

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Claim Suit No: 641 of 2019

BETWEEN:

DESIREE MARGARITA DIAZ

CLAIMANT

AND

SUZANNE DEBORAH JOHNSON

1st DEFENDANT

**(As Executrix for the Estate of
Patrick Anthony Diaz)**

FELIPE JOHATHAN DIAZ

2nd DEFENDANT

Before: The Hon. Madam Justice Shona O. Griffith, Judge of the High Court

Date of Hearing: 2020: 13th July

**Date of Decision: 2020: 21st September (Oral)
11th November (Written)**

Appearances:

Mr. Bryan L. Weekes for the Claimant

**Mr. Barry Gale QC in association with Mrs. Laura Harvey-Read for the
1st Defendant**

**Mrs. Marguerite Woodstock-Riley in association with Ms. Amanda Riley-
Jordan for the 2nd Defendant**

*Contentious probate claim - Application to dismiss - CPR Rule 68.9 - Basis for
dismissal - Striking Out and Contentious Probate Claim - CPR Rules 26.3(3)(a)&(b)*

RULING

Introduction

[1] This is an Application filed by the 2nd Defendant herein, for the dismissal of the Claimant's contentious probate claim which was filed in March, 2019 under CPR Part 68. The Claim is for revocation of the grant of probate issued in March, 2017, to the 1st Defendant, the Executrix of the Estate of Patrick Diaz, deceased. Patrick Diaz was the father of the Claimant and both Defendants. The Claimant alleges that her deceased father not only lacked testamentary capacity to make the will which he executed in December, 2015 but also that he neither knew nor approved of its contents. In the alternative, the Application seeks the striking out of the Claim pursuant to Rules 26.3(3)(a)&(b), or pursuant to the inherent jurisdiction of the Court. The 1st Defendant joins with the Application to dismiss, whilst the Claimant resists same on the basis that the matter is one properly determined by a trial on its merits.

Issues

- [2] The issues which arise for determination are as follows:-
- (i) What is the scope of the Court's power of dismissal under Rule 68.9(2)?
 - (ii) Should the Court exercise its discretion to dismiss or strike out the Claim as prayed?

Factual and Procedural Background

[3] The Claimant Desiree Diaz is the daughter of the deceased Patrick Diaz, who died in March, 2016. The deceased left a will executed on the 10th December, 2015 by which he left his Estate to his youngest child Felipe Diaz, the 2nd Defendant. The 1st Defendant Suzanne Johnson is also a child of the deceased and is the Executrix of the will, which was probated in common form in March, 2017. Desiree Diaz alleges that the deceased lacked testamentary capacity when he executed his will in December, 2015 as he was suffering from severe dementia, as well as had a tumor in his brain. By affidavit evidence, she also alleges that the deceased was unable to speak at the time of execution of his will, due to his medical condition. The Claim alleges that the deceased neither had testamentary capacity nor did he know and approve of the contents of his will. In particular, the Claim prays the following relief:-

- “1. A Declaration that the will of Patrick Anthony Diaz dated the 10th Day of December, 2015, is invalid;*
- 2. An Order revoking the High Court’s Grant of Probate in No. 23 of 2017 to the Estate of Patrick Anthony Diaz issued on the 3rd day of March, 2017 to Suzanne Deborah Johnson in relation to his purported will of the 10th day of December, 2015 pursuant to s.18(2) of the Succession Act Cap. 249 of the laws of Barbados.”*

[4] The Claimant alleges that the last will and testament of the deceased is a will executed in October, 2009, of which she is the sole executor and one of the named beneficiaries. (There is no claim for that will to be admitted to proof by the Court). In addition to the statement of claim, the Claimant filed affidavits on the 13th May, 2019, 20th February, 2020 and a witness statement sworn by a brother (Antonio Diaz, not a party), on 8th May, 2020. Affidavits in response to the Claim were filed on the 1st November, 2019 by the 1st Defendant herself and on her behalf, by the attorney-at-law who prepared the will and who was present at its time of execution. The 2nd Defendant filed an affidavit in response to the Claim on the 11th July, 2019 and on his behalf, two other affidavits were filed by (i) a sister of the deceased (Patricia Wentworth); and (ii) a physical therapist who worked with the deceased whilst he was a patient at the nursing home, before he died. There is therefore a significant body of evidence before the Court, however there was no first hearing (case management) of the matter in accordance with Part 27.2(2) of the Rules.

The Application and Submissions of Counsel

Submissions on behalf of 2nd Defendant

[5] In March, 2020 the 2nd Defendant filed an application to dismiss the Claim, pursuant to Rule 68.9 of the CPR 2008. This Rule provides as follows:-

“68.9 (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 acknowledgment 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.”

- [6] To the extent that the Rule does not prescribe any grounds for dismissal, Queen’s Counsel on behalf of the 2nd Defendant categorises the Court’s discretion under the Rule as wide, to be exercised in keeping with the overriding objectives of the CPR¹. The Application is also advanced on the alternative bases of dismissal pursuant to the Court’s inherent jurisdiction, or for the striking out of the claim, pursuant to Rule 26.3(3) on the grounds that:-
- a. The statement of claim is an abuse of the Court’s process;
 - b. The statement of claim discloses no reasonable ground for bringing a claim; or

¹ CPR 2008 Part I

Notwithstanding the multiple grounds for striking out or dismissal advanced by the 2nd Defendant, the Court considers the Application to rest on two main contentions. Firstly, that the Claimant's case, standing on its own, even when taken at its highest, is bound to fail. Secondly, when assessed with reference to the relative strength of the respective cases, the Claimant's case is likewise bound to fail.

Factual bases of Application

[7] The attack on the Claimant's case, when considered on its own, takes into account the following:-

- (i) The Claimant's grounds for revocation of the grant of probate, namely
 - lack of testamentary capacity, and lack of knowledge and approval of the contents of the will – are unsupported by the totality of the medical evidence produced by the Claimant;
 - In this regard, the Claimant's medical evidence consists of two letters and a medical report (made for the purposes of the claim), from Dr. Steven Moe, who was not the deceased's regular doctor, and who saw the deceased on only one occasion in November, 2015. Most importantly however, Dr. Moe's statements do not state and are not able to rise to the conclusion that the deceased lacked testamentary capacity at the date of making the will.

- Specifically, Dr. Moe's first letter (dated 6th November, 2015) spoke of the deceased exhibiting '*signs of dementia*' and that the deceased was '*unable to look after his own affairs*'. In his further letter dated 1st April, 2019 which was written to the Claimant's then attorney, Dr. Moe stated that the deceased '*had dementia*' and according to the Defendants, Dr. Moe also speculated that a lesion on the deceased's brain was the likely cause for his dementia and for the deceased being *non compos mentis*.
- (ii) It is submitted that none of Dr. Moe's statements in either of the two letters, are capable of establishing that the deceased lacked testamentary capacity, or lacked knowledge and approval of the contents of his will;
- (iii) It is also pointed out that the medical evidence does not support the Claimant's pleading that the deceased was suffering from '*severe dementia*.'
- (iv) Upon the request of the Claimant's attorneys made in December 2019, (which was after commencement of the Claim), Dr. Moe provided a report based a specific question put by the Claimant's attorneys as to the deceased's mental state and his capacity to make his will.

The 2nd Defendant contends as follows arising from the Doctor's report which was issued in February 2020:-

- The doctor did not answer the specific question posed by the Claimant's attorney and it is submitted that he is unable to do so. As a result, Dr. Moe's evidence cannot be said to support the claim;
- Dr. Moe's medical experience and background is that of cardiology; his examination of the deceased arose out of a referral for a second opinion on the deceased's cardiac issues at the time.
- Dr. Moe's report acknowledges and accepts that his area of specialty was not that which would enable him to make a proper assessment of the deceased's neurological condition.
- Dr. Moe's assessment of the deceased was incomplete as he was not in possession of sufficient medical information to even make a referral for a full dementia assessment;
- Dr. Moe distances himself from any attempt to make any pronouncement on terms of 'sound mind' and 'compos mentis'.
- Dr. Moe had recommended that the deceased execute a power of attorney, in case his memory loss progressed.

It is submitted that if Dr. Moe was able to recommend that the deceased execute a power of attorney, it was not open to him to opine that the deceased lacked testamentary capacity;

- Finally, Dr. Moe's report reveals that due to a lack of testing, he was not able to ascertain the extent of the deceased's dementia.

(v) In addition to the weak medical evidence, it is pointed out that the Claimant herself gave no particulars as to why she claims that the deceased lacked testamentary capacity or did not know or approve of the contents of his will.

[8] As a result of the weakness of the medical evidence and unsupported assertions of the Claimant, Queen's Counsel's position is that the claim is bound to fail. Contrary to the weak case of the Claimant, Queen's Counsel for the 2nd Defendant contrasts the evidence on behalf of the Defendants, as speaking overwhelmingly in support of the validity of the will:-

(i) The will was drafted by an attorney-at-law based on instructions received, and it was reviewed by three of the deceased's children.

Accordingly, the will was not prepared in secret;

(ii) The attorney visited the deceased in person where she read over the will to him and he communicated his understanding and agreement;

- (iii) The will was witnessed by the attorney-at-law as well as one of the deceased's nurses;
- (iv) Subsequent to the will, the deceased, executed (by affixing his mark in the presence of others), a power of attorney, which was prepared by the same attorney-at-law on the deceased's instructions. Such instructions were given by the deceased in the presence of the deceased's son and granddaughter. The power of attorney was executed by the deceased at his home in the presence of the attorney-at-law, who read over same to the deceased. The deceased affirmed his instructions for the power of attorney and confirmed his acceptance of what was read over to him by nodding his head and then affixing his mark. The power of attorney was witnessed by the Attorney-at-Law;
- (v) A number of persons are able to speak to the deceased's mental state prior to or after the making of the will on December 10th, 2015, namely:-
 - (a) Patricia Wentworth (sister) - spoke to the deceased, a few days before his stroke in November, 2015 and described the conversation as 'perfectly normal. Patricia also says that the deceased had discussed what was effected by the will long before he fell ill;

- (b) Zena Miller, a psychiatric nurse and operator of a senior citizen's residence speaks to the deceased being able to communicate and being mentally competent subsequent to the execution of the will;
- (c) Owen McCollin, a physical trainer who worked with the deceased several times a week, found him able to understand and communicate in spite of not being able to speak;
- (d) Letter dated 23 May, 2019 from Dr. Karen Collins who treated the deceased on various occasions from February, 2011, to the last occasion she saw him in October, 2015. At that time the deceased was mentally capable of making his own decisions;
- (e) Letter dated 23 December, 2015 from Dr. Claudia Martindale (the deceased's general practitioner) to First Caribbean International Bank, stating that albeit unable to speak or write that the deceased was of sound mind and understanding of his surroundings;
- (f) Felipe Diaz, the youngest child of the deceased, who lived with his father his entire life, by affidavit attested to his father still being mentally alert and able to communicate after his stroke in November, 2015.

Felipe was also present when the will was executed and states that his father was able to communicate that he understood the will when it was read to him, and that he recognized each of his children up to the day he died.

Legal basis of Application

[9] The Application as advanced in law on behalf of the 2nd Defendant is summarized in the following manner:-

A. Dismissal pursuant to Rule 68.9(2)(b)

(i) Queen's Counsel for the 2nd Defendant observes that CPR Rule 68.9 gives no guidance in relation to the grounds upon which the Court is entitled to dismiss a probate claim. However, given the Court's obligation to give effect to the factors comprising the overriding objective when applying any rule, Queen's Counsel submitted that the factors set out in Rule 1.1 can properly guide the Court in the exercise of its power to dismiss under Rule 68.9(2)(b). Queen's Counsel then assessed the factors comprised in the overriding objective against the evidence before the Court as follows:-

- Ensuring parties are on an equal footing – the 2nd Defendant will be prejudiced by the continuance of the claim.

He has an unresolved status in Barbados as he is no longer a student, does not earn an income, and the proceedings would have the effect of depleting the Estate;

- Saving expense – as the Claimant’s case is bound to fail, the expense of a trial is not justified. The 2nd Defendant is unemployed and unable to work. The deceased’s estate comprises only shares and as such the litigation is bound to diminish the Estate’s only asset. There is no guarantee of recovery of costs from the Claimant which could result in further expense to the 2nd Defendant;
- Complexity of Issues – given the weakness of the Claimant’s case, no issue of complexity arises;
- Financial position of the parties – The 2nd Defendant has no income, the Claimant is an accountant;
- Expedience and Fairness – the weakness of the Claimant’s case does not justify the further delay to the 2nd Defendant in having the matter resolved;
- Resources of the Court – The case already has 9 witnesses and as such would require a significant amount of the Court’s time.

Having regard to all of the above factors, the submission is that the dismissal of the claim as enabled under Rule 68.9 would be in furtherance of the overriding objective to deal with cases justly.

B. Strike out – Abuse of Process, Rule 26.3(3)(a)

[10] Queen’s Counsel for the 2nd Defendant submits that the Court should consider the underlying rationale of the Court’s power to strike out a statement of case. As set out in the **Caribbean Civil Court Practice**², the power to strike out as a means of achieving the overriding objective of the Rules, is clear. Further reference is made to **Halsbury’s Laws of England**³, which speaks to the power to strike out as being necessary not only to enforce basic rules of pleadings but also to dispose of proceedings which are ‘*hopeless, baseless or without foundation in law or in equity or otherwise and abuse of the process of the court.*’ It is submitted that there are two competing principles to be balanced, namely (i) that a party should not lightly be driven from the seat of justice; and (ii) that dismissal of a claim may sometimes be necessary in order for justice to be done.

² 2011, Note 23-24

³ Vol. 37 (Practice and Procedure), para 430

[11] Queen's Counsel also commends onto the Court, principles further expressed in **Halsbury's**⁴ pertaining to striking out pleadings which are an abuse of process. Where the court's process is misused, used in bad faith as a means of vexation, oppression or for ulterior purposes, the Court is justified in striking out the case. The Court's powers under its Rules are in addition to its inherent jurisdiction to strike out pleadings which are frivolous or vexatious, or bound to fail as being incapable of proof and without a solid basis. Queen's Counsel for the 2nd Defendant categorises the Claimant's case in the above light given the lack of evidence outlined at paragraph 7 supra, versus the plethora of the Defendants' evidence, outlined at paragraph 8. Having regard to the lack of evidence in support of the Claimant's case, Queen's Counsel submits that the claim is motivated by malice, and the lack of evidence establishes that the Claimant could have not have held an honest belief in the success of her claim at the time of commencing same. The Claim is commended unto the Court as 'unwinnable' and as such deserving of being struck out as an abuse of process pursuant to Rule 26.3(3)(a).

[12] Further to the Claimant having no honest belief in the success of her claim, Queen's Counsel points to the progress of the Claim, including its commencement some 3 years after the deceased's death in March, 2016.

⁴ Ibid @ para 434-435

In terms of the evidence, Queen's Counsel points out that after filing affidavits in support of the Claim in May, 2019, the Claimant was afforded additional opportunities in January, 2020 and March, 2020 to bring forth further evidence in support of her claim. Even after those opportunities, it is submitted that the Claimant has failed to put forward any cogent evidence that the deceased was not of sound mind or did not know and approve of the contents of his will. The Claimant's own language, is also submitted to be equivocal, in respect of her assessment of the deceased's mental state.⁵

C. Strike Out – No reasonable ground for bringing the Claim, Rule 26.3(3)(b)

[13] Queen's Counsel submits that the Claim ought to be struck out for want of any reasonable ground for bringing the claim pursuant to Rule 26.3(3)(b), having regard to the legal deficiencies of the claim expressed in the manner:-

- (i) The statement of claim is not particularized as required by Rule 68.8, in that there are no particulars given in respect of the plea that the deceased was not of sound mind;
- (ii) Whilst accepted that the burden of proving a testator's knowledge and approval of a will rests on the party seeking to propound the will, that burden is satisfied prima facie by execution of the will by a competent testator.

⁵ Reference to paragraph 10, Claimant's affidavit filed 13th May, 2019

It is a general rule that due execution by a competent testator coupled with evidence of the will having been read over or the contents thereof otherwise brought to his notice, amounts to conclusive evidence of the testator's knowledge and approval of the contents of his will. There is no conclusive presumption in that regard, but whilst it remains open for a tribunal of fact to find to the contrary, the presumption of knowledge and approval (by virtue of due execution by a competent testator) must be rebutted by the clearest evidence.⁶

- (iii) The Claimant in this case does not dispute due execution of the will and there is cogent evidence that the will was read over to the deceased – by an attorney-at-law in the presence of several of his children. The Defendants have therefore discharged their primary burden of testamentary capacity and knowledge and approval by proof of due execution. The Claimant is unable to prove to the contrary.
- (iv) Further, a duly executed will, rational on its face, gives rise to a presumption as to the competence of the testator, in the absence of evidence to the contrary⁷. In the instant case, there is no evidence that the will is irrational on its face.

⁶ Halsbury's Laws of England, Vol 17, Paras 905&906; paras 11.2-3 of submissions on behalf of 2nd Defendant.

⁷ Tristram & Coote's Probate Practice, 13th Ed., paras 34.26; 34.29; para. 11.4 of submissions on behalf of 2nd Defendant

The 2nd Defendant, the youngest child of the testator, was a minor and student at the time of execution, whilst the remaining children were adults. It was rationale for the deceased to have made provision for the 2nd Defendant in those circumstances. Further, the will was not executed in secret, several children (none of whom were included) as well as witnesses outside of the family were present at the execution of the will. Due to the above, contrary to the suggestion of the Claimant, there were no suspicious circumstances attendant upon the execution of the will;

- (v) The material time at which mental capacity must be shown is at the time of execution of the will. Inconsistencies in a testator's mental health will not be sufficient to invalidate a will, once the will can be shown to have been made during a lucid period.⁸
- (vi) Finally, mental capacity is not equivalent to a test of memory, so that dementia is not in and of itself indicative of a lack of testamentary capacity.⁹

⁸ Banks v Goodfellow (1870) LR 5QB 549; Para 11.5 submissions on behalf of 2nd Defendant

⁹ Simon v Byford [2014] EWCA 280; Para 11.5 *ibid*.

Having regard to the lack of evidence on the part of the Claimant; the strength of evidence put forward by the Defendants, and the applicable law regarding due execution which raise presumptions as to the deceased's mental capacity and knowledge and approval of the contents of his will, it is submitted on behalf of the 2nd Defendant that the Claimant has no reasonable ground for bringing the claim which therefore ought to be struck out.

1st Defendant's Submissions

[14] Queen's Counsel on behalf of the 1st Defendant joined in support of the 2nd Defendant's Application to dismiss the Claim, as well as adopted the submissions filed in respect of the Application. In addition to the submissions adopted, Queen's Counsel for the 1st Defendant concentrated on the specific case alleged by the Claimant and the failure of the case put before the Court to establish any reasonable ground for bringing the claim. The submissions on behalf of both Defendants do not differ in substance, only in terms of emphasis of what is being commended for the Court's consideration. Queen's Counsel for the 1st Defendant drew the Court's attention to the medical evidence in some detail, particularly in terms that the grounds for revocation of the grant (lack of testamentary capacity and want of knowledge and approval of the contents of the will), were pleaded on the basis of medical evidence.

[15] With specific reference to the medical evidence filed in support of the Claim, Queen's Counsel for the 1st Defendant points out that that evidence has not concluded that the deceased lacked testamentary capacity. The terminologies used in the letters from Dr. Moe speak to the deceased having 'exhibited signs of dementia' and being 'unable to look after his own affairs' and neither of these statements amount to a lack of testamentary capacity. Additionally, it is pointed out that the Claimant's attorney posed a specific and apt question to Dr. Moe regarding testamentary capacity, however the doctor failed to answer this question. Further, the doctor's report revealed additional shortcomings of his medical evidence in relation to the issue of testamentary capacity. Namely, Dr. Moe's specialty as a cardiologist limited his ability to speak to the deceased's mental capacity; Dr. Moe himself recognized his limitation in that regard, having recommended additional tests; Dr. Moe did not have primary care of the deceased and saw him on only one occasion.

[16] Having regard to these limitations in the medical evidence, the Claimant's case is bound to fail. On that basis, it is submitted that there is no reasonable ground for the Claimant to have brought the Claim. On the issue of whether or not the Court should exercise its discretion to strike out the claim, the greater consideration as per the overriding objective is costs.

The Estate is being and will continue to be depleted from the costs of the claim which means that the inheritance of the 2nd Defendant is being diminished. The Claim does not allege that the will was not duly executed which affords to the Defendants, the presumptions in favour of capacity as well as knowledge and approval of the contents of the will.

- [17] Given that the Claimant is not challenging the due execution of the will, it became the Claimant's burden to prove a want of testamentary capacity and lack of knowledge and approval of the contents of the will, on the part of the deceased. With respect to medical evidence, the Court is invited to disregard the evidence of Dr. Herbert which was mentioned in the February, 2020 report of Dr. Moe and insofar as Counsel for the Claimant raises the issue of the deceased having been affected by medication he was being administered, this issue has not been pleaded as any basis for want of testamentary capacity. Accordingly, the submissions on behalf of the 1st Defendant support the Application for the claim to be dismissed pursuant to Rule 68.9 or struck out, pursuant to Rule 26.3(3)(b).

Submissions of the Claimant

- [18] Counsel for the Claimant firstly contends that the jurisdiction of the Court in relation to probate matters is to be apprehended differently from other matters within the civil jurisdiction of the court.

The reason for that difference is that the last will and testament of a deceased person is placed in the charge of the court, and it is submitted that the exclusion of the application of CPR Part 15 (summary judgment), underscores the special consideration to be afforded by the court in a probate action. The power to dismiss under section 68.9(2) should be reserved for cases that are hopeless, Counsel for the Claimant submits that the case at bar is not to be categorized as such.

- [19] In relation to the factual basis of the case, it is submitted that regardless of what terminology is adopted, the deceased was at the time of execution of his will, an extremely ill man, who was suffering from cancer which had spread to his brain. The deceased's normal brain function was affected and at the time his will was made he was unable to speak and is said to have communicated with others only by moving his head. The circumstances of execution of the will are such that the instructions for its preparation were not given by the deceased to the counsel who prepared the will. The instructions were instead given to counsel via the 1st Defendant, who received information from sibling Antonio Diaz, who himself is said to have been told about the deceased's wishes by the deceased's sister Ms. Wentworth. The evidence of the Defendants is that the deceased was only able to communicate by nodding his

head when told about the details of his new will and at the time of its execution.

[20] The deceased's inability to communicate therefore is a circumstance that can cast doubt as to his capacity and ability to have given instructions for his will. Further, the effect of the new will was to have revoked an earlier will, in which most of his children were beneficiaries. The new will disinherited all of his children except the 2nd Defendant. It is acknowledged that whilst there is no challenge to the due execution of the will, there is sufficient evidence raised by the Claimant which raises doubt as to the deceased's testamentary capacity at the time, thereby requiring the Defendants to affirmatively prove the will. It is submitted that the claim ought not to be dismissed without the Court having the opportunity to assess the evidence of the witnesses at a trial.

[21] The main legal contentions of the Claimant having regard to the evidence, are summarized as follows:-

- (i) The burden of proving testamentary capacity rests on the person propounding the will. That burden is satisfied by proof of due execution by a competent testator.¹⁰ In this case however, the Claimant is challenging the competence of the testator.

¹⁰ *Cleare v Cleare* (1869) LR 1 P&D 655; para 10 on behalf of the Claimant

- (ii) In the case of doubt as to testamentary capacity however, the executor is required to prove testamentary capacity by affirmative evidence.¹¹ The evidence required for proof of testamentary capacity could be medical evidence, but the evidence of lay persons may be accepted by the Court.¹² Insofar as the Defendants have put forth evidence that the deceased was of sound mind, the medical evidence is open to question and interpretation, and evidence of the lay persons is based on their impressions in respect of which the Claimant should be allowed to test by means of cross-examination at trial.
- (iii) The requirement for testamentary capacity is a sound mind, which by section 60 of the Succession Act, Cap. 249 means that at the time of execution of a will, a testator must have the capacity to understand and recall the extent of his property and to appreciate what he is giving and to whom. Given the deceased's inability to communicate and the extent of his illness, the Court should be obliged to inquire into the knowledge and approval of the contents of his will.

¹¹ Halsbury's Laws of England, 4th Ed. Vol. 17 para. 903; para 11, submissions on behalf of the Claimant

¹² Banks v Goodfellow (1870) LR 5Qb 549; paras 12-13, submissions on behalf of Claimant

- (iv) The testator's actions should also be rational in respect of the dispositions made.¹³ The issue of rationality should be investigated given that the deceased revoked an earlier will in which most of his children benefited, with a will which disinherited all of his children except one.
- (v) The terms of the will and its circumstances of execution should excite the suspicion of the Court as to its validity in terms that:-
- The will was prepared on the basis of verbal instructions only, as the testator was unable to speak;
 - The instructions were not communicated directly by the testator but from a third party;
 - The will is at odds with a previous will and disinherits all but one of his children;
 - The testator was suffering from a mental incapacity, namely, dementia.

[22] Counsel for the Claimant in his written submissions raised additional arguments, not previously addressed in the evidence or pleaded as part of his case:-

¹³ Sharp et anor v Adam et anor [2006] EWCA Civ. 449; paras 14-17, submissions on behalf of Claimant

- The existence of circumstances which should excite the suspicion of the Court;
- Further medical evidence by way of an email written by one Dr. Joseph Herbert to the deceased's sister in April, 2019, recalling his concerns as to the cognitive decline of the deceased. This email was appended to the report of Dr. Moe submitted in February, 2020.
- There are questions in relation to what medications were being taken by the deceased and what effect they did or could have had on his mental capacity.

Queen's Counsel respectively for each Defendant however, objected to Counsel for the Claimant raising these additional issues for the first time in submissions, and urged the Court not to consider them in determining the Application.

[23] Having regard to all of the above, Counsel for the Claimant submits that the matter would not be appropriately dismissed without the Court having the benefit of a full inquiry into the circumstances under which the will of the deceased was executed, by means of a trial. In very brief replies to the submissions on behalf of the Claimant, Queen's Counsel for the 2nd Defendant points out that the email from Dr. Herbert is not part of the Claimant's evidence.

The email cannot be relied upon as evidence as attempted by the Claimant. Further, the Claimant did not plead that the execution of the will ought to excite the suspicion of the Court and as such ought not to be allowed to raise that issue for the first time in submissions.

Discussion and Analysis

Scope of the Application

[24] Rule 68.9(2), upon which the Application to dismiss is based provides as follows:-

“68.9. (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 acknowledgment of service, order that the proceedings 68.9.(1)*

(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.

[25] As is evident, the power to dismiss under CPR 68.9(2) is not defined in scope nor are any grounds prescribed upon which the Court is to exercise its discretion. Further, as acknowledged by respective Counsel for all parties, summary judgment (Part 15), is not applicable to contentious probate proceedings¹⁴ - (Part 68). The Court also observes that default judgments (Part 12) do not apply to Part 68 either.

¹⁴ CPR Rule 15.3(e)

The exclusion of what are essentially summary modes of disposal from application to contentious probate proceedings has caused the Court some concern in relation to the Application for dismissal. This concern arises notwithstanding that the application before the Court is not one filed pursuant to Part 15. For reasons to be illustrated as follows herein, the Court must nonetheless make reference to summary judgment.

[26] A summary judgment application is made on the basis that the case of the claimant or defendant has no reasonable prospect of success and there is no other compelling reason why the case should be disposed of at a trial¹⁵. The consideration of an application for summary judgment requires an assessment of evidence (whether by witness statements filed or otherwise by affidavit), as well as an assessment of the respective statements of case. The test for summary judgment is well known, generally associated with **Swain v Hillman**¹⁶ per Lord Woolf's turn of phrase that the claim or defence has 'no real prospect of succeeding'. Along with this phrase comes the sometimes impractical distinctions made between 'realistic as opposed to fanciful' or 'more than arguable' which can often cause difficulties in application.

¹⁵ CPR Rule 15.2

¹⁶ [2001] 1 All ER 91

[27] In any event, there is some clarity to be had arising from the further statement of Lord Woolf in *Swain*, to the effect that summary judgment applications have to be kept within their proper role and they are not meant to dispense with the need for a trial where there are issues which should be considered at a trial¹⁷. One further well-known qualification of Lord Woolf's test in *Swain*, is that the application should not become a mini-trial, and this is best explained by Lord Hope of Craighead in **Three Rivers DC v Bank of England** (No. 3)¹⁸.

[28] Lord Hope said as follows re summary judgment:-

“94. For the reasons which I have just given, I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is – what is the scope of that inquiry?”

“95. I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he

¹⁷ *Swain v Hillman* supra @ 94-95

¹⁸ [2003] 2 AC 1 @ paras 94-95

offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf MR said in Swain's case [2001] 1 All ER 91 at 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all.”

[29] At this point, one must question why the Court is concerning itself with any question of summary judgment when that is not the application that is before the Court. This question will be answered shortly, but for now it suffices to reiterate the absence of any prescribed grounds for dismissal under Rule 68.9(2). In light of such absence, the Court is obliged to seek guidance from elsewhere, particularly the UK CPR Rule 57.11 which is set out in the same terms as Barbados’ Rule 68.9(2). In contrast to Barbados’ position however, summary judgment is not excluded from the UK’s counterpart Rule 57.11¹⁹.

¹⁹ CPR 24.3(1) – summary judgment may be given against a claimant in any type of proceedings; 24.3(2) – probate proceedings are not amongst the list of excepted matters in respect of which summary judgment may not be given against a defendant.

This position can be illustrated by **Goss-Custard et anor v Templeman et al.**²⁰ in which an application for summary judgment of a probate claim was made on the basis that the claim seeking to prove a will in solemn form, had no real prospect of success. The application was therefore that of the defendants who had counterclaimed for the will to be declared invalid. After referring to the very paragraphs of Lord Hope in *Three Rivers*, as cited above, the court said as follows:-

“7. The criterion to be applied by the court under CPR 24, unlike a trial, is not one of probability, but the absence of reality.

8. The evidential burden is on the applicant to establish that there are grounds to believe that the respondent has no real prospect of success and that there is no other reason for a trial. If credible evidence is adduced in support of the application the respondent becomes subject to an evidential burden of proving some real prospect of success or some other reason for a trial. The standard of proof is not high. As the notes to the White Book 2018 24.2.5 emphasise,

‘The Court hearing a Pt 24 application should be wary of trying issues of fact on evidence where the facts are apparently credible and are to be set against the facts being advanced by the other side. Choosing between them is the function of the trial judge, not the judge on an interim application, unless there is some inherent improbability in what is being asserted or some extraneous evidence which would contradict it’

²⁰ [2018] All ER (D) 20

9. *The other limb of the summary judgment test must also not be overlooked, that there is ‘no other compelling reason [for] a trial’. This is a claim in which the claimants seek a pronouncement for the force and validity of the 2008 Will and the 1st and 2nd defendants by this application seek an order pronouncing against the 2008 Will. The court will only make a grant in solemn form if it is satisfied on the balance of probabilities that the testator was free to make the will, had the requisite testamentary capacity and knew and approved of the contents of the will... Mr. Justice Henderson in *Cushway v Harris* [2012] EWHC 2273 (Ch) at paragraph 8 commented, ‘the court always has a supervisory, and to some extent, investigatory, jurisdiction in probate matters’.*

[30] After setting out the principles he was obliged to consider, the Master in *Goss-Custard* above, set out the evidence which was being commended unto him by both sides. That evidence consisted (inter alia), of expert medical reports pertaining to the deceased’s mental capacity, evidence of known testamentary intention, competing evidence from relatives and persons well known, as to the state of the deceased’s mind in the years leading up to and at the material time shortly before his death. The Master made observations to the effect that the case of the respondent was not inherently improbable, and that the evidence (which supported testamentary capacity), were matters which required ‘*testing at cross-examination.*’²¹

²¹ *Goss-Custard v Templeman*, supra @para 49

The Master concluded:-

“The 1st and 2nd defendants’ arguments are in effect asking me to do what I cannot do at the hearing of a summary judgment application, conduct a summary trial.”²²

And further

“As the 1st and 2nd defendants freely acknowledge summary judgment in a probate claim is unusual, although possible”²³

[31] The Court now returns to the question posed, i.e. - why there is reference to summary judgment, given that the Application before the Court has not sought summary judgment. In fact, Queen’s Counsel for the 2nd Defendant says that the Application is one for dismissal based on the overriding objective, and in the alternative to strike out the claim, on the grounds of abuse of process or there being no reasonable ground for bringing the claim. Queen’s Counsel for the 1st Defendant opined that the exclusion of summary judgment from Rule 68.9 was intended to preclude a claimant from obtaining judgment in summary form in a probate claim. All Counsel were of the view that in the absence of any defining grounds or factors, the scope of dismissal pursuant to Rule 68.9 is wide.

²² Ibid @para 52

²³ Ibid @ para 56

[32] Counsel for the Claimant however, was of the further view that probate proceedings are to be differently regarded, as evidenced by the exclusion of Part 15. The Court is of the view that the scope of dismissal under Rule 68.9 is to be constrained firstly by virtue of the exclusions of default judgment²⁴ and summary judgment. The Court expands upon this view by referring to *Goss-Custard* above, in which it was acknowledged that albeit permitted, summary judgment is still an unusual application in a probate claim.²⁵ In this regard, reference is made to **In The Estate of Langton, Deceased**²⁶ in which the nature of a probate action can be extracted from the following²⁷:-

“In exercising its jurisdiction in probate matters the High Court is acting as successor to the Prerogative Court of Canterbury, and, in so far as the matter is not regulated by Act of Parliament or Rules of Court, it applies the law and practice of that court. A judgment in a probate action pronouncing in favour of a will and granting probate thereof in solemn form is not comparable with a common law judgment in personam. It transfers, nunc pro tunc, to the personal representatives the legal property in the estate of the deceased and, so long as the grant is not revoked, it creates enforceable rights in beneficiaries under the will pronounced for and admitted to probate irrespective of whether or not the beneficiaries were parties to the action. Because such a judgment can affect the rights of persons who are not parties to the action, it was the practice of the Prerogative Court to permit any person claiming an interest in the estate of the deceased, whose rights

²⁴ CPR Rule 12.2; Rule 68.6

²⁵ *Goss-Custard v Templeman*, supra

²⁶ 1964 P 163

²⁷ *Ibid* @ 178-179

could be affected by the grant applied for, to intervene in the action at any stage.”

- [33] It should not be too difficult from this excerpt to comprehend why in relation to a party seeking to propound a will, any form of summary judgment is viewed as unusual even though permitted (by the UK Rules). In relation to a party seeking to impugn a will or revoke a will already admitted to probate in common form, the law can be seen to favour a public interest in upholding the freedom of testamentary disposition of property subject to safeguards against ‘*caprice...artful connivance or sinister influence...*’;²⁸ or ‘*If the human instincts and affections or the moral sense be perverted by mental disease...if reason and judgment or lost...the condition of testamentary power fails.*’²⁹
- [34] Therefore, even though a claim may be brought by someone else, the obligation rests upon the person seeking to propound a will, to affirmatively prove its validity. In fact, at common law, a person whose interest was adversely affected by probate granted in common form could call in the grant by citation and proceed by action for its revocation. This required the personal representative who obtained the probate to prove the will in solemn form.³⁰

²⁸ Banks v Goodfellow [1861-73] All ER 47 @ 54-55

²⁹ Ibid @ 56

³⁰ Tristram & Coote’s Probate Practice (29th Ed., 2002, para 39.11)

In addition to the nature and context of contentious probate actions as illustrated above³¹ the Court makes further reference to **Payne et anor v Payne**,³² in which it is illustrated that there are special features applicable to contentious probate proceedings in the High Court.

[35] These special features include the procedural requirements for filing the claim; the contents of pleadings; extended time for filing an acknowledgment of service of claim; exclusion of default judgment; requirement for the court's permission to discontinue a claim; requirements to lodge a will or grant upon commencement of a claim³³. All of these features are present in Barbados' CPR Part 68, with the addition of the exclusion of the availability of summary judgment. The purpose of examining the regime and underlying rationale governing contentious probate actions, is to ensure that given the absence of prescribed grounds of dismissal under Rule 68.9, the context of the Court's exercise of such powers, is properly informed. With this context in mind, the Court must be particularly mindful of (i) the exclusion of summary judgment to probate proceedings; (ii) the reserve of the UK Courts in applying summary

³¹ Paras 34-35 supra

³² [2018] EWCA Civ 985 @ para 45-47 (in this authority the special provisions were apprehended with reference to the public interest in upholding the wishes of a testator, however the Court can infer a public interest in ensuring that the wishes of the testator are a genuine expression of his will and capacity).

³³ UK CPR Part 57

judgment in a probate claim, even as the same is available under their rules; and (iii) the special provisions applicable to a probate claim.

The Application to dismiss

[36] The Application to dismiss relies on the overriding objective of the Rules to guide the Court's exercise of its power of dismissal. In this regard, Queen's Counsel (for the 2nd Defendant), illustrated each factor of the overriding objective (from Rule 1.1(2)(a-e)), with reference to the ways in which the 2nd Defendant stood to be prejudiced by the Claim. Namely,³⁴ ensuring the parties are on an equal footing, saving expense, dealing with cases proportionately, expeditiously and fairly³⁵. Inasmuch as the Court is required to give effect to the overriding objective, the factors which comprise the overriding objective do not present to the Court any *grounds* for dismissal (or striking out) of a claim. An application to dismiss/strike out must meet some required or recognized basis for either action, and once such basis is established, the overriding objective is then to guide the Court in determining whether or not to exercise its discretion to exercise its power to dismiss or strike out.

³⁴ Submissions on behalf of the 2nd Def. extracted supra @ para. 9A(i)

³⁵ Cf para. 10(i) supra

[37] Reference in this regard is made to **McHugh v McHugh**³⁶. This case concerned an application for dismissal of a claim made by an executor in respect of his deceased's mother's estate, whereby he was bequeathed certain lands by his mother's will. Several years prior to her death however, the deceased executed a deed of transfer of the land to two other sons, in respect of whom title was then registered prior to the deceased's death. After the death of the deceased, the executor son (having obtained a grant of probate) brought an action seeking to prove the will in solemn form and to have the transfer made by the deceased in her lifetime to his brothers, set aside. The defendant brothers entered an appearance to the claim, filed their defence but then filed a motion for the dismissal of the claim

[38] The defendant brothers were successful at first instance in having the claim dismissed. The bequest and will were made in 1987; the deed of transfer to the defendants was executed in 1990; and the deceased died in 1998. The plaintiff's claim was based on his view that he was entitled to the property having improved the lands in reliance on the bequest, and having expended considerable sums on the nursing care of his mother in the years before her death.

³⁶ [2015] IESC 101

The plaintiff alleged inter alia undue influence, lack of independent legal advice in respect of his mother's execution of the deed of transfer to his brothers, breach of promise by his mother and lack of adequate financial provision. As stated, the plaintiff's claim was dismissed primarily on the grounds of undue delay and expiry of limitation. The plaintiff appealed.

[39] On appeal, the court set out the parameters of summary dismissal in a manner which illustrates the Court's position that the overriding objective does not afford grounds for dismissal or striking out of a case. It was stated as follows (emphasis mine):-

“The jurisdiction to terminate an action without a due merits consideration of the issues involved is one which produces a truncated form of justice and is one, even if very well established, which is inherently capable of creating an unforeseen injustice, unless the many safeguards which a series of cases have established are clearly understood and correctly applied...However, where the required finding type analysis is properly carried out, there is no doubt but that both under the Rules of the Superior Courts and by its inherent jurisdiction, a court not only has the competence but also is duty bound to strike out a case at that point in the proceedings, if justified in so doing. An unsuccessful claimant can have no justifiable grievance at such a course, as a respondent also has an equal right to justice and should not be forced to continue meeting a claim which, within established parameters, is, for example, bound to fail”

[40] This statement is intended to bring into focus the fact that, – a termination ‘without a due merits consideration of the issues’ – is carried out within established parameters, even where that is to be done in pursuance of the Court’s inherent jurisdiction. The CPR has its prescribed bases for summary disposal, and the overriding objective is not such a basis. The Court therefore cannot accede to dismissing the claim on the basis of the factors enumerated by the 2nd Defendant as taken from Rule 1.1(2). The Application also prayed dismissal pursuant to the Court’s inherent jurisdiction, however Queen’s Counsel for the 2nd Defendant in answer to the Court, declined to advance arguments in relation to the exercise of the Court’s inherent jurisdiction. This position is accepted, as the Court is of the view that its inherent jurisdiction being intended to safeguard its process from abuse, ought only to be resorted to where provision is not made in the Rules, or there is some other exceptional circumstance.

[41] This position is illustrated in **Attorney-General v Universal Projects Ltd.**³⁷ where the Privy Council considered a submission for resort to the inherent jurisdiction of the court to set aside a default judgment, to prevent an alleged abuse of process. Lord Dyson responded in the negative, stating:-

³⁷ [2011] UKPC 37

“There is no scope for recourse to the inherent jurisdiction of the court. The territory is occupied by the rules. The Court’s inherent jurisdiction cannot be invoked to circumvent the express provisions of the rules.”

Lord Dyson also cited the Board’s decision in ***Texan Management v Pacific Electric Wire and Cable Co. Ltd.***³⁸:-

“The modern tendency is to treat the inherent jurisdiction as inapplicable where it is inconsistent with the CPR, on the basis that it would be wrong to exercise the inherent jurisdiction to adopt a different approach and arrive at a different outcome from that which would result from an application of the rules.”

[42] The Court has thus far declined to determine the Application to dismiss in the manner sought by the 2nd Defendant, namely, by reliance on the factors comprised in the overriding objective as grounds for dismissal or resorting to its inherent jurisdiction. The Application to dismiss in the round is also hinged on the relative strength of the respective cases which have been put before the Court. The Court is of the view that in this regard, the 2nd Defendant’s Application to dismiss engages the Court in like manner as an application for summary judgment. The Court, regardless of what terminology is used, is being asked to dismiss the Claim without a trial, on the basis that the Claim cannot succeed at trial.

³⁸ [2009] UKPC 46 @ 57

A similar conclusion regarding the substance of an application, was reached in the case of **Johnson v Cammack**,³⁹ and the court governed itself accordingly. The court therein found that although no application so termed had specifically been made, in substance, the ground for dismissal advanced by the claimant was on all fours with a defendant's application for summary judgment⁴⁰.

[43] In the circumstances, the Court finds that it has been engaged, to consider the relative strength of the Claimant's versus the Defendants' cases, with reference to the following:-

- (i) Differing medical opinions as to the deceased's mental capacity from which the Court would be entitled to draw its own conclusions regarding the legal effect of such evidence;
- (ii) Conclusions as to the deceased's mental capacity, drawn from eye witnesses based on perceptions and observances which can vary from person to person;
- (iii) The nature of the evidence requires the Court at this stage, to make a judgment as to weight, credibility, which are matters that are within the province of a trial judge;

³⁹ [2013] EWHC 4845 (Ch)

⁴⁰ Ibid @ para 4

- (iv) Most importantly, the Court finds that the exercise undertaken upon the Application to dismiss, amounts to a mini trial of the evidence.

[44] From the above discussion the Court summarises its position as follows with respect to the exercise of its power to dismiss the Claimant's probate claim pursuant to Rule 68.9(2):-

- (i) To the extent prescribed without reference to any grounds or legal basis upon which to exercise its power under Rule 68.9(2), the Court's power to dismiss a probate claim, on the express terms of the Rule, is very wide;
- (ii) Notwithstanding the unspecified bases of the power to dismiss, summary judgment (and default judgment) are expressly excluded from application to contentious probate proceedings, by virtue of Rule 15.3(e);
- (iii) By way of comparison, the provisions of Part 57 of the UK CPR are in pari materia to Part 68 of the Barbados CPR; in particular, Rule 57.11 is identical to Barbados' Rule 68.9(2).
- (iv) Some guidance can be taken from the authorities on the UK CPR Part 57. However unlike Barbados' position, summary judgment is not excluded from application to the UK's Part 57;

- (v) As per **Goss-Custard et anor v Templeman et al**⁴¹ notwithstanding the availability of summary judgment in relation to a UK contentious probate claim, such applications are unusual, given the court's supervisory dispensation in relation to the last wishes of a testator;
- (vi) There are special features contained in UK Part 57, as in Barbados' Part 68 which demonstrate underlying policy considerations including the public interest in upholding freedom of testamentary dispositions, as well as safeguarding any interference with the will or capacity of a testator;
- (vii) The overriding objective is not a ground for dismissal or striking out of a claim. There must be recognized bases for so doing⁴², and thereafter the overriding objective is to be applied in order to assist the court in determining whether to exercise its discretion to summarily dispose of a matter or not, having regard to the several factors therein provided;
- (viii) Inasmuch as the Court retains an inherent jurisdiction to safeguard its process from abuse, the inherent jurisdiction of the court should not be exercised in respect of territory which is occupied by the Rules, or where there would be a result inconsistent with the Rules;⁴³

⁴¹ [2018] All ER (D) 20

⁴² *McHugh v McHugh*, supra

⁴³ *Universal Projects Ltd v Attorney-General (T&T)*, supra

- (ix) In spite of the absence of any application filed pursuant to Part 15, the Court finds that it has been engaged in an application for summary judgment which it is unable to undertake given the express exclusion of Part 15 to contentious probate claims;
- (x) This exclusion is buttressed by the underlying rationale identified in respect of probate claims; and the special features identified in the filing of a probate claim under Part 68.

[45] To the extent that Part 68 does provide for dismissal, the Court considers that the discretion to dismiss may be exercised by way of example, for failure to comply with one of the requirements for filing a probate claim in Part 68⁴⁴; failure to properly plead particulars pursuant to Rule 68.8⁴⁵; or for some other reason properly found to be an abuse of the court's process⁴⁶. In this regard, the Court rules that the 2nd Defendant's Application to dismiss the matter based upon the matters expressed in aid of the overriding objective or what is evidently the relative strength of parties' cases, cannot be sustained. The Court will therefore proceed to consider the alternative bases of the Application for dismissal, which are put forward pursuant to Rule 26.3 of the CPR.

⁴⁴ Wahab v Khan et al [2011] EWHC 908 @ para 8 – failure to lodge or file written evidence about testamentary script (Barbados Rule 68.5)

⁴⁵ Re Stott (deceased); Kouda v Lloyds Bank Ltd et al, [1980] 1 All ER 259 (this case was decided under the previous RSC but the requirement to plead was set out in RSC Ord 76 r 9(3))

⁴⁶ Garnham v Millar et al [2015] EWHC 274 CH.

The Alternative Applications to Strike Out

No reasonable ground for bringing the claim – Rule 26.3(3)(b)

[46] The Court repeats its position that notwithstanding the undefined power to dismiss pursuant to Rule 68.9(2), an application to strike out the claim on any of the specified grounds would have to be determined pursuant to the established parameters of those grounds. Therefore, an application to strike on the basis of there being no reasonable ground for bringing the claim must first be made only with reference to the pleadings, as normally obtains in any other kind of claim. There are two ways in which this ground is made out⁴⁷:-

- (i) Where the content of a statement of case is defective in that, even if every factual allegation contained in it were proved, the party whose statement of case it is cannot succeed; or
- (ii) Where the statement of case, no matter how complete and apparently correct it may be, will fail as a matter of law.

[47] This ground is not short of judicial interpretation, and terms such as ‘*hopeless*’ ‘*incurably bad*’ or ‘*obviously unsustainable*’ have all been accepted as the standard which must be met in order for the draconian step to be taken of driving a party from the seat of justice.⁴⁸

⁴⁷ Caribbean Civil Court Practice, 2008, 1st Ed. Page 231

⁴⁸ Tawney Assets Ltd. V East Pine Management Ltd et al, per Mitchell JA, citing with approval Byron CJ in Baldwin Spencer v Attorney-General of Antigua & Barbuda

[48] In the instant case, the 2nd Defendant alleges that on the Claimant's case alone, the claim is to be so characterized, so as to warrant the striking out of the case. The Court is reminded of the evidence pleaded by the Claimant, as assessed by the Defendants. Namely, the weakness of the medical evidence of Dr. Moe in respect of the plea of lack of testamentary capacity; and the absence of any evidence from the Claimant particularizing the plea of want of knowledge and approval of the contents of the will.

[49] On this particular ground, Queen's Counsel for the 2nd Defendant had also submitted that the paucity of the evidence pleaded by the Claimant ought to give rise to a finding that the Claimant herself, subjectively lacked any reasonable grounds for bringing the claim. The bases of the Court's power are set out in the two components above. The Court is not of the view that this ground is available to the 2nd Defendant on the face of the pleadings. The cause of action is obviously identifiable. The claim is pleaded in compliance with Rule 68.8(3), insofar as the grounds 'lack of testamentary capacity' and 'want of knowledge and approval' and distinctly set out in the claim. There may not be a separate paragraph marked 'particulars', however the fact upon which these grounds are pleaded is asserted as 'severe dementia', accompanied by letters penned by a medical doctor.

- [50] Whether or not this allegation is true depends on medical evidence, which has to be tested within the bounds of a trial. The question of what effect dementia has on testamentary capacity is not a question of law, it is a question of fact. Therefore, albeit the Defendants have cited **Simon v Byford**⁴⁹ in support of their contention that the presence of dementia does not give rise to a finding of lack of testamentary capacity, the judge's decision therein in favour of testamentary capacity was made on conclusion of a trial and assessment of evidence. In relation to the evidence, the Court understands the Defendant's position to be that the Claimant's evidence is weak – in their eyes, non-existent. The Court does not agree that the evidence is non-existent. In relation to any question of weakness, on the one hand, summary judgment is excluded.
- [51] On the other hand, a weak case is not reason alone to strike out a case on this ground (26.3(3)(b)). In **Re Magee (as Administratrix of the Estate of Jonathan Magee (deceased) et anor**⁵⁰ the following was said with reference to a defendant's application to strike out a claim on the basis that there was no reasonable ground for bringing the claim (emphasis mine):-

“I have to say that the defendant's submissions carry weight and at very least it can be concluded at this stage that the plaintiff's Convention claim faces considerable difficulties, and is by any standards a weak case. However, it is not the function of an interlocutory court dealing with a striking out of pleadings as

⁴⁹ [2014] EWCA Civ 280

⁵⁰ (2017) 15 QBD 332 @ para 26

disclosing no reasonable cause of action application, to strike out weak cases, but rather to consider whether or not the case pleaded is unarguable or incontestably bad. This is indeed a weak case, but I am not satisfied that it can be deemed unarguable.”

The Court is not of the view that this ground (that there is no reasonable ground for bringing the claim), is properly raised in this case. It is a challenge to testamentary capacity and two grounds known to law, supported by a medical evidence. The 2nd Defendant is in truth challenging the sufficiency of the Claimant’s evidence and Rule 26.3(3)(b) is not the applicable rule for so doing. This ground of the 2nd Defendant’s application must therefore fail.

The Claim is an abuse of process – Rule 26.3(3)(a)

[52] The Application contends that the claim is an abuse of process on the basis that the Claimant is ill motivated by spite and an intention to harass 2nd Defendant. This state of mind is submitted as to be gleaned from the poor state of the evidence put forward in support of the Claim. It is also submitted that there has been delay by the Claimant in bringing the claim, having regard to the fact that the deceased died in March, 2016; probate of the will was granted in March 2017 and some three years after the death of the deceased, the Claimant has filed the Claim – with no evidence to support.

Further, it is pointed out that the Claimant would have had the opportunity to object to the grant during application process and finally, the Claimant has been given multiple opportunities to place her evidence before the Court and has failed to do so.

[53] The Court commences its examination of this ground of abuse of process with reference to Lord Diplock in **Hunter v Chief Constable of West Midlands**⁵¹

Police who says of that the power to strike for abuse of process is one

“...which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people”

Firstly, in relation to the imputation of ill motives to the Claimant as grounding the abuse of process, the Court is unable to treat with this submission. Malice has its places in law, for example, as a constituent element of several torts (such as defamation or malicious prosecution) and is therein required to be specifically alleged, particularized and proven. In relation to the striking out of a claim, the Court would have to be presented with an exceptional fact pattern in which motives of malice or harassment being the only reason for instituting proceedings, can be plainly attributed to a claimant,

⁵¹ [1982] AC 529 @ 536

and so give rise to a strike out. The instant case is not such a case. The Court declines to entertain any questions of malice or harassment in relation to the ground of abuse of process.

[54] In relation to the submission relating to delay and the opportunity to object to the issue of a grant afforded the Claimant by virtue of the application process, it has been held that delay alone, is not a cause for dismissing a probate action. In **Re Flynn deceased**⁵² a claim for revocation of a grant of probate was made six years after the issue of the grant. There was admittedly a good reason for the delay, (it was believed that the estate was insolvent), but the point was made, with reference to several illustrations, that delay alone is not cause for dismissing a probate action as the considerations in relation to a probate action militated against this. It was stated that issues of delay should be accompanied by it being shown that there cannot be a fair trial, serious prejudice to a defendant, or some strong consideration of public policy. In this regard, the Court can now advert to the factors (of the overriding objective), relating to time, expense, and the effect of the claim on the 2nd Defendant, which were commended to the Court by Queen's Counsel for the 2nd Defendant.

⁵² [1982] 1 All ER 882

[55] Against these factors however the Court must balance the countervailing interests of the Claimant, as a person who does have an interest in the deceased's estate, as well as the public interest which is implicitly regarded in a probate action. Reference is made to **The Estate of Langton deceased**⁵³ regarding the fact that a grant of probate affects not just private rights between the parties to an action, but affects and binds third party rights and interests as well. Further in relation to delay and the opportunity to have intervened prior to the issue of the grant, reference is made to **Chow Siu Po v Wong Ming Fing**.⁵⁴ It was stated in this case that even where admitted in common form (i.e. a grant of probate issued), if challenged thereafter, there is an obligation to prove the will in solemn form. The legal burden of that obligation to prove in solemn form, as also stated in **Chow Siu Po**, remains on the person propounding the will.⁵⁵ Bearing these considerations in mind, the Court is not of the view that the circumstances of three years having elapsed, and the fact that the grant has already been issued, amount to reasons why the proceedings herein should be regarded as an abuse of process.

⁵³ Para 34 supra.

⁵⁴ 5 ITEL 843

⁵⁵ Chow Siu Po v Wong Ming Fing, supra @ paras 100 - 109

[56] The Application on behalf of the 2nd Defendant finally asserts that the poor state of the Claimant's evidence should ground the Court's finding that the proceedings are an abuse of its process, as the Claimant cannot in the face of such evidence, be said to have had any real basis for bringing the Claim. Queen's Counsel for the respective Defendants point to the strength of the combined evidence of the Defendants versus what they describe the lack of evidence in support of the Claimant's case, even after the Claimant was given several opportunities to advance her case. In particular, the Defendants' evidence consists of (i) the unchallenged due execution of the will which was witnessed by an attorney-at-law; (ii) the will was not drawn up or executed in secret; (iii) the non-verbal if not verbal communication of the deceased and subsequent execution of a power of attorney; (iv) the evidence of caregivers, medical doctors and family members who unlike the Claimant's Dr. Moe, had the opportunity to observe and interact with him on more than one occasion and around the time of execution of the will.

[57] On the other hand, the Defendants assert that the Claimant's evidence consists of inconsistent medical evidence which does not and cannot even when taken at its highest, support a finding of a lack of testamentary capacity. The Court is not of the view that the Application to strike out, articulated in this manner takes the matter any further as it requires the Court to return to the question

of an assessment of the relative strength of the parties' cases. The Court has already found that the evidence of the Claimant is not in the realm of hopeless. The proof of the Claimant's case lies with the weight and credibility of the doctor's evidence which is a matter for trial. The nature of the Defendants' evidence also involves findings based on credibility and weight given that one is dealing with matters primarily borne out of persons' perceptions of what they saw or heard in relation to the deceased.

[58] As a result, to accede to the Defendants' view of the case on their evidence requires the Court to accept their version of the facts without the benefit of the trial process as described by Lord Hope of Craighead in *Three Rivers*.⁵⁶ The Court firstly is precluded from making a determination of the relative strength of the parties' cases given the exclusion of summary judgment to probate proceedings. This notwithstanding, even if it were to be regarded that the absence of prescribed grounds of dismissal in Rule 68.9(2) enabled the Court to do so dismiss in a manner akin to summary judgment, the Court would in this case take into account the special dispensation afforded to probate claims and the fact the nature of the evidence on both sides is best suited for ventilation in the trial process. The ground of abuse of process in respect of the Application to strike out therefore also fails.

⁵⁶ *Three Rivers District Council v Bank of England* (No. 3), supra, @ 95

Conclusion

[59] The Application before the Court was advanced on several grounds. The Court has ruled against all aspects of the Application which sought dismissal pursuant to Rule 68.9(2) of the Civil Procedure Rules, 2008. Particularly, the Court has found that even though there are no prescribed grounds for the dismissal, the Court is constrained by the exclusion of summary disposal by means of summary judgment, from carrying out any exercise which would in effect amount to the same process namely, assessing the alternative strength of the parties' cases. The Court has also ruled that the overriding objective cannot, as has been advanced on behalf of the 2nd Defendant, be used as a ground of striking out a claim. The Court's jurisdiction to strike out must be advanced within the parameters of prescribed grounds and once established, the overriding objective is to inform the exercise of the Court's discretion of whether to strike out or not. In relation to the actual grounds of striking out relied on pursuant to Rules 26.3(3)(a) and (b), the Court has declined to find either that there is no reasonable ground for the Claimant to have brought the Claim, or that the Claim is an abuse of process in the manners asserted by the 2nd Defendant.

[60] It is therefore ordered as follows:-

- (i) The 2nd Defendant's Application to Dismiss the Claim pursuant to Rule 68.9(2) is unsuccessful;
- (ii) The alternative Application to Strike Out the Claim on the basis of Rules 26.3(3)(a)&(b) are also unsuccessful;
- (iii) The Claimant is entitled to costs arising out of the Application, to be assessed pursuant to Rule 65.11, if not agreed;
- (iv) The Defendants are to file defences to the Claim, as required by CPR Part 68.
- (v) The matter is adjourned to the **12th February, 2021** for 1st hearing.

SHONA O. GRIFFITH
Judge of the High Court