In The Supreme Court of Bermuda

CIVIL JURISDICTION
(COMMERCIAL COURT)

2020: No. 198

In the matter of the Estate of Howard Caisey (Deceased)

BETWEEN:

DOLETA BEAN

Plaintiff

- and -

ANTHONY CAISEY (As Executor of the Deceased's Estate)

First Defendant

-and -

KEITH WAYNE CAISEY (As Sole Beneficiary of the Deceased's Estate)

Second Defendant

RULING

Date of Hearing: **5 October 2021**
Date of Ruling: **16 November 2021**

Appearances: **Jaymo Durham, Amicus Law Chambers, for the Plaintiff**

Paul Harshaw, Canterbury Law Limited, for the Second Defendant

RULING of Mussenden J

Introduction

1. This matter came before me by three summonses as follows:

    a. The Second Defendant's Summons dated 8 September 2021 seeking:

        i. to strike out this matter for failure to set this matter down for trial as ordered on 18 February 2021 and 28 July 2021, as supported by the Fourth Affidavit of Julica Harvey ("**Harvey 4**") and her Exhibit "**JH-4**";

        ii. alternatively, to strike out the allegation relating to undue influence, as those allegations do not contain the particulars necessary for the Second Defendant to sustain such an allegation;

    b. The Second Defendant's Summons dated 8 September 2021 seeking an order that the Plaintiff verify her List of Documents by an affidavit in the statutory form; and

    c. The Plaintiff's summons dated 27 August 2021 seeking leave to amend the Writ of Summons (or more accurately the Statement of Claim indorsed on the Writ of Summons.

Background

2. The parties are siblings and are the children of Howard Caisey (Deceased) (the "**Deceased**"). By a Will dated 9 August 2012 (the "**2012 Will**"), the Deceased revoked a previous Will, and then bequeathed the property situated at 3 Riviera Road, Warwick (the "**Property**") to the Second Defendant as the beneficiary absolutely and appointing the First Defendant as the Executors and Trustees of the 2012 Will.

3. The Deceased died on 5 August 2018 leaving the Second Defendant entitled to the Property. Probate of the estate of the Deceased was granted by the Supreme Court on the 18 September 2019 to the First Defendant. By a vesting deed dated 19 November 2019, the Property was vested in the name of the Second Defendant.

4. The Plaintiff commenced these proceedings by way of a Specially Indorsed Writ of Summons issued 22 June 2020 on the basis that the First and Second Defendants exercised undue influence over the Deceased when he executed the 2012 Will and but for the undue influence, she would have been entitled to a beneficial interest in the Property. She seeks a declaration to void the 2012 Will.

Application to strike out the matter for not setting it down for trial

The Second's Defendant's Application

5. Mr. Harshaw submitted that the matter should be struck out for failure to set it down for trial pursuant to the orders of the Court. The Order of 28 July 2021 was an unless order for the matter to be struck out if it was not set down for trial in compliance with the terms of the earlier Order of 18 February 2021.

6. Mr. Harshaw submitted that it appeared that the Plaintiff did not want to set the matter down for trial because it was in her interest to delay the trial as she was in occupation of the Property without any payment to the Second Defendant. Thus, the Defendants were obviously prejudiced financially. Further, he argued that as the matter was not set down, then the Court could not assign a trial date, meaning that any likely trial would be some time away into the next year.

7. Mr. Harshaw relied on Order 34 of the Rules of the Supreme Court 1985 ("R.S.C.") and the Supreme Court Practice 1999 for "Setting down for trial action begun by Writ", in particular rule 2 for the time to set down the action, rule 3 for the lodging of documents when setting down the action and rule 8 for the notification to other parties of the matter

being set down for trial. He submitted that none of the requirements had been complied with.

The Plaintiff's Reply

8. Mr. Durham relied on his affidavit sworn 20 September 2021 and the Exhibit "**JED-1**" which set out a chronology of events between the parties and in some cases the Court. He submitted that at all times he was engaged with the Court and with counsel for the Defendants with whom he was responsive in a timely manner. He also relied on his Second Affidavit sworn on 1 October 2021 and the Exhibit "**JED-2**".

9. Mr. Durham submitted that the Court should reject the application to strike out the matter for failure to set it down for trial. He relied on the case of *Hytech Information Systems Limited v The Council of City of Coventry*[1] where Auld LJ stated " … *the essential notion in play is whether a party's failure to comply with an Order is inexcusable, in the sense of being without a reasonable excuse. … It all depends on the individual circumstances and the existence and degree of fault found by the Court after hearing representations to the contrary by the party whose pleading it is sought to strike out."* In that same case, he cited Ward LJ who set out the following considerations in weighing a failure to comply with a peremptory order of a court:

> *" a) An unless order is an order of last resort. It is not made unless there is a history of failure to comply with other orders. It is the party's last chance to put his case in order;*
> *b) Because that was his last chance, a failure to comply will ordinarily result in the sanction being imposed;*
> *c) This sanction is a necessary forensic weapon which the broader interests of the administration of justice require to be deployed unless the most compelling reason is advanced to exempt his failure;*

[1] [1996] EWCA Civ 1099

d) It seems axiomatic that if a party intentionally or deliberately (if the synonym is preferred), flouts the order then he can expect no mercy;

e) A sufficient exoneration will almost inevitably require that he satisfies the court that something beyond his control has caused his failure to comply with the order;

f) The judge exercises his judicial discretion in deciding whether or not to excuse. A discretion judicially exercised on the facts and circumstances of each case on its own merits depends on the circumstances of that case; at the core is service to justice;

g) The interests of justice require that justice be shown to the injured party for the procedural inefficiencies caused the twin scourges of delay and wasted costs. The public interest in the administration of justice to contain those two blights upon it also weigh very heavily. Any injustice to the defaulting party, though never to be ignored, comes a long way behind the other two."

10. Mr. Durham relied on the case of *Periera v Beanlands*[2] where the Court exercised its discretion in favour of a party who had breached an unless order having taken into account several principles including that (a) there was no evidence the litigant personally was at fault; (b) the opposing party did not allege any prejudice; and (c) the defendant was not seeking to defend the action in his personal capacity but in a fiduciary capacity. Also, in that case, the Court referred to its discretion which could be exercised unfettered by any binding principle and that the failure of counsel should not be visited upon the litigant. Mr. Durham submitted that in the present case, as the Plaintiff personally was not at fault, there was no prejudice to the Defendants and the matter was not time barred, in the interests of justice the matter should not be struck out.

11. Mr. Durham also relied on the case of *Marcan Shipping (London) Limited v (1) George Kefalas and Candida Corporation* in relation to the Court's power to grant relief from sanctions of an unless order, where Moore-Bick LJ gave the history and development of the use of unless orders.

[2] [1996] 3 All ER 528 at 534

12. Mr. Durham submitted that in the present case, the circumstances of the default of the unless order is excusable in that: (a) he was focused on completing the requirement for disclosure pursuant to the Overriding Objective, which he did accomplish, taking place before setting the matter down for trial; (b) there was an administrative error in diarizing the task of setting the matter down for trial; (c) there has been no delay or prejudice to the Second Defendant in that it was subsequently complied with before the Summons to strike out was filed; (d) the available dates in December 2021 for trial submitted by the Second Defendant would still allow for the matter to be listed; and (e) the Plaintiff had applied to amend her Statement of Claim necessitating some delays by the Second Defendant to address the amendments.

13. Mr. Durham submitted that the Court has a discretion whether or not to excuse the breach of the order and in doing so, must place the emphasis on the interests of justice, namely the prevention of wasted time and expense. He argued that the interests of justice would lean toward excusing the breach, particularly as the Plaintiff has evidenced an intention to get on with the required tasks and thus there is no risk of prejudice to the Defendants.

Discussion and Analysis

14. In my view, I decline to exercise the Court's discretion to strike out this matter because it has not been set down for trial for several reasons. First, I am not satisfied that there has been a history of the Plaintiff failing to comply with the orders of the Court or that the Plaintiff has intentionally or deliberately flouted the orders in the manner envisaged in the *Hytech* case. I am more inclined to accept the explanation of Mr. Durham that he had been pressing on with various matters in respect of the case, for example disclosure, as he understand the priority to be based. I take note of the correspondence between the parties and the Court in respect of the efforts to move the matter along to get it set down for trial.

15. Second, I am not satisfied that the Plaintiff personally has caused any delay in setting the matter down for trial. In my view, on that basis, the approach or procedure followed by counsel that caused any delay or failure to set the matter down for trial should not be visited

on the Plaintiff. Having said that, I do not agree with Mr. Durham that there has been no prejudice to the Second Defendant as the Second Defendant is keen to have the matter resolved, recoup any damages due if there is a favourable result to him and to move on from this litigation.

16. In light of these reasons, in my view, the interests of justice lean towards excusing the breach of the unless order. However, the Plaintiff should take heed that the orders of the Court should be complied with unless the Court is canvassed about difficulties beforehand and has addressed them accordingly.

Application to strike out the claim of Undue Influence

The Second's Defendant's Application

17. Mr. Harshaw submitted that the claim for undue influence should be struck out as there are no particulars of undue influence that the Plaintiff can allege. He argued that the sole ground for alleging undue influence against the Defendants is that they used to cajole their father, thus there is no suggestion as to how that behaviour influenced the Deceased, much less unduly so.

18. Mr. Harshaw submitted that the party who wished to contend that the execution of a will was obtained by undue influence must set out the contention specifically and give particulars of the facts and matters relied upon, citing *Tristram and Coote's Probate Practice*. The reference also stated that a plea of undue influence ought never to be put forward unless the person who pleads it had reasonable grounds on which to support it and that the plea cannot be used as a screen behind which to make veiled charges of fraud and dishonesty.

19. Mr. Harshaw submitted that a charge of exercising undue influence is a charge of a specie of fraud citing the House of Lords case of *Low v Guthrie*[3] where Lord James of Hereford

[3] [1909] AC 278

quoted Lord Kinnear who stated "*Upon the whole evidence in the case I must say I am unable to see any shadow of evidence for charging Mr. Guthrie with undue influence, or, in other words, with fraud.*"

20. Mr. Harshaw submitted that, as with any plea of fraud, counsel pleading it is under a duty to the Court as well as to his client in that he may not plead fraud unless he has clear instructions in writing to plead fraud and he has before him reasonable credible material which establishes a *prima facie* case of fraud, relying on the Barrister's Code of Conduct 1981 Rule 41.

21. Mr. Harshaw submitted with any plea of fraud, vague allegations are not to be permitted and that for undue influence there must be coercion or fraud. He complained that the Plaintiff has not provided any such particulars.

The Plaintiff's Reply

22. Mr. Durham relied on his affidavit sworn 19 August 2021 and the Exhibit "**JED-1**" which set out a chronology of events between the parties and in some cases the Court.

23. Mr. Durham submitted that the proposed amendments in the application to amend would seek to include a claim of "fraudulent calumny". He relied on the case of *Edwards v Edwards*[4] which set out principles of law as follows:

> *"(a) In a case of testamentary dispositions of assets, unlike a lifetime disposition, there is no presumption of undue influence;*
> *(b) Whether undue influence has procured the execution of a will is therefore a matter of fact;*
> *(c) The burden of proving it lies on the person who asserts it. It is not enough to prove that the facts are consistent with the hypothesis of undue influence. What must be shown is that the facts are inconsistent with any other hypothesis. In the*

[4] [2007] EWHC 1119 (Ch)

modern law this is, perhaps no more than a reminder of the high burden, even on the civil standard, that a claimant bears in proving undue influence as vitiating a testamentary disposition;

(d) In this context undue influence means influence exercised either by coercion, in the sense that the testator's will must be overborne, or by fraud;

(e) Coercion is pressure that overpowers the volition without convincing the testator's judgment. It is to be distinguished from mere persuasion, appeals to ties of affection or pity for future destitution, all of which are legitimate. Pressure which causes a testator to succumb for the sake of a quiet life, if carried to an extent that overbears the testator's free judgment discretion or wishes, is enough to amount to coercion in this sense;

(f) The physical and mental strength of the testator are relevant factors in determining how much pressure is necessary in order to overbear the will. The will of a weak and ill person may be more easily overborne that that of a hale and hearty one. As was said on one case simply to talk to a weak and feeble testator may so fatigue the brain that a sick person may be induced for quietness' sake to do anything. A "drip drip" approach may be highly effective in sapping the will;

(g) There is a separate ground for avoiding a testamentary disposition on the ground of fraud. The shorthand used to refer to this species of fraud is "fraudulent calumny". The basic idea is that if A poisons the testator's mind against B, who would otherwise be a natural beneficiary of the testator's bounty, by casting dishonest aspersions on his character, then the will is liable to be set aside;

(h) The essence of fraudulent calumny is that the person alleged to have been poisoning the testator's mind must either know that the aspersions are false or not care whether they are true or false. In my judgment if a person believes that he is telling the truth about a potential beneficiary then even if what he tells the testator is objectively untrue, the will is not liable to be set aside on that ground alone;

(i) The question is not whether the Court considers that the testator's testamentary disposition is fair because, subject to statutory powers of intervention, a testator may dispose of his estate as he wishes. The question, in the end, is whether in making his dispositions, the testator has acted as a free agent."

24. Mr. Durham also cited the case of *Schrader v Schrader*[5] where Mann J stated :

> *"It will be a common feature of a large number of undue influence cases that there is no direct evidence of the application of influence. It is of the nature of undue influence that it goes on when no-one is looking. That does not stop its being proved. The proof has to come, if at all, from more circumstantial evidence. The present case has those characteristics. The allegation is a serious one, so the evidence necessary to make out the case has to be commensurately stronger, on normal principles.*
>
> *…*
>
> *In all those circumstances I find that undue influence has been proved. I think that they require the inference that Nick was instrumental in sowing in his mother's mind the desirability of his having the house, and in doing so he took advantage of her vulnerability. It is not possible to determine any more than that the precise form of the pressure, or its occasion or occasions, but it is not necessary to do so. I am satisfied that this will results from some form of undue influence."*

25. Mr. Durham submitted that the Plaintiff's amended pleadings set out and constitute particulars of undue influence, in that they allege fraudulent calumny by the poisoning of the Deceased's mind by the Defendants for the purposes of obtaining the Property. He argued that the Respondent appeared to want evidence but that he was only required to plead facts. On that basis, as the pleadings meet the principles set out in *Edwards v Edwards*, the cause of action for undue influence is properly pleaded by the amendments. Further, he could provide Further and Better Particulars if requested.

Discussion and Analysis

26. In my view, on the basis that I have granted leave for the Plaintiff to amend the Statement of Claim for the reasons as set out below, the application to strike out the claim of undue influence is denied for several reasons. First, in my judgment, the allegations of undue influence are not vague. The draft Amended Statement of Claim sets out the particulars of

[5] [2013] EWHC 466 (Ch)

the claim of undue influence including that: (a) the Deceased was under a delusion in relation to potential beneficiaries including the Plaintiff when making his last Will as his mind was poisoned against them by the Defendants' aspersions on their character; (b) the Defendants had a relationship of trust and confidence with the Deceased and assisted him in various matters; (c) the Deceased was elderly, mentally and physically frail and vulnerable to the influence of the Defendants; (d) the Second Defendant had a dominant character and exerted influence over the Deceased; (e) the Defendants exercised either coercion or fraud over the Deceased to the extent that his Will was overborne and he did not act as a free agent; and further or alternatively, (f) the Defendants poisoned the Deceased's mind against the Plaintiff and her siblings, cast dishonest aspersions on their character, defamed them to the neighbors, lied about the Second Defendant to the Police, and stated that he was going to take the deceased's house from him knowing or not caring that those aspersions were not true.

27. Second, I am of the view that if more particulars are required then the Plaintiff can be provided with a request for Further and Better Particulars.

28. Third, in my view the pleadings as amended meet the requirements to plead undue influence as envisaged in *Edwards and Edwards* and *Schrader v Schrader* in that they set out the state of the Deceased, the conduct of the Defendants and the effect of such conduct on the Deceased. I find that these are reasonable grounds on which a claim of undue influence can be based. On this basis, the Defendants know what case they are confronted with and have to meet and further, what evidence they need to consider in preparation for trial.

Application for an order for Plaintiff to verify her List of Documents

The Second's Defendant's Application

29. Mr. Harshaw submitted that the Order 24 rule 5(3) of the R.S.C. provides that an affidavit verifying a List of Documents must be in the Form No. 27. He complained that the Plaintiff

had sworn an affidavit explaining her List of Documents but that the affidavit did not verify it and it was not in Form No. 27. He was concerned that a party could get to trial and then say make submissions that the List of Documents was not correct or that he gave inconsistent evidence because he did not understand what he signed, citing similarities in the case of *Benevides v Walker*[6].

The Plaintiff's Reply

30. Mr. Durham submitted that the Plaintiff had filed an Amended List of Documents and an affidavit verifying it as of 22 September 2021, thus the application ought to be refused.

Discussion and Analysis

31. In my view, I agree with Mr. Harshaw that the Plaintiff should file an affidavit verifying the List of Documents in the Form. No. 27. Compliance with this rule will avoid potential difficulties at trial that could arise in the absence of such an affidavit,

Plaintiff's Application to Amend

The Plaintiff's Application

32. Mr. Durham's submission for the Plaintiff's application to amend are set out in the section above in his reply to the Second Defendant's application to strikeout the claim of undue influence, primarily that the amendments answer the Second Defendant's complaint that the claim of undue influence cannot be sustained.

The Defendants' Reply

33. Mr. Harshaw referred to Order 20, rule 5 of the R.S.C. which permit a party to amend pleadings at any stage of the proceedings with leave of the Court. He also referred to the

[6] [2013] SC (Bda) 71 Civ

Supreme Court Practice (1999)[7] for the principles of the requirements to give particulars which reflect the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly, without surprises and, as far as possible, so as to minimize cost. That reference also cited the functions of particulars as:

a. To inform the other side of the nature of the case that they have to meet as distinguished from the mode in which that case is to be proved;
b. To prevent the other side from being taken by surprise at the trial;
c. To enable the other side to know with what evidence they ought to be prepared and to prepare for trial;
d. To limit the generality of the pleadings or of the claim or the evidence;
e. To limit and define the issues to be tried, and as to which discovery is required;
f. To tie the hands of the party so that he cannot without leave go into any matters not included.

34. Mr. Harshaw further referred to the Supreme Court Practice that generally speaking, all amendments ought to be allowed at any stage of the proceedings on such terms as to costs or otherwise as the Court thinks just and for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error on any proceedings.

35. Mr. Harshaw submitted that amendments should be sought to be made *bona fide* to plead matters necessary to resolve at trial, but such amendments should be refused if they are for some other reason such as avoiding a strike out application. He argued that due to a lack of particulars being pleaded in the present case, it suggested that the amendments were not being made *bona fide*.

Discussion and Analysis

36. In my view, the amendments should be allowed so that the particulars can be given of the claim for undue influence. I am not satisfied that there is evidence that the amendments are

[7] At 18/12/2 Particulars of Pleading

not being made *bona fide*. In the usual manner, the Plaintiff should bear the Defendants' costs arising out of the amendments.

Conclusion

37. For the reasons above, I have found as follows:
    a. I decline the Second Defendant's application to strike out the matter for failure to set the matter down for trial.
    b. I decline the Second' Defendant's application to strike out the claim for undue influence.
    c. I order that the Plaintiff verify her List of Documents in the Form. No. 27 within 7 days, if this has not already been done.
    d. I grant leave to the Plaintiff to amend the Statement of Claim indorsed on the Writ of Summons within 7 days and I grant leave to the Defendants to file an Amended Defence within 14 days thereafter. The Plaintiff to bear the Defendants' costs arising out of the amendments.

38. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that no order for costs be made in respect of the Second Defendant's summonses.

Dated 16 November 2021

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HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT