's death and the Claimant believes that this Will was obtained by undue influence or fraud and/or that the Testatrix's mental health was compromised due to her medical condition. As a result, her testamentary capacity at the time has been called into question.

PROCEDURAL HISTORY

[6] The Claimant filed a **Fixed Date Claim Form** under a **Certificate of Extreme Urgency** on 18 June 2012 for orders under **Part 68** and **Part 17 of the Supreme Court (Civil Procedure Rules) 2008 [the CPR]** including an order for a Mareva Injunction.

[7] That application came on for hearing before Chandler J who granted case management orders in the matter and also granted an injunction in the following terms that:

1. Under the Rule 17.1 (1) (e) of the Supreme Court (Civil Procedure) Rules in the nature of a Mareva Injunction, the assets of the estate of the said GLORIA THERESA EDWARDS nee Whitney, Deceased, be frozen immediately to prevent the depletion thereof, prior to a grant of probate including but not limited to all Bank accounts maintained at CIBC First Caribbean International Bank Barbados Limited and Bank of Nova Scotia and the City of Bridgetown Co-operative Credit Union Limited in the joint names of Gloria Theresa Edwards and Richard John Blair or in whatever Banks such account may be maintained.
2. The Defendant, the said Richard John Blair be restrained from disposing of any of the chattel of the

said estate which are presently in the property of the estate of the deceased situate at No. 6 Welches Gardens, St. Michael and No. 174 Rendezvous Gardens, Christ Church with immediate effect to the said Defendant and that Ronald Fitt do make an inventory of the said chattels in the company of Mr. George Bennett and Ms. Nicole Nurse Counsel for the Defendant and the Claimant respectively.

- [8] Subsequently from 2012 - 2014 several documents were filed including an **Amended Statement of Claim, Defence and Counterclaim** Affidavits and several witness statements. Chandler J also made various orders during that period.
- [9] The matter first came to my attention on 10 March 2015 in relation to the **Further Amended Application for Case Management**. At that time, I made an order that the Claimant be at liberty to file additional written submissions on or before 24 March 2015, written submissions already having been filed by both parties. The matter was adjourned to 14 April 2015.
- [10] On 14 April 2015, I made another order for written submissions to be filed on or before 14 May 2015 and the matter was adjourned for Pre-Trial Review on 15 September 2015.
- [11] On 15 September 2015 there was no appearance by Mr Gregory Nicholls, Attorney-at-Law for the Claimant. The Court's decision on

the **Further Amended Application for Case Management** was reserved at that time with only one set of written submissions having been filed relating to that particular Application.

THE CLAIMANT'S PLEADINGS

The Amended Statement of Claim

[12] The Claimant filed an **Amended Statement of Claim** on 4 November 2012. The Claimant claimed the following:

- (a) A declaration that the Will duly executed by his mother Ms. Gloria Edwards, on the 30th of April 2012, and lodged at the Registration Office of the Supreme Court, on the 2nd of May 2012, be declared valid.
- (b) An order under **Rule 68.11(1) of the CPR** compelling the Defendant to bring in any testamentary script relating to the deceased's estate as may be under his control and to attend court so that he may be examined.
- (c) A declaration of invalidity of any testamentary script under the control of Richard John Blair.
- (d) An order in the nature of a Mareva Injunction, under **Rule 17.1 (1) (e) of the Supreme Court (Civil Procedure) Rules, 2008 (CPR)**, to freeze the assets of the estate of the said Gloria Edwards, deceased, to prevent the depletion thereof prior to a grant of probate.
- (e) An order that the Defendant give an account of any

rents, pensions, or other funds or assets of the said Gloria Edwards.

- (f) An order that the Defendant pay any monies found due and owing to the said deceased or her estate, be paid into court pending a grant of probate.
- (g) An order of ejectment of the Defendant from the former residence of the deceased.
- (h) Interest and costs.

[13] The particulars of the fraud and suspicious circumstances were also outlined in the **Amended Statement of Claim** filed on the 29th of November 2012 and while lengthy are set out in full. They are as follows:

- i. On or about April 2011, the Testatrix initially gave instructions to Ms. Nicole A. Nurse, who was at all material times, her legal counsel, in relation to her Last Will and Testament.
- ii. On or about the 26th day of March 2012, the Defendant brought the Testatrix and an accompanying friend to the law offices of the said Ms. Nicole Nurse and purported to give instructions in relation to:
 - (a) the revocation of the previous Will of the Testatrix;
 - (b) the execution of a Deed of Gift by the Testatrix in favour of the Defendant in respect of property owned by the Testatrix;
 - (c) the joint purchase of a property at #16

Tino Terrace, Christ Church to be financed by way of a Mortgage to the Defendant and the Testatrix in relation to the same;

(d) the sale of the property situate at Rendezvous, Christ Church owned by the deceased.

- iii. The said Ms. Nurse exercised her professional judgment in the circumstances and refused to act on the instructions of the Defendant in relation to the Testatrix.
- iv. The said Nicole A. Nurse then requested the Defendant and the accompanying friend to withdraw so that the Testatrix could be free to give her instructions to legal counsel uninfluenced by the Defendant to which the Defendant duly complied and withdrew.
- v. After the withdrawal of the Defendant and his friend, the Testatrix indicated to Ms. Nurse that she did not want to give the Defendant her house by way of Deed of Gift or by a devise under a new Will and that the Defendant had been collecting rents due to the Testatrix and was not accounting to her for the same.
- vi. The said Ms. Nurse thereafter informed the Defendant that she was unable to act on the instructions given by the Defendant in relation to the Testatrix and informed the Defendant that a medical certificate of competency was required before any instructions could be taken from the Testatrix.
- vii. The Defendant did not return to the said Ms. Nurse with the Testatrix nor with the said medical certificate of competency as requested.
- viii. On or about the 26th day of April 2012, the Testatrix who was hospitalized requested the said Ms. Nurse to visit her at the Queen Elizabeth Hospital, (the QEH) so that she

could give instructions as to the alteration of her previous Will.

- ix. Ms. Nurse went to the QEH on the following day, the 27th of April 2012 in order to take instructions from the Testatrix with respect to the alteration of the testamentary devises in her said Last Will and Testament.
- x. Given the deteriorating state of health of the Testatrix, the Regulations of the QEH required her to be assessed by the Hospital's resident consultant psychiatrist and accordingly, Dr. Jo-Anne Brathwaite, consultant psychiatrist conducted a medical examination and determined that the Testatrix was competent to give testamentary instructions at that material time.
- xi. The said **April Will** was completed after a number of changes to the various devises and dispositions by the Testatrix who was specific in her intention to benefit as many of her family members as possible in the said Will which was thereafter executed on April 30th, 2012.
- xii. Neither the execution of the **May Will** nor the nature of the testamentary devises therein can be readily explained by the relationship of the Testatrix and the Defendant.
- xiii. Instructions to the said Nicole Nurse were that the Defendant was not employed at the material time.
- xiv. The Defendant as the primary caregiver to the Testatrix had full control over the Testatrix and the property at Rendezvous in the parish of Christ Church.
- xv. Further and/or in the alternative, the said May Will, was executed by the Testatrix without any assessment as to the medical fitness of the Testatrix to make such testamentary

dispositions being ascertained at the time of the purported execution.

xvi. The Claimant avers that the Testatrix was highly unlikely to have sufficient mental capacity to make the May Will and as such the same is invalid. The Defendant will be put to strict proof to establish the validity of the May Will *animus testandi* specifically, and due execution generally by the Testatrix.

xvii. Still further and/or in the alternative, the Testatrix was unduly influenced in the making of the said May Will by the Defendant who was at the material time her primary caregiver who had full day-to-day control over her.

[14] Affidavits and Witness statements in support of the allegations were also filed including witness statements by the Claimant, Nicole Nurse, and Dr. Andre Brathwaite and Dr. Sharon Harvey.

Affidavit of Ronald Fitt

[15] Mr. Fitt deposed that Nicole Nurse was retained by his mother to draft a Will for her in April of 2012 and that she did so. He also deposed that he was appointed Power of Attorney by his mother at that time. He was unaware of any undue influence exerted on his mother for her to execute the Will and cosigned the signature as being hers.

[16] He said that in the May Will the Defendant was described as being the Testatrix's brother-in-law but that he was not related to the deceased by

either blood or marriage. He said that his mother is unlikely to have made such a representation and if she did it would suggest that she was disoriented at the time of making such a representation.

[17] He also averred that given his mother's severely compromised health three weeks before her death it is possible that she was disoriented.

Witness Statement of Nicole Nurse

[18] Nicole Nurse stated that she met the Testatrix in or about April 2011 when she retained her services with respect to the drafting of a Will. She prepared the Will and it was lodged in the Supreme Court.

[19] In February of 2012 she received a telephone call from the Defendant whom she had not yet met. He informed that he was calling on behalf of the Testatrix who told him that she was her Attorney. He said that the Testatrix wanted to purchase property jointly with him and informed her that he would pay the deposit and the balance of the purchase price could be paid from the proceeds of the sale of the Testatrix's property at Rendezvous Christ Church. He informed her that he and the Testatrix would be seeking a mortgage together in order to get the sale money until the Rendezvous property could be sold. She found this odd as the Testatrix was ill and of advanced years.

[20] She then explained to the Defendant that she needed to speak directly with the Testatrix and he handed her the telephone. The Testatrix explained that the gentleman was a friend. Ms Nurse then asked her whether she really wanted to sell her property in order to purchase a new one and she hesitated before saying yes.

[21] She explained to the Defendant when he returned to the telephone that she needed a meeting in person with the Testatrix and he agreed to arrange this. She offered to do a home visit as she knew that the Testatrix was ill, but the Defendant said he would bring the Testatrix to her office in Holetown.

[22] In March 2012 she received a letter from Clarke Gittens and Farmer regarding the sale of the property but did not reply as she had not yet taken proper instructions from the Testatrix.

[23] On 26 March 2012 the Defendant and another man brought the Testatrix to her office. The Defendant explained to her that he wanted to discuss *inter alia* a deed of gift from the Testatrix to himself, a new Will for the Testatrix, a Power of Attorney to himself from the Testatrix and the conveyance of the property to him. He said he wanted to make sure that she did right by him as he was looking after her. The Defendant and the other man were very adamant that the matters needed to be dealt with

urgently as the Testatrix was ill.

[23] He said he would be taking her on a cruise vacation within the next week or two and he needed to have the Will and Power of Attorney prepared before that time.

[24] The friend then said he wanted to see these things done before he left Barbados. He asked the friend what difference it made to him whether the Testatrix's business was completed or not. The friend replied "the weather at sea is not like the weather on land, anything could happen out there".

[25] She then explained to the Defendant that she would not be able to accept instructions from him as to the Testatrix's Will nor would she accept instructions from her in his presence. She then asked the Defendant and the friend to leave the room and closed the door behind them.

[26] On closing the door she asked the Testatrix whether she really wanted to give that man her house and the Testatrix replied negatively by shaking her head from side to side. She asked the Testatrix whether she really wanted to sell her Rendezvous property to purchase the other property. She repeated the Defendant's comment that he would pay the deposit from his own funds. The Testatrix replied he does not have any money, that is my money. She asked the Testatrix why the Defendant

had access to her money and she replied that the Defendant collected the rent and “I don’t know what he does with it”. She went on to say that he buys “whatever he want”.

[27] The Testatrix further informed her that she had loaned the Defendant \$10,000. Because she had become concerned about any transaction involving the Defendant, she asked the Testatrix’s permission to call one of her relatives, she gave her permission to call her niece Sherry-Ann Hinkson which she did immediately in the presence of the Testatrix. She explained her discomfort with the request they made to Ms. Hinkson and Ms. Hinkson said she would discuss the matter with the Testatrix’s son Ronald and thanked her for calling.

[28] She then re-opened the door and informed the Defendant that she was permitting the Testatrix to take some more time to consider the transactions and that in any event she would need to have a medical certificate of competence in order to proceed with any changes to her Will.

[29] On or about 26 April 2012 the Testatrix requested that she visit her at the QEH as she wanted to make changes to her Will and prepare a Power of Attorney in favour of her son Ronald Fitt who was the Executor named in her existing Will. She was unable to visit the same day but

did so the following day.

[30] She asked to see Dr. Andre Brathwaite the attending physician with respect to the QEH's procedure for the giving of legal instructions and signing of legal documents by patients at the QEH. Dr. Brathwaite informed her that such permission would be granted only following a Certificate of Competence given by a Consultant Psychiatrist employed by the QEH under the direction of the Director of Medical Services. Dr. Joanne Brathwaite, Consultant Psychiatrist examined the Testatrix that evening and certified the Testatrix competence to execute the legal Documents.

[31] The Testatrix signed the Power of Attorney immediately following the evaluation. On 28 April 2012 she returned to the QEH with the Will drafted according to the Testatrix instructions. The Testatrix instructed her that she wanted to make minor amendments. She returned to her office, implemented the changes, read them to the Testatrix over the telephone and the Testatrix again made a minor amendment.

[32] She returned to the QEH on 30 April 2012 read over the final version to the Testatrix and the April Will was duly executed before two witnesses.

[33] On 10 June 2012 she received a telephone call from the Claimant who informed her that his mother had died the previous day and that the

Defendant had shown him a copy of a Will dated 21st May 2012 which purported to make the Defendant the sole Executor of the Testatrix's Will and the sole beneficiary of her estate.

[34] The Claimant then retained her to challenge the Will.

Witness Statement of Dr. Andre Brathwaite

[35] He was the Testatrix's doctor at the QEH. He treated her on her several admissions to the QEH. In 2003 she was diagnosed with cancer and required constant care. In or about January of 2012 Ms. Edwards was accompanied by the Defendant on some of the visits to the QEH. She was admitted to the QEH on 24 April 2012 until 3rd May 2012 and on or about 26 April 2012 the Testatrix requested her Attorney-at-Law Nicole A. Nurse to visit her in the QEH, which she did.

[36] Ms. Nurse asked to see him in respect of the QEH's procedure for giving legal instructions and signing legal documents. He met with Ms. Nurse who informed him that the Testatrix wanted to execute a Power of Attorney and make amendments to her Will. He informed Miss Nurse that permission would only be granted following a certificate of competence given by a Consultant Psychiatrist employed by the QEH.

[37] Dr. Joanne Brathwaite came to the ward to examine the deceased and certified the deceased competent to execute the documents.

The Testatrix signed the Power of Attorney immediately and he witnessed it.

[38] Miss Nurse visited on 30th April 2012 for the Testatrix to sign her Will.

The note for that day showed that she was responding well with usual vital signs and that she was lucid.

She was discharged on 3 May 2012. Her diagnosis was advanced malignancy, anaemia and resolving sepsis secondary to infected malignant ulceration.

[39] She was admitted to the QEH for the final time on 4 June 2012 and died at the QEH on 9 June 2012.

[40] He understood one of the present issues was the competence of the Testatrix at the time of the later Will. The question of competence is one that would have to be determined frequently given that by the time she was discharged on 3 May she was septic and prone to periods of disorientation.

[41] It was his belief that a certificate of competence given more than a week prior to the signature of the later Will could not properly contemplate or assess the state of mind and competence of the deceased at the time of signature.

Witness Statement of Dr. Sharon Harvey

[42] Dr. Harvey stated that she examined the Testatrix on 29 March 2012 and at the time of assessment she was mentally competent to handle her affairs.

[43] However, according to Dr. Harvey, a mental state examination is a present state examination and can only give the condition of the patient at the point in time it is conducted. Physical, mental and chemical variables may intervene shortly thereafter which may cause changes in the patient's mental state. This is so especially where the patient suffers from a severe illness and is advanced in age.

[44] Dr. Harvey stated that an evaluation could not be used as a certification of capacity at a time other than at the date of her evaluation. An arrangement was made by the Defendant for her to conduct a second assessment but she never did so as the Defendant told her that the Testatrix had been admitted to hospital.

THE DEFENDANT'S PLEADINGS

The Amended Defence

[45] On 10 December 2012, the Defendant filed an **Amended Defence and Counterclaim**. He contests the Claimant's allegations on the basis that

the Testatrix executed a Will in May, revoking any prior Will, and at the time of execution, she had the requisite testamentary capacity, and the Will was executed by her own free and voluntary act and not obtained by an act of fraud. Affidavits and Witness Statements of George A. Bennett and Petra Anetta Cato and Irene Francis-Worrell were also filed in support of the Defence.

Affidavit of Richard Blair

[46] The Defendant deposed that he met the Testatrix at church about 20 years before and they became friends. He came to know her family. At the time of her death he was with her full time provider and did everything for her including preparing her meals and taking her to her medical appointments.

[47] He further deposed that her relationship with her children was strained, that her children rarely visited her and that she was hurt that one Mother's Day none of her children visited. He rejected the accusation of undue influence on his part and said that the deceased indicated to him that she wanted to change her Will and he arranged to have Mr. George Bennett, Attorney-at-Law attend to the Testatrix and take her instructions. He played no part in instructing Mr. Bennett.

[48] He stated that in March of 2012 he had taken the Testatrix to see Dr. Sharon Harvey a Consultant Psychiatrist. Dr. Harvey provided a report. The Defendant acknowledged that the Testatrix was ill for much of the time he cared for her and that she had cancer.

[49] He stated that in May of 2012, the Testatrix decided to add him to her bank accounts and that the account should be held jointly by herself and him. According to him, the Testatrix wanted to make it easier for her to access monies from the accounts to pay for her day to day needs.

[50] He took the Testatrix to Dr. Harvey as he realized the banks would require proof of her mental competence and the Bank of Nova Scotia complied with the request to establish a joint account.

[51] He further deposed that the Testatrix revoked the Power of Attorney to her son and issue a new Power of Attorney to him the Defendant.

[52] He was advised by his Attorney-a-Law that the Claimant had not adduced any evidence to establish that he had unduly influenced the deceased.

Affidavit of George Bennett

[53] Mr. Bennett, an Attorney-at-Law deposed that he took instructions from the Testatrix and witnessed her sign and publish her Will. According to him she was alert, knew the extent of her property and he had no reason

to suspect that she did not have the requisite testamentary capacity to properly instruct him. He also assisted the Testatrix with having the Defendant joined on her bank accounts. He had no reason to doubt her mental competence and having read Dr. Harvey's report dealing with the Testatrix's mental capacity, see no need for any further medical intervention before the Will was executed.

Affidavit of Ivone Francis-Worrell

[54] Mrs. Francis-Worrell deposed that she knew both the Testatrix and the Defendant. She had lost touch with the Testatrix but knew her from attending the same church. She was a volunteer at the hospital and met the Defendant because he was always in the hospital for the Testatrix's cancer treatments. The Testatrix was in and out of the hospital but alert and talkative during their conversations. She did not recall ever seeing anyone else visiting the Testatrix.

Affidavit of Petra Anetta Cato

[55] Ms. Cato deposed that she knew both the Testatrix and the Defendant. In July 2011 the Defendant returned from England and they discussed the fact that the Testatrix was ill. The Testatrix's daughter and grand children lived with her at the time of her early visits but they later moved out. The Testatrix's son Pedro lived in the apartment downstairs. She

attested to the fact that the Defendant looked after the Testatrix and that she helped him. The Testatrix confirmed to her that she had left something for her children but stated that the Defendant was also going to get something.

[56] She stated that during another visit the Testatrix told her that she was upset that none of her family had visited her for mother's day and that they had a surprise coming. She further deposed that the Testatrix's relationship with her children was not good at the end of her life. She attested to the fact that the Defendant took good care of the Testatrix and that she never saw him try to influence her decisions on any matters.

THE DEFENDANT'S FURTHER AMENDED APPLICATION FOR CASE MANAGEMENT

[57] On 22 November 2012 the Applicant filed an **Application for Case Management** under **CPR 2008 Part 27** requesting that injunctions granted by Chandler J on the 20th June be varied or discharged and that summary judgment be entered for the Defendant pursuant to **Part 15 of the CPR** which deals with summary judgment. That application was amended by **Amended Notice of Application for Case Management** filed on 25 February 2013 and again by **Further Amended Notice of Application for Case Management** filed on 5

March 2014. **The Further Amended Application** requests:

(1) That the injunctions granted by Chandler J on 20 June 2012 be discharged.

(2) That Paragraph 8 of the Claimant's Amended Statement of Claim as it relates to the pleaded allegation of fraud on the part of the Defendant be dismissed/struck out pursuant to Parts 68.9(2) and 26.

(3)(1)(i) or Part 26.3(3)(b) of the CPR on the ground:

(a) That the Claimant has failed to establish by his pleading and the evidence provided to the Court that he has a reasonable basis for predicating his claim based on the theory of fraudulent conduct on the part of the Defendant.

(3) That paragraph 11 of the Claimant's Amended Statement of Claim as it relates to the pleaded allegation of fraud on the part of the Defendant be dismissed/struck out pursuant to Parts 68.9(2) and 226.1(1)(i) or Part 26.3(3)(b) of the CPR on the ground:

(a) That the Claimant has failed to establish by his pleading and the evidence provided to the Court that he has a reasonable basis for predicating his claim based on the theory of conduct on the part of the Defendant amounting to undue influence by the Defendant over the deceased.

THE CONTEXT OF THE WRITTEN SUBMISSIONS AND DELIVERY OF THE DECISION

[58] Counsel for the parties filed written submissions in the matter. There were no oral submissions.

[59] The Defendant filed three sets of written submissions on March 21, 2013, May 24, 2013 and September 26, 2014 in support of his original **Application for Case Management** (re summary judgment) the **Amended Application** (re default judgment) and the **Further Amended Application** (re striking out). The first two applications were not heard and it is the **Further Amended Application** which is at issue in the present matter.

[60] The Claimant's written submissions however were filed in response to the original **Application for Case Management** and the **Amended Application for Case Management**. The Claimant's submissions in relation to the **Amended Application for Case Management** were filed in **March 2018**, some three years after the court reserved its decision in respect of the **Further Amended Application**. No submissions were ever received from the Claimant in relation to the **Further Amended Application for Case Management** (dismissal and striking out).

[61] From January 2016 to December 2017, I was assigned to the Continuous Criminal Sessions. In April 2018 I set a date for delivery of the decision without knowing that the additional submissions had been filed. Unfortunately, that date had to be vacated due to the commencement of industrial action at the Registration Department and the Supreme Court.

Sittings at the Supreme Court only resumed in September 2018 after relocation to Manor Lodge from Whitepark Road.

It is against this background, that despite their late receipt, I have also had regard to the Claimant's March 2018 submissions in reaching a decision in this matter.

THE DEFENDANT'S SUBMISSIONS

[62] Counsel for the Defendant Mr. Bryan Weekes, submitted that the considerations relating to **Part 15** of the Civil Procedure Rules (**CPR**) (**2008**) would apply in this instance, in that the claim as made by the Claimant has 'no real prospect of success.'

[63] Counsel cited **Swain v Hillman [2001] 1 All ER 91**, which dealt with the issue of summary judgment stating that the disposal of a matter by summary judgment does "not involve the judge conducting a mini-trial... it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily." This principle was followed in the case of **Stewart v Samuels JM 2005 CA 66**, which differentiated the 'real prospect of success' test from that of a "good arguable case" and "serious issue to be tried". To determine real prospect of success, the judge must consider the ultimate result.

[64] In **Smikle v Nunes et al JM 2007 SC 24** Sykes J stated that the judge should take into account whether the pleaded case, and the possibility of gaining further information would cause the judge to conclude a real prospect of success. If the judge concludes that there is no real prospect of success, summary judgment should be granted in favour of the applying party.

[65] The Defendant also made an application for an Order pursuant to **Part 26.1 (2) (i)** and **Part 26.3 (3) (c)** of the **CPR**. This Part gives the court the power to dismiss any part of a claim after a trial of a preliminary issue. Counsel submitted that the preliminary issue is whether as pleaded, there is any allegation of conduct, which amounts to undue influence or fraud by the Defendant, and whether such claim is on the basis of reasonable grounds.

[66] It is the Defendant's contention that there was no undue influence by the Defendant, causing the Testatrix to execute a new Will. The burden of proving undue influence rests on the party alleging it, and clear evidence must be adduced to prove such. The element of coercion must exist to establish undue influence. Fraud if alleged must also be proven by the alleging party. The law has established as fraud, circumstances where a beneficiary is directly involved in the preparation of a Will. In

such an instance, it is the duty of that party to bring the Testator's mind to the effect of the testamentary act.

[67] The Defendant avers that no evidence has been adduced to conclude that there was any undue influence or fraud or that the Testatrix did not possess testamentary capacity. The Claimant would be required to prove that 1) the Defendant had a relationship with the deceased, which would have allowed him to exert influence on her and 2) he did in fact exert that influence over her to the extent that her decisions in relation to the 'May Will' were not reflective of her true testamentary wishes. The Defendant submits that only evidence of the first question has been given, but that the Claimant fails at the second stage and therefore the claim has no real prospect of success.

THE CLAIMANT'S SUBMISSIONS

[68] Counsel for the Claimant filed submissions on the 4th of April 2013 and an Addendum to the Claimant's legal submissions on March 16, 2018 stating a formal objection to the application made by the Defendant on the grounds that:

- 1) the Court has no jurisdiction to grant summary judgment in a probate matter under the CPR or at all,
- 2) that the Court cannot dismiss the action under Part 68.9 of the CPR when the Defendant is required at law to

propound the will he asserts in these proceedings and has not accordingly done so; and 3) the balance of justice requires that the injunction granted by Chandler J should stay until this Action is finally disposed at trial.

[69] The Claimant submitted that under **Part 15 of the CPR**, summary judgment in probate proceedings is specifically excluded from the powers of the Court. The Claimant argues that the Defendant is seeking to have the Court exercise its powers under **Rule 68.9 of the CPR** (a general power to dismiss an action) to achieve what is specifically excluded by **Part 15**.

[70] Counsel for the Claimant conceded that **Rule 68.9 of the CPR** provides that the court may at any stage of the proceedings, on an application, order the proceedings dismissed and make any appropriate order in relation to the probate or administration of an estate thereafter. He further submitted that this power is not a special power of the court under the CPR but only reflects and preserves the inherent power of the court to dismiss a matter at any stage.

[71] The Claimant also argued that both the Claimant and the Defendant are required to establish that the Testatrix knew and approved the contents of the respective Wills. As the Claimant has pleaded suspicious circumstances, the law requires that the Defendant satisfies the court that

the deceased knew and approved the Will he asserts to be the true and last Will of the Testatrix. This burden ought not to be averted by the grant of a summary judgment.

[72] The Claimant also submitted that the balance of justice has not shifted and the Defendant has not brought any new grounds to substantiate the application that the injunction granted by Chandler J should be varied or discharged.

THE ISSUES

[73] The issues for this Court's determination are:

- i. Whether the Court has the necessary jurisdiction under **Rule 68.9 of the CPR** and /or **Rule 26.1(1) (i) or 26.3(3)(b)** to dismiss or strike out Paragraphs 8 and 11 of the Claimant's **Amended Statement of Claim**.
- ii. If the Court has the necessary jurisdiction at (i) what are the conditions precedent to the dismissal of a Probate action or striking out of paragraphs in a Claimant's **Statement of Claim**.
- iii. Whether the injunction granted by Chandler J ought to be discharged;

THE LAW

[74] **Part 68** of the **CPR** deals with Contentious Probate Proceedings

Rule 68.9 (2) provides that:

“(1) Part 37 does not apply in relation to probate proceedings.

(2) “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.”

[75] **Part 37** relates to discontinuance of general claims and as set out in **Rule 68.9 (2)** is therefore not applicable here.

[76] **Part 26** deals with the Court’s general case management powers. Of note is **Rule 26.1 (1)(i)** which provides:

(i) “Except where these Rules provide otherwise, the court may dismiss or give judgment on a claim after a decision on a preliminary issue.”

[77] In addition **Rule 26.3 (3)(b)** states that:

“The Court may also, in addition to all other powers under these Rules, strike out, at a case management conference or otherwise upon an application on notice, a statement of case or part of a statement of case if it appears to the court

(b) that the statement of case or the part to be struck out discloses no reasonable ground for bringing or defending a claim.”

DISCUSSION

Whether the Court has Jurisdiction under Part 68 of the CPR

[78] On an interpretation of the relevant rules of the **CPR**, the court has the power to dismiss or discontinue proceedings both generally and in Probate Matters. The **CPR** also give the Court the general power following a determination of a preliminary issue to strike out a claim where there are no reasonable grounds.

[79] However **Rule 15.3 of the CPR** is instructive in relation to Probate matters. That Rule clearly states that

“The court may give summary judgment in any type of proceeding except...

(e) a probate proceeding.”

[80] I also note that **Rule 12.2** specifically provides that default judgment may not be obtained in a Probate Action.

[81] Since the **CPR** clearly prohibit the grant of both summary judgment and default judgment in relation to Probate matters the Defendant’s submissions that the principles for the grant of summary judgment should be applicable in the present case must fail.

[82] While the relevant rules reveal that the court has the power to dismiss a contentious Probate matter as provided in **Rule 68.9** it is clear that that power is not equivalent to the grant of a summary judgment

determined on the merits of the pleadings. Put simply the Court has the jurisdiction to dismiss a probate matter, but not the jurisdiction to determine it summarily.

Conditions Precedent to dismissal of a Probate Action

- [83] So what are the considerations which the Court must take into account with regard to dismissal of a Probate matter? It is clear that the considerations in dismissing a Probate Matter differ from those with regard to the grant of summary judgment.

Williams, Mortimer and Sunnucks on Executors Administrators and Probate - Sweet and Maxwell in the nineteenth edition at **paragraph 39 - 07** provide some guidance on the issue.

“Dismissal of a probate action might be appropriate, for example, where a party failed to disclose any necessary interest in his pleadings or they were otherwise frivolous or vexatious, or a party had failed to comply with an order of the court or was guilty of undue delay.” In such circumstances the party seeking dismissal of the action or the court might well require formal pronouncement for or against a will.

- [84] The case of **Wylde v Culver [2006] All ER (D) 172 (Apr)**, a case which dealt with an application for a discontinuance of a probate matter, pursuant to **Rule 57.11 of the CPR, U.K.** (equivalent to **Rule**

68.9 of the CPR Barbados), provides guidance. In that case, the court ruled that in considering whether to grant permission to discontinue probate proceedings, the relevant question was whether, viewed objectively, there was at the time of the discontinuance a serious issue to be resolved in relation to the Will. At page 4 the Deputy Judge stated that:

“Probate claims are not simply proceedings between the parties. There are likely to be others affected by the outcome of the proceedings... There is no doubt that the Court may refuse permission to discontinue, where it considers that there is a serious question, which should be decided by the Court (Paragraph 20).”

[85] It is evident then that the power granted in **Rule 68.9 of the CPR** to dismiss does not give the Court power to determine a probate matter summarily. The Court has the power to dismiss a matter where there is a procedural error or where there is no serious issue to be tried. Where any legitimate contention to a claim exists, due to the nature of probate proceedings, the matter must be ventilated by a full trial.

[86] By way of contrast, the test in relation to summary judgment is that of ‘real prospect of success’ and is a consideration of the likely outcome. In the Jamaican Court of Appeal case of **Stewart, Reid and Bay Roc Ltd v Samuels JM 2005 CA 66**, Harrison JA stated that “the prime test being ‘no real prospect of success’ requires that the learned trial judge

do an assessment of the party's case to determine probable ultimate success or failure. Hence, it must be a 'real prospect' and not a 'fanciful' one. The judge's focus is therefore in effect directed to the ultimate result of the action as distinct from the initial contention of each party." Harrison JA distinguished the 'good arguable case' and 'serious issue to be tried' tests from 'real prospect of success' stating that the former tests are a preliminary assessment of the party's contention in contrast to an ultimate result"

[87] In contentious Probate proceedings where the circumstances under which a Will is executed are such as to excite the suspicion of the Court, the Court ought not to pronounce in favour of the Will unless the suspicion is satisfactorily removed. This in effect amounts to a serious issue to be tried.

[88] The case of **Tyrrell v Painton C.A. 1893** is instructive in this regard. The rule was that in circumstances where a person involved in the making of the testamentary document benefits, the suspicion of the court is excited, and the onus is on that party to quell such excitement. Lindley L.J. expanded the rule stating that this

“extends to all cases in which circumstances exist, which excite the suspicion of the Court and whatever their nature may be, it is for those who propound the Will to remove such suspicion, and to

prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the Will”.

[89] In that case, a second Will was made two days after the original Will, naming a friend of the Testatrix as the sole beneficiary. Lindley LJ stated that he found nothing to throw any suspicion on the first Will and no reason to doubt that that had been the intention of the Testatrix at the time. In relation to the second Will however, the Judge’s suspicions were excited. He stated that there was no evidence to suggest that the Testatrix had changed her mind in the short time between the two documents. There was also evidence that the Testatrix had complained about the beneficiary of the second Will stating that she was glad to have cut him out of the Will. The Testatrix had also complained about a strange man being brought to her room on the day the second Will was executed.

[90] Against this background, the Court held that the doubt raised was not removed by the Defendant’s evidence. Lindley LJ stated that the question to be determined is whether the Testatrix knew and approved of the new Will and it was for the one propounding the Will, to prove

that she did. In this case the question of undue influence and fraud was not assessed, as the initial suspicion was not removed.

[91] In **Mackenzie v Handasyde 2 HAGG.ECC 212**, a codicil was made seven months after a Will and one month prior to the death of the testator. The codicil altered the Will to benefit the Testator's son and was drawn up by a solicitor retained through the son. The judge stated at paragraph 218,

“On the face then – on the very surface of the transaction – the affair is suspicious, and with the admitted dissatisfaction of the son at both the Wills – the last only executed six weeks before, by which the change in Mackenzie's legacy from sterling to stock was made, the Court would require the clearest possible evidence of the factum of this codicil”.

The Court stated at paragraph 224:

“it cannot but hold that this conduct and the whole transaction bear such strong marks of unfairness, and are exposed to such suspicions of fraud, that it must pronounce against the codicil...”.

In this instance again the suspicions were sufficient on their own to bar the pronouncement.

Application of the Doctrine of suspicious circumstances to the present matter.

[92] The evidence as given, by Ms. Nicole Nurse Attorney-at-Law, is of particular note. Ms. Nurse stated that the Defendant called her around

February 2012, indicating that the Testatrix was desirous of buying a property with him and that the Testatrix intended to pay for the property from the sale of another property of hers. Ms. Nurse found this odd and informed the Defendant that she would need to speak to the Testatrix. The Testatrix indicated during a phone call that she did not want to sell her property and enter into the purchase of a property jointly with the Defendant. Ms. Nurse then suggested an in person meeting.

[93] The Defendant brought the Testatrix to Ms. Nurse's office on the 26th of March 2012. It is Ms. Nurse's evidence that the Testatrix was spoken to in the absence of the Defendant. When asked in his absence if she indeed wanted "to give that man your house?" she responded in the negative by shaking her head. The Testatrix further stated that the deposit, which the Defendant said he was going to contribute, was her money as he had none, and further that he obtained money from collecting rent from her property and she did not know what he had done with it. As a result of this conversation, Ms. Nurse informed the Defendant that she would not follow the instructions as given by him.

[94] On the 26th of April 2012, the Testatrix called Ms. Nurse to visit her at the QEH to take instructions regarding changes to her Will. These changes were completed by the 30th of April 2012, and the Will was

executed on that date. The Testatrix also executed a Power of Attorney authorizing the Claimant to act on her behalf. According to Dr. Andre Brathwaite, Dr. Joanna Brathwaite examined the Testatrix on the 27th of April 2012, and determined that she possessed the capacity to sign such documents. In that Will the Testatrix left her property to her family members. The Court notes that this occurred subsequent to the Defendant's representation that the testatrix was desirous of owing property with him.

[95] It is the Defendant's evidence that subsequent to these events Attorney-at-Law George Bennett was retained, and the May Will was executed on 21st May 2012, naming him as Executor and sole beneficiary, along with a revocation of the previous Power of Attorney to the Claimant and new Power of Attorney in favour of the Defendant.

[96] The Court notes the short period between the two Wills, as well as the fact that Testatrix indicated to Ms. Nurse, in the absence of the Defendant that what she had agreed to in the presence of the Defendant, was not in fact her intention. The Court also notes the evidence of Dr. Sharon Harvey, that during the period between the examination and prior to the April Will and the execution of the May Will. The Court also notes the evidence of Dr. Andre Brathwaite that the capacity of the

Testatrix could not be verified after the execution of the May Will. Against this background I find that there are suspicious circumstances surrounding the execution of the May Will.

[97] Petra Cato's affidavit does provide some evidence to explain the change in the testamentary documents. She deposed that on one occasion she visited the Testatrix who told her that she was upset with her family, and that they had a surprise coming. She however did not state what that surprise would be. This is evidence which should be tested at trial to determine the weight to be given to it.

[98] At this time therefore the Defendant has not removed any of the suspicions raised. This Court cannot propound the May Will in circumstances where it has suspicions and in any case the Defendant has not moved this Court to do so.

[99] In the present matter, the issues arising on the pleadings present a serious issue to be tried. The claims of undue influence and fraud have given rise to suspicions, which can only be allayed through full ventilation at trial. I therefore consider that to dismiss the matter in these circumstances would be inappropriate.

Whether the Court has the necessary Jurisdiction under Rule 26 (1) (1) (i) or 26.3 (3) (b).

[100] **Part 26** deals with the Court's general case management powers. **Rule**

26.1 (1) (i) provides that:

“Except where these Rules provide otherwise, the Court may:

- (i) Dismiss or give judgment on a claim after a decision on a preliminary issue.

[101] The previous discussion in relation to **Rule 68.9** which addresses dismissal and discontinuance of Probate Matters is also applicable here. Since **Rule 68.9** provides for Probate Matters, I consider that **Rule 26.1 (1) (i)** is not applicable here. I have already outlined the circumstances under which a Probate matter can be dismissed and the present case is not one since there is a serious issue to be tried.

[102] Finally I turn to **Rule 26 (3) (3)** which deals with striking out. The Defendant has applied to strike out paragraphs 8 and 11 of the Claimant's Statement of Case.

[103] This application has been made despite the fact that the Claimant has filed Affidavits and witness statements in the Claim and has pleaded undue influence and fraud in his statement of case. In addition, suspicious circumstances have been raised which place the burden on the Defendant to remove them. The application to strike out is therefore not appropriate in this case.

DISCHARGE OF THE INJUNCTION

[104] In relation to the question as to whether the injunction should be discharged the case of **Toojays Ltd v Westhaven Ltd CA No. 14 of 2008** elaborates on the tests to be applied in the granting of and discharge of an injunction. Burgess JA confirmed that **Section 44 (b) of the Supreme Court of Judicature Act, Cap. 117A** confers a discretionary power on the High Court to grant a mandatory or other injunction. In its inherent jurisdiction, the High Court has discretionary power to discharge or not discharge an injunction so granted. Burgess JA identified the two questions to be determined in the granting and discharge of an injunction namely, whether there is a serious issue to be tried and secondly where does the balance of justice lie.

[105] I consider that the issues of undue influence and suspicious circumstances are serious issues to be tried in this matter. The balance of justice leans in favour of maintaining the status quo, if this is disturbed prior to the grant of probate, the possible depletion of the property may not be adequately remedied with damages.

[106] In the circumstances I consider that there is no reasonable ground to discharge the injunction at this time.

DISPOSAL

[107] The Court's responsibility in determining testamentary intention is weighty, as the true intent of the Testatrix must be protected. I consider that the pleadings raise serious issues in relation to the Wills, issues which can only be resolved at a full trial.

[108] The Application to dismiss the matter or strike out paragraphs 8 and 11 of the Claimant's **Amended Statement of Claim** is therefore denied and the Defendant's application is dismissed. The injunction is to continue until trial.

[109] I will hear the parties as to costs.

Michelle I. L. Weekes

MICHELLE I. L. WEEKES
Judge of the High Court

2020-08-29

