# In The Supreme Court of Bermuda

## PROBATE JURISDICTION

**IN THE ESTATE OF JOHN HOWARD FUBLER TAYLOR DECEASED**

2009: No. 29

**BETWEEN:**

**ELAINE CHARLES**

**Plaintiff**

**- and -**

**RODERIC ETHELBERT PEARMAN**
**IRIS ALMERIA DAVIS**

**First Defendant**

**and**

**DR. CLARENCE ELDRIDGE JAMES**
**ALBERT HOWARD TUCKER TAYLOR**

**Second Defendant**

Date of Hearing: 18 November 2009
Date of Judgment: 8th January 2010

Mr. Marshall for the Plaintiff;
Mr. Duncan for the first defendant, and the second named second defendant; and
Mr. Harshaw for the first named second defendant.

## RULING

1. This ruling is given on the application of the first defendant and the second named second defendant ('the applicants') to strike out the plaintiff's claim. The application is made on each of the grounds under RSC Ord. 18, r. 19(1) and under the inherent jurisdiction.

2. The plaintiff brings her claim as the daughter of John Howard Fubler Taylor ('the deceased') and hence as one of the persons entitled to share in his estate in the event of an intestacy. She seeks decrees that the two known wills of the deceased, under neither of which would she benefit, are invalid, and that she and her two surviving brothers are entitled to the estate and to the grant of letters of administration in respect of it. The first defendants are the executors of the later of the two wills, being that of 31st July 2002 ('the 2002 will'), and the second defendants are the executors of the earlier of the wills, being that of 8th June 1999 ('the 1999 will'). The plaintiff alleges that the deceased was not of sound disposing mind, memory and understanding when he executed each of the wills and gave instructions for them to be prepared. In addition, in respect of the 2002 will, she alleges that it was obtained by the undue influence of the first named first defendant ('Mr. Pearman'), and in respect of the 1999 will she alleges that it was obtained by the undue influence of the first named second defendant ('Dr. James') and a lawyer.

3. The applicants seek to strike out the writ and statement of claim under RSC Ord. 18, r. 19(1)(a) as disclosing no reasonable cause of action. No evidence is admissible on this head: see RSC Ord. 19, r. 2. The question is simply whether the pleadings, taken at face value, disclose a cause of action. The applicants argue that the plaintiff has failed to plead any sufficient particulars of the deceased unsoundness of mind or of the alleged undue influence in respect of each will. In my view the plaintiff has pleaded sufficient to make out a cause of action under each head. Its strength and chances of success are not a proper point for consideration under this paragraph of the rule.

4. The applicants' case on the other paragraphs of RSC Ord. 18, r. 19(1) essentially comes down to an assertion that the plaintiff's claim is incredible because the pleaded facts fail to make out the claims with any legal basis and are internally inconsistent. Evidence has been filed on this, and it invites a critical analysis of the merits of the various parties' positions. In support of this approach the applicants rely upon Broadsino Finance Company Limited v Brilliance China Automotive Holdings Limited & Ors. [2005] Bda LR 31 (CA). That case plainly turned upon its own particular, and rather complex, facts. I do not think that it purports to lay down any new law. Indeed, Stuart-Smith JA, in delivering the judgment of

the court, expressly proceeded upon the basis that the applicable principles of law were not in dispute. Essentially he proceeded on the basis that a claim should be struck out if it is incredible, applying a test derived from National Westminster Bank plc v Daniel [1994] 1 All ER 156. He also cited the decision in Electra Private Equity Partners (Ltd Partnership) & Ors v KPMG Peat Marwick (A Firm) & Ors [1999] EWCA Civ 1247 at p. 17, where Auld LJ said[1] –

> "It is trite law that the power to strike out a claim under RSC Order 18, r. 19 or in the inherent jurisdiction of the Court should only be exercised in "plain and obvious" cases. That is particularly so where there are issues as to material primary facts and the inferences to be drawn from them, and when there has been no discovery or oral evidence. In such cases, as Mr Aldous submitted, to succeed in an application to strike out, a defendant must show that there is no realistic possibility of the plaintiff establishing a cause of action consistently with his pleading and the possible facts of the matter when they are known. Certainly, a judge, on a strike-out application where the central issue is one of determination of a legal outcome by reference to as yet undetermined facts, should not attempt to try the case on the affidavits . . . There may be more scope for early summary judicial dismissal of a claim where the evidence relied on by the plaintiff can properly be characterised as "shadowy" or where "the story told in the pleadings is a myth ... and has no substantial foundation"; see e.g. Lawrance v. Lord Norreys (1890) 15 App. Cas. 210, per Lord Herschell at 219-220.
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> "However, the court should proceed with great caution in exercising its power of strike-out on such a factual basis when all the facts are not known to it, when they and the legal principle(s) turning on them are complex and the law, as here, is in a state of development. It should only strike out a claim in a clear and obvious case. Thus, in McDonald's Corporation v. Steel [1995] 3 All ER 615, CA, Neill LJ, with whom Steyn and Peter Gibson LJJ agreed, said, at 623e-f, that the power to strike out was a Draconian remedy which should be employed only in clear and obvious cases where it was possible to say at the interlocutory stage and before full discovery that a particular allegation was incapable of proof. In X v. Bedfordshire County Council [1995] 2 AC 633, Sir Thomas Bingham MR, also underlined the rigour of the limits of the strike-out jurisdiction in the following passages, at 693E-694F, which were approved by Lord Browne-Wilkinson, at 740H-741D, and the other Members of the Appellate Committee when the matter reached the House of Lords:
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> > " It is clear that a statement of claim should not be struck out under R.S.C. Ord. 18, r. 19 as disclosing no reasonable cause of action save in clear and obvious cases, where the legal basis of the claim is unarguable or almost

[1] I have set out the passage from the original judgment, rather than the abbreviated version quoted in the judgment of Stuart-Smith JA.

> incontestably bad. ... I share the unease many judges have expressed at deciding questions of legal principle without knowing the full facts. But applications of this kind are fought on ground of a plaintiff's choosing, since he may generally be assumed to plead his best case, and there should be no risk of injustice to plaintiffs if orders to strike out are indeed made only in plain and obvious cases. This must mean that where the legal viability of a cause of action is unclear (perhaps because the law is in a state of transition), or in any way sensitive to the facts, an order to strike out should not be made. But if after argument the court can be properly persuaded that no matter what (within the reasonable bounds of the pleading) the actual facts the claim is bound to fail for want of a cause of action, I can see no reason why the parties should be required to prolong the proceedings before that decision is reached. ..."'

5. Having considered the various arguments on this I consider that I am indeed being asked to conduct a trial of this action on affidavit at a premature stage. In particular, in respect of the allegation of unsound mind, I do not know at this point what the medical evidence will be. It may well be that some of the particulars relied upon are demonstrably bad: for instance it may be that the failure to leave anything to the plaintiff or her children was the result of a pre-existing family arrangement which the plaintiff has admitted in correspondence. But even if all the particulars go, there remains the general allegation in each case, which can perhaps be summarized as incipient dementia exacerbated by drink. It is not for the plaintiff to plead *evidence* in support of that, and it is not an appropriate issue to try on affidavit evidence.

6. I do, moreover, note in passing that the second affidavit of Dr. James, sworn on 10th September 2009, itself contains opinion evidence that at some point in 2002 he formed the impression that the deceased "was no longer competent to make decisions about his life". That of itself would be enough to get the plaintiff's claim in respect of the 2002 will past a strike-out application. In saying that I am not blind to the tactical considerations which may apply as between the two sets of defendants, but that sort of thing is a matter for exploration at trial.

7. Moreover, the plaintiff relies upon the local case of Grace Simmons & Ors. v Lucy Davis [1986] Bda LR 71, as demonstrating that the legal burden of proof lies upon the

executors to demonstrate to the court on the balance of probabilities that the testator was of sound disposing mind both at the date when the will was executed and at the earlier date when he gave instructions to his attorney. While that may be technically right, it also appears to be the case that, where a will complies with all the formalities, there are evidential presumptions of due execution and sanity which may assist the executors. How those various principles interact may give rise to difficult issues of law which were not fully explored before me. Nevertheless, for the purposes of this application, I do consider that it is for the executors to prove that the testator had an understanding of the nature of the business in which he was engaged, and a recollection of the property he meant to dispose of, of the persons who have a claim to be objects of his bounty, and the manner in which it was to be distributed. The plaintiff, on the other hand, does not have to demonstrate that the testator lacked all of those things – it is enough if any one of them is missing.

8. As to undue influence, Mr. Harshaw, for the first named second defendant, advanced arguments based upon the law as it has developed in the field of contract. It is by no means clear to me that the law as it has developed in that context is applicable to wills. It may be that there needs to be proper and full legal argument on that, and it has not been had before me. Be that as it may, it is plain from the pleadings that the plaintiff is alleging actual coercion by Mr. Pearman in respect of the 2002 will, and by Dr. James and a named attorney in respect of the 1999 will. I consider the pleading sufficient in respect of that.

9. Whether the pleaded remedy for undue influence, namely the setting aside of the whole will as opposed to only the particular legacy in favour of the person said to be applying the undue influence, is available on the facts alleged is by no means clear to me. However, the point was not argued and is best left to trial when the full facts are known.

10. As to the facts on undue influence, I think that they fall within the note of caution sounded in Electra Private Equity Partners (*supra*) –

> "Certainly, a judge, on a strike-out application where the central issue is one of determination of a legal outcome by reference to as yet undetermined facts, should not attempt to try the case on the affidavits . . . "

As noted above, I think that that is just what I am being invited to do. I also note, *en passant*, that the allegation of undue influence is closely tied to the deceased's allegedly frail mental state. That is an important factor, as the learned Judge noted in Re Killick (deceased), Killick v Pountney and Anor. (The Times 30 April 1999, transcript) at p. 16:

> "I can readily accept that, if there is evidence showing the exertion of improper influence in relation to the execution of a will, it will be easier – and sometimes very much easier – where the testator is enfeebled in body or mind, and all the more so if he is enfeebled in both body and mind, to find such influence was in all the circumstances undue and, to adopt Viscount Haldane's words, that it was by means of the exercise of that influence that the will was obtained. This is because . . . a lesser degree of pressure or inducement may suffice to produce the desired result where the testator is feeble in body or mind than would be required were he in vigorous health. But no amount of evidence of bodily infirmity will of itself establish undue influence in the absence of some independent evidence tending to show the exercise of an improper influence."

In my view many of the arguments advanced on behalf of the defendants fail to take that fully into account.

11. I should add one point. To the extent that the plaintiff says that to strike out her action now would offend against her constitutional rights to a fair hearing under section 6(8) of the Constitution, I reject that. A judicial decision by a properly constituted court that her claim discloses no cause of action or should otherwise be struck out should only be given after a fair hearing, and if it is not it is capable of correction on appeal. The Constitution confers no right to a full hearing of a claim which discloses no reasonable cause of action, or is otherwise bad.

12. In summary, I think that the statement of claim is adequately pleaded and does disclose a reasonable cause of action on both unsoundness of mind and undue influence. As to the factual challenge to the plaintiff's case, I do not think that this is such a clear and obvious case that I should strike it out as being plainly incredible or unsustainable. I therefore dismiss the application.

13. I will hear the parties on costs, and on any other outstanding matters including directions for the future conduct of this matter, if they cannot be agreed, and the plaintiff's objection to the first affidavit of Mr. Albert Taylor and the allegedly without prejudice correspondence exhibited to it.

Dated this 8th day of January 2010

Richard Ground
Chief Justice