

BARBADOS

**IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
CIVIL DIVISION**

Civil Suit No: 1400 of 2020

BETWEEN:

**IN THE MATTER OF THE ESTATE OF
MARIE JORDAN, Deceased, late of
Gilkes Road, Benthams in the parish of
Saint Lucy**

FATIMA JORDAN BROWN

CLAIMANT

AND

**CICELYN AMELIA HINDS
(Personal Representative of the Estate
of Marie Jordan)**

DEFENDANT

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

**Date of Hearing: 2021 9th July
Date of Decision: 2021 10th August (Oral)
21st September (Written)**

Appearances:

Mr. Corey Beckles for the Claimant

Mr. Clement Lashley QC for the Defendant.

*CPR Part 68, Contentious Probate Claim –Pleadings, Rule 68.8(3)- Sufficiency of
Pleadings – Grounds for Dismissal or Strike Out of Contentious Probate Claim.*

RULING

Introduction

- [1] This is a Fixed Date Claim filed on 11th December, 2020 by Fatima Jordan Brown against Cicelyn Hinds, in respect of the Estate of Marie Jordan, deceased, who died in July, 2011. The Defendant is the Executrix of the deceased's Estate with letters testamentary issued in July, 2014. The Claimant is the granddaughter of the deceased and was initially entitled to real property bequeathed to her under the deceased's will, executed in October, 2008. In October, 2010 the deceased executed a codicil to her will whereby the property previously gifted solely to the Claimant (and her sister), was instead gifted to the Defendant. The Claimant and her sister received nothing under the codicil.
- [2] The Claimant alleges that the October 2010 codicil is invalid and seeks (i) the revocation of the letters testamentary issued to the Defendant; (ii) a declaration that the codicil is invalid; (iii) an injunction to restrain the Claimant from being removed from possession of the property; and (iv) that the Defendant provide an account of the administration of the Estate thus far. Given that that the Claimant seeks a revocation of the letters testamentary, and alleges the invalidity of the codicil, the claim is unequivocally a contentious probate claim, and must therefore comply with the provisions of

CPR Part 68. Part 68 prescribes certain prerequisites for the filing of a contentious probate claim, including the content of what should be contained in a statement of case.

Background and Submissions

[3] The Claimant's case as extracted from her Statement of Claim (SOC) is as follows:-

- (i) The deceased's will was executed on the 19th October, 2008 and the codicil was executed on the 20th October, 2010. There is no allegation pleaded of want of due execution in relation to either document;
- (ii) Prior to the execution of her will in October, 2008, the deceased was certified mentally competent to do so by a medical doctor, however there was no such certification prior to the execution of the codicil in October, 2010;
- (iii) The effect of the codicil is the reversal of the gift of the only real property owned by the deceased, from the Claimant and her sister under the will, to the Defendant, under the codicil;
- (iv) It is alleged that the execution of the codicil was obtained by undue influence exerted against the deceased by the Defendant.

(The relationship between the Defendant and deceased is not pleaded, but by virtue of the will attached to the SOC, it is seen that the Defendant is the deceased's daughter).

- [4] The Claimant's SOC directly pleads undue influence (but provides no particulars) and raises the issue of the deceased's mental capacity. The Defendant filed a defence along with a counterclaim for the codicil to be pronounced in solemn form. The matter came on for first hearing on the 18th March, 2021 and Counsel for the Claimant was directed by the Court to examine the provisions of Part 68 and to determine whether the case filed complied therewith. Counsel for the Claimant availed himself of that opportunity and duly filed an application to amend the claim form and statement of claim. The affidavit in support of the application appended a draft of the intended amended fixed date claim form and statement of claim. The draft amended claim form and SOC differ from the original only in terms of an additional allegation pleaded that the deceased did not know or approve of the contents of the codicil, and expanded particulars in relation to both pleas (i.e. undue influence and want of knowledge and approval).
- [5] The Defendant resisted the grant of permission to amend and filed an application of her own to dismiss the claim and statement of case, (taking into account the proposed amendments).

The Defendant's application is styled as an application to dismiss, but asserts that the SOC (even with the proposed amendments) contains no sustainable cause of action. Queen's Counsel submits that the proposed amendments do not rise to the level of the legal requirements for sustaining an action for undue influence or establishing want of knowledge and approval of the contents of a will. Counsel for the Claimant's submissions in support of the Claimant's application to amend her case served the additional purpose of a response to the Defendant's Application to dismiss the Claim. In the first place, as regards any failure to comply with Part 68, Counsel for the Claimant submits that the Court has a discretion under Rule 26.4 to remedy a failure to comply with any order, rule or direction and such discretion could be exercised in relation to the Claimant's case.

- [6] More relevant however, submits Counsel for the Claimant, is the Court's obligation to apply the overriding objective to deal with cases justly and to save time and expense. With respect to the overriding objective, Counsel for the Claimant submits that a dismissal of the claim would result in further delay in disposing the issues between the parties, as the claim would have to be refiled, thereby incurring further expense. With further reference to the overriding objective, Counsel for the Claimant submits that the subject matter (testamentary dispositions and alleged undue influence), is an important one

involving public policy and as such the Court should be slow to strike it out. Counsel for the Claimant referred to the case of **Maureen Niersmann v Bernard Pesticcio**¹ to illustrate the seriousness of the issue raised by the claim of undue influence.

Discussion

[7] Queen's Counsel for the Defendant did not specify the rule or other basis upon which the application to dismiss was filed. CPR Part 68, namely Rule 68.9 provides for dismissal in relation to a contentious probate claim, but does not specify any grounds for dismissal or factors to be taken into account in effecting dismissal. The Application to dismiss alleges that the claim reveals no sustainable cause of action, which is in effect a ground for striking out a statement of case under Rule 26.3(3)(b) of the CPR. It is open to the Court to consider both Rules (26.3(3)(b) and 68.9), however the scope of application of the Rules are different. A Rule 26.3(3)(b) application (that the statement of case discloses no reasonable ground for bringing the claim) is one ordinarily determined on the pleadings only and does not take into account evidence.²

¹ [2004] EWCA Civ 372

² Eastern Caribbean Supreme Court's *Tawney Assets Ltd v East Pine Management Ltd. et al*, HCVAP No. 2012/007 per Mitchell JA @ paras 27-28.

On the other hand, dismissal under Part 68 is not prescribed with reference to any grounds, and whilst the Court is not precluded from taking evidence into account, Rule 15.3 expressly excludes the application of summary judgment to Part 68 proceedings.

[8] In the circumstances, outside of a strike out of the Claimant's case pursuant to Rule 26.3(3)(b), the Court must be very careful in relation to how any dismissal of the Claim under Rule 68.9 might be effected. In a defendant's application to dismiss the contentious probate claim filed in **Desiree Diaz v Suzanne Johnson et anor**,³ this Court examined the scope of dismissal under Rule 68.9. It was firstly noted that that certain modes of summary disposal of cases were excluded from application to Part 68. Thereafter, the Court considered why neither summary judgment nor default judgment apply to Part 68 claims.⁴ In brief, the Court opined that the exclusion of the application of summary judgment (and default judgment) to contentious probate claims, is referable to the underlying nature, and implications of, contentious probate claims.⁵

³ Barbados Supreme Court Claim No. 641/2019

⁴ Rule 15.3 provides that summary judgment does not apply to Contentious Probate Proceedings; Rule 68.6(1) precludes the operation of default judgments.

⁵ Diaz v Johnson supra, @ paras 24 - 35

[9] For example, probate claims have been said to on the one hand to serve an underlying public interest in maintaining freedom of testamentary dispositions,⁶ but on the other hand provide necessary safeguards to ensure that testamentary dispositions are made with requisite mental capacity and free from external inhibitors such as undue influence, greed or connivance.⁷ The existence of this underlying rationale was also viewed as supported by the regime of additional rules and processes separately prescribed in respect of contentious probate claims in Part 68.⁸ In light of the fact that summary judgment is inapplicable to Part 68, the Court's position as reasoned in **Desiree Diaz v Suzanne Johnson**,⁹ is that even if not so coined, an application that enjoins the court to assess the strength of a case in the same manner as an application styled for summary judgment, is not permissible.

[10] In the instant case therefore, the application for dismissal under Rule 68.9 is not to be determined with reference to any affidavit evidence filed in support of the applications which may speak to the merits of the respective cases. Instead, the dismissal will be considered with reference to the sufficiency of the Claimant's pleaded case (including the draft amended SOC), as against

⁶In the Estate of Langton, Deceased, [1964] P 163 @ 178-179; In Re Muirhead [1971] P 263 @ 265E

⁷*Banks v Goodfellow* [1861-73] All ER 47 @ 54-55

⁸*Payne et anor v Payne* [2018] EWCA Civ 985 @ paras 45-47; other than the exclusion of summary and default judgments, for example - requirement to file statement of claim instead of affidavit with FDC, CPR Rule 68.2(3), thereby mandating the need for pleadings; Rule 68.3, requirement to join all persons entitled to administer an estate, in a revocation claim; Rule 68.9, the court's permission is required for a claimant to discontinue a claim.

⁹*Diaz v Johnson* supra, @ para. 42

the requirements of Part 68 as well as general principles applicable to a contentious probate claim. Additionally, the Application for dismissal can be considered with reference to the standard for striking out a SOC under Rule 26.3(3)(b), i.e., on the basis that the pleaded case discloses no reasonable ground for bringing the claim. The judicial interpretation of this ground is expressed in terms that if every factual allegation pleaded were to be proved, the claim would still fail; or the statement of case, no matter how correct or complete, would fail as a matter of law.¹⁰

[11] In this case, the Claimant has pleaded the testatrix's want of knowledge and approval of the October, 2010 codicil, which changed her prior bequest of property from the Claimant, to the Defendant instead. As a matter of law, in relation to knowledge and approval of a testamentary disposition - (i) the will must be as a result of the testator's own intelligence and volition and not from another person;¹¹ (ii) the relevant time for such knowledge and approval is at the time of execution;¹² and (iii) the burden of proving knowledge and approval is on the party seeking to propound the will¹³ (in this case the Defendant).

¹⁰ Caribbean Civil Court Practice 2008 1st Ed. Pg. 231.

¹¹ Banks v Goodfellow (1870) LR 5 QB 549 @ 567

¹² Hastilow v Stobi (1865) 1P&D 64

¹³ Barry v Butlin (1838) 2 Moo PC 480; Cleare v Cleare (1869) 1 P&D 655

However, proof of due execution of the will (along with testamentary capacity), gives rise to a presumption of knowledge and approval, which is for the party alleging lack thereof, to rebut.¹⁴

[12] The Claimant has not pleaded want of due execution in relation to the codicil, nor has she pleaded a lack of testamentary capacity. The statement of case (amended draft) states that the deceased was certified as competent at the time of execution of the will in October, 2008 but not so certified at the time of execution of the codicil. To stop there however, is not to plead of lack of testamentary capacity, therefore according to the Claimant's case, testamentary capacity and due execution of the will must be taken as accepted, in the absence of any plea to the contrary. In light of there being no challenge to the deceased's testamentary capacity or the due execution of the will (and codicil), there is a rebuttable presumption in favour of the deceased's knowledge and approval of the codicil.¹⁵ As a consequence, the Claimant's pleaded case at the very least, should contain allegations capable of rebutting that presumption.

¹⁴ Ibid

¹⁵ Barry v Butlin (1838) 2 Moo P.C. 480 @ 484; Cleare v Cleare (1869) 1 P&D 655 @ 657-58

[13] In considering the Application to dismiss, the Court must assess the contents of the Claimant's statement of case with reference to the presumption of knowledge of want and approval of the will, which arises as a result of there being no challenge to testamentary capacity or due execution of the will. In the absence of any challenge to the deceased's testamentary capacity and the due execution of the will and codicil, the Claimant's case is regarded as follows:-

- (i) The Claimant's particulars of want of knowledge and approval state the fact of the reversal of the gift of property from the Claimant and her sister, to the Defendant, along with the allegation that the Claimant's relationship with the deceased from the time of execution of the will in 2008, to execution of the codicil in 2010, did not change. In the face of due execution of the codicil such facts taken at their highest are unremarkable;
- (ii) The particulars also allege that the deceased testatrix did not receive independent legal advice. Standing on its own, or together with the fact of the reversal of gift, there is still nothing remarkable of such a fact as legal advice is not a prerequisite to making or changing a will. There is no circumstance alleged on the Claimant's case which suggest why there ought to have been the need for legal or independent legal advice;

- (iii) In October, 2010, the deceased's physical and mental health had deteriorated severely from the time of execution of her will in October, 2008 - There is no indication of precisely what the physical and mental condition of the deceased was *at the time of* execution of the codicil. For example, was the deceased under assisted care, able to speak or otherwise communicate, lucid or not lucid? Aside from the lack of proper particulars speaking to the alleged condition of the deceased, any circumstance which is intended to impugn the deceased's testamentary capacity must be distinctly pleaded as such. This is the effect of Rule 68.8(3). The Claimant did not plead a lack of testamentary capacity and accordingly, no doubt as to testamentary capacity can cast if not distinctly pleaded.
- (iv) Taken in their entirety, the Claimant's particulars pleaded¹⁶ in support of her claim that the deceased testatrix lacked knowledge and approval of the contents of the codicil, raise no suspicion and even if taken at their highest in the current pleaded circumstances, do nothing to rebut the presumption raised by failure to plead lack of testamentary capacity or due execution;

¹⁶ Paragraphs 15(a) through (e) of the SOC

- (v) Where the Claimant's particulars state that the contents of the codicil were not read over to the deceased before execution and allege a deteriorated physical condition, these particulars also offend against Rule 68.8(3) in that they speak to want of due execution and lack of testamentary capacity without same having been separately pleaded.¹⁷

[14] In relation to the plea of undue influence, Counsel for the Claimant cited **Niersmans v Pesticcio**,¹⁸ which is instructive in relation to the nature of undue influence. The plea of undue influence according to *Niersmans v Pesticcio* is based upon the existence of a relationship of trust and dependence. Albeit the relationship of parent and child is one in which undue influence can generally be presumed, the facts pleaded by the Claimant do not support such a presumption. The Claimant has pleaded that the Defendant resides in the United Kingdom and that the Claimant lived with the deceased testatrix at the time of her death. It has not been pleaded that the Defendant resided with the Claimant at the time of execution of the will; or how, or in what manner the Defendant exercised her will over the deceased to the point of giving rise to undue influence.

¹⁷ *Webster Shillingford v Norma Dalrymple* DOMHCV 2008/0308 per Cottle J @ para. 8.

¹⁸ [2004] EWCA Civ 372

The particulars of undue influence allege that the Defendant prepared the will and gave it to the deceased to sign but this allegation is not supported by the pleadings in terms of relevant details of such preparation.

[15] In relation to the lack of independent legal advice, again there is nothing pleaded which gives rise to any requirement for the deceased to have obtained independent legal advice; the fact that the codicil was witnessed by a friend and the Deceased's brother is also unremarkable without other facts pleaded that give context as to why they contribute to any undue influence alleged. These particulars similarly allege that the physical and mental condition of the deceased, as well as her vulnerability and dependency on the Defendant prior to and at the time of the execution of the codicil rendered her (the deceased) susceptible to undue influence which was in fact exercised. These allegations are bald assertions. Precisely what the physical and mental condition of the deceased was at the time of execution of the codicil was not pleaded – was the deceased unable to care for herself, unable to manage her own affairs, in what way was she dependent on the Defendant who resided in England whilst the Claimant resided with the deceased?

[16] These kinds of particulars are required in order for the Defendant to properly answer a case against her, as well as in the circumstance where testamentary capacity and due execution are to be presumed, having not been pleaded

otherwise. In particular, given that the Defendant resided overseas and it was the Claimant who resided with the deceased at the time of her death (which was 9 months after the execution of the codicil), the physical circumstances of the dependence alleged have not been pleaded – for example, was the Defendant financially responsible for the deceased or her day to day affairs; by what means was there control and influence exerted given the fact that the Defendant resided overseas and the Claimant, with the deceased? None of the matters particularized by the Claimant excite the suspicion of the Court generally, much less having regard to the facts pleaded by the Claimant that the Defendant resides overseas and the Claimant resided with the deceased.

[17] It is therefore found that the Claim as pleaded by the Claimant does not disclose any reasonable grounds for bringing the claim, not to mention a failure to comply with Rule 68.8(3). The failure to comply with Rule 68.8(3) occurs by reason of the fact that the Claimant's particulars raise issues of lack of testamentary capacity and want of due execution of the codicil, without having distinctly pleaded either ground as a basis for revocation of the probate issued to the Defendant. This finding by the Court is made in circumstances where the Claimant's case as pleaded failed to comply with Rule 68.8(3) at all and the Claimant was afforded an opportunity of the Court's initiative to bring her case within compliance of Rule 68.8(3).

The draft amended statement of claim has been taken into consideration by the Court and the flaws present in the original SOC have not been remedied. As a consequence, contrary to Counsel for the Claimant's submission, the defects of pleading in the (draft amended) SOC are not matters which can be set right by the Court pursuant to Rule 26.4

[18] Additionally, the Court refers to Counsel for the Claimant's reliance on various enumerated factors of the overriding objective which ought to be weighed in determining the applications to dismiss and to grant permission to amend. The Court acknowledges the importance of the overriding objective, but declines the approach which seeks to have the Court assess and weigh specifically enumerated factors thereof, in order to arrive at its decision. As stated in Privy Council decision (Trinidad & Tobago) **Crick et anor v Kurt Brown**¹⁹ the overriding objective is central to case management and is well understood by judges. It is not incumbent upon a court to work through each element of the overriding objective in order to come to a decision.²⁰ In this case, the Court considers the matter to be a question of case management and the overall justice of the case.

¹⁹ [2020] UKPC 32

²⁰ Ibid @ para 33

The Claimant has already been afforded an opportunity by the Court, (gratuitously so), to bring her contentious probate claim into compliance with the requirements of Part 68 under which it must be filed.

- [19] The proposed amended claim does not properly comply with Part 68 in that it raises allegations which contain overlapping grounds for revocation of a grant and invalidation of a will without expressly pleading each ground, in contravention of Rule 68.8(3). The particulars pleaded in support of the grounds of undue influence and want of knowledge and approval by the deceased of the contents of her will do not disclose any reasonable ground for making those claims. In these circumstances, the Court considers that the application of the overriding objective of dealing with cases fairly and justly is tipped in favour of preventing any further prejudice to the Defendant in having to abide by any further attempt by the Claimant to remedy her pleaded case. It is therefore determined that the Claim would appropriately be struck out pursuant to CPR Rule 26.3(3)(b) as opposed to dismissed under Rule 68.9(2).

Conclusion and Disposal

- [20] Rule 26.3(3)(b) is the more appropriate Rule to be applied, given that the striking out of the Claimant's case can only be partial – namely, to the extent of the claim for invalidation of the codicil and revocation of the grant of

probate issued to the Defendant. The Claim also seeks a remedy of an account to be rendered by the Defendant as personal representative of the deceased testatrix's estate. The Claim pleads which has not been denied, that there was no residuary clause in either the will or codicil, which will leave a triable issue in relation to the existence or not of any further property of the deceased which falls into residue, and the succession to and administration of the residuary estate. Further, the Defendant has filed a counterclaim seeking to admit the will and codicil to solemn proof, and has not sought the Court's leave to discontinue same as required by Rule 68.9(2). Proof of the will in solemn form will require evidence to be adduced and a finding made by the Court as to its validity. The Claim therefore requires case management of the remaining aspect arising from any entitlement to residue by the Claimant; and the determination of the counterclaim for pronouncing for the will and codicil in solemn form.

[21] The respective Applications are determined as follows:-

- (i) The Claimant's application for permission to amend her statement of case in terms of the draft amended claim and statement of claim appended to her affidavit in support of application, is refused;
- (ii) The Claimant's case is partially struck out pursuant to Rule 26.3(3)(b), as the case for revocation of grant of probate to the Defendant and a

declaration of the invalidity of the Codicil executed in October, 2010 disclose no reasonable grounds for bringing such claims;

- (iii) Upon the partial striking out of the Claimant's case, the issue of the existence or not of a residuary estate of the deceased testatrix and for succession and administration of any such residuary estate remains an issue to be tried;
- (iv) The Defendant's counterclaim for admission to proof in solemn form, of the deceased's will of October, 2008 and codicil of October, 2010 remains in existence to be tried upon directions issued by the Court;
- (v) Costs in the sum of \$750.00 are awarded to the Defendant arising from the adjournment of the 1st hearing of the matter on 18th March, 2021;
- (vi) Prescribed costs calculated on a value of \$50,000.00 up to the stage of case management only are awarded to the Defendant, for one counsel only, arising from the Application for dismissal of the Claim.
- (vii) The matter is fixed for 22nd October, 2021 for case management and further hearing.

SHONA O. GRIFFITH
Judge of the High Court